

BRB No. 06-0965 BLA

V.M.)
(Widow of W.M.))
)
Claimant-Respondent)
)
v.) DATE ISSUED: 09/24/2007
)
OLIVER COAL COMPANY)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-06297 and 05-BLA-06298) of Administrative Law Judge Daniel F. Solomon rendered on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The miner died on June 2, 2004, and claimant filed her claim for survivor's benefits on June 8, 2004.¹ Director's Exhibits 2, 12. The administrative law judge found that claimant established that the miner worked

¹ The administrative law judge denied benefits in the miner's claim in the same decision in which he awarded benefits in the survivor's claim. Claimant did not appeal the administrative law judge's denial of benefits in the miner's claim.

for thirty-three years in coal mine employment. The administrative law judge denied the miner's claim because, while employer conceded that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and the administrative law judge found that claimant established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), claimant did not establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge awarded benefits on the survivor's claim based on employer's concession that the miner had pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b), and the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On appeal, employer challenges the administrative law judge's weighing of the evidence at Section 718.205(c).² Claimant has not filed a response brief.³ The Director, Office of Workers' Compensation Programs, did not file a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to Section 718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.205(a)(1)-(3); 718.202(a); 718.203; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a "substantially contributing cause or factor leading to" the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a "'substantially contributing cause' of a miner's death if it hastens the miner's death." 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-980, 16 BLR 2-90, 2-93 (4th Cir. 1992). Failure to establish any one

² We affirm the administrative law judge's findings that pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ Employer notes that claimant died prior to the hearing, and that the administrator of her estate was substituted. Employer's Brief at 2.

of these elements precludes entitlement. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo*, 17 BLR at 1-87.

The medical evidence consists of the opinion of claimant's pathologist, Dr. Perper, the death certificate completed by the miner's treating doctor, Dr. Nida, as well as the opinions of claimant's pulmonary experts, Drs. Ranavaya and Rasmussen, and the autopsy report completed by the prosector, Dr. Latimer. Employer's pathologists, Drs. Crouch and Tomashefski, as well as employer's pulmonary experts, Drs. Castle and Dahhan, also rendered opinions on the miner's cause of death.

Dr. Perper opined that the miner's coal workers' pneumoconiosis was a contributing cause of death and a hastening factor. Claimant's Exhibit 1 at 33. Dr. Nida, who treated the miner from April 24, 2003, completed the death certificate, listing the immediate cause of death as respiratory failure due to black lung and lung mass. Director's Exhibit 12. Drs. Ranavaya, Rasmussen, and Latimer did not render an opinion on the cause of death. Director's Exhibits 13, 14 (miner's claim)⁴; Claimant's Exhibit 2.

Dr. Crouch stated that the miner's "mild" simple pneumoconiosis could not have caused any clinically significant degree of respiratory impairment, and could not have caused, contributed to, or otherwise hastened the miner's death. Employer's Exhibit 7 at 1-2. Dr. Tomashefski opined that the miner's "very mild" simple pneumoconiosis was not a cause of, or a contributing factor in, his death. Employer's Exhibit 9 at 3. Drs. Castle and Dahhan rendered opinions both before and after the miner's death. Both opined, prior to his death, that the miner did not have pneumoconiosis. Employer's Exhibit 1; Director's Exhibit 26 (miner's claim). After his death, both physicians reviewed the pathologists' reports, and concluded that the miner had pneumoconiosis that did not cause, contribute to, or hasten his death. Employer's Exhibits 2 at 3, 3 at 6.

In finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge relied principally on Dr. Perper's opinion, as supported by the opinions of Drs. Nida, Ranavaya, and Rasmussen. Decision and Order at 13-15. The administrative law judge discounted the opinions of employer's experts, Drs. Castle, Crouch, Dahhan, and Tomashefski. *Id.*

Employer argues that the administrative law judge erred by relying on Dr. Perper's opinion to find death causation pursuant to Section 718.205(c). Specifically, employer argues that the administrative law judge failed to explain why he found that Dr. Perper's opinion was more rational than the opinions of Drs. Crouch and Tomashefski. Moreover,

⁴ The administrative law judge found that good cause existed to admit the evidence in the miner's claim into the record of the survivor's claim. Decision and Order at 4. No party challenges this aspect of the administrative law judge's decision.

employer argues that the administrative law judge erred by crediting Dr. Perper's opinion over those of Drs. Crouch and Tomashefski, where Dr. Perper is not a pulmonary pathologist. The administrative law judge stated:

Dr. Crouch assumed that based on a finding of mild simple pneumoconiosis that the amount of pneumoconiosis in the lungs precludes hastening. She does not explain how she reached such a conclusion. Dr. Tomashefski, likewise did not explain whether the pneumoconiosis aggravated or exacerbated another respiratory condition, as cardiomegaly and pulmonary edema are accepted as a principal cause of death, and disabling emphysema is of record. Emphysema can also be or combine with pneumoconiosis. *Warth v. Southern Ohio Coal Co., supra*. Therefore, I find Dr. Perper's opinion more rational than the other opinions of record.

Decision and Order at 15.

We agree with employer that the administrative law judge failed to adequately explain why he found that Dr. Perper's opinion was more rational than those of Drs. Crouch and Tomashefski.⁵ Because it is not apparent from the record how the administrative law judge found that the accepted principal causes of death are cardiomegaly and pulmonary edema, and that the miner's emphysema was totally disabling, or combined with the miner's pneumoconiosis, the administrative law judge erred in weighing the opinions of Drs. Crouch and Tomashefski against these assumed facts. Moreover, employer correctly argues that it does not have the burden to disprove that the miner's pneumoconiosis aggravated other conditions. *See* 20 C.F.R. §718.205(a). Additionally, the administrative law judge erred in crediting Dr. Perper's opinion over those of Drs. Crouch and Tomashefski, without considering whether any pathologist has pulmonary credentials.⁶ Consequently, we vacate the administrative law judge's finding that Dr. Perper's opinion is more rational than those of Drs. Crouch and

⁵ The administrative law judge noted that Dr. Perper referred to medical studies. *But cf. Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 n.7 (1998)(*en banc*); Decision and Order at 14. The administrative law judge also relied on Dr. Perper's opinion because it was consistent with the proposition that persons weakened by pneumoconiosis may expire more quickly from other diseases, but as employer argues, this finding does not establish that that is what occurred in this case. *Cf. Ziegler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 335, 22 BLR 2-2581, 2-588-2-590 (7th Cir. 2002); Decision and Order at 14.

⁶ Dr. Tomashefski's curriculum vitae indicates that he is a lecturer in pulmonary pathology, and conducts research in this area. Employer's Exhibit 10.

Tomashefski, and remand this case to the administrative law judge for further consideration of these opinions. On remand, the administrative law judge must adequately explain his reasons for crediting and discrediting the medical opinion evidence and must take into account whether any pathologist of record has pulmonary credentials. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-533, 21 BLR 2-323, 2-336 (4th Cir. 1998).

Employer next argues that the administrative law judge erred in discounting the opinions of its pulmonary experts, Drs. Castle and Dahhan, because they were not pathologists and did not review the autopsy slides. Moreover, employer argues that the administrative law judge erred in discounting Dr. Castle's opinion because the administrative law judge found that the doctor was "wrong" to read an x-ray as negative for pneumoconiosis. With respect to Dr. Castle's opinion, the administrative law judge stated:

Dr. Castle examined the Miner only a very short time before his demise. At the time, he took an x-ray, which he read as negative. EX 1. *He was wrong.* The Miner had pneumoconiosis at that time. The Miner was also certainly totally disabled at that time. It was not until he was sent the pathology reports that Dr. Castle later found that the Miner did have pathological evidence of minimal, simple coal worker[s'] pneumoconiosis. He also determined that pneumoconiosis did not play any part in causing death. I do not find any valid explanation for this conclusion. However, at best, he is not a pathologist, he did not inspect the slides and I attribute less weight to his opinion

Decision and Order at 15 (emphasis added).

With respect to Dr. Dahhan's opinion, the administrative law judge stated:

Dr. Dahhan originally did not find the existence of pneumoconiosis, which is a necessary predicate to an evaluation regarding death After he was sent the pathology reports, he recanted his diagnosis, but he parroted Dr. C[r]ouch's opinion. I accord his opinion little weight. He also is not a pathologist and for that reason, I accord the opinion less weight.

Decision and Order at 15.

We agree with employer that the administrative law judge erred by discounting the opinions of Drs. Castle and Dahhan because they are not pathologists. In *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 191, 22 BLR 2-251, 2-260, 2-261 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this

case arises, addressed the same issue. In *Sparks*, the administrative law judge, without explanation, found the pathologists' opinions more probative than the pulmonary experts' opinions on the issue of whether pneumoconiosis hastened the miner's death. The court, in *Sparks*, refused to guess why the administrative law judge had found the pathologists' opinions more probative, and remanded the case to the administrative law judge for a better explanation. As in *Sparks*, the administrative law judge did not explain why the pathologists' opinions were more probative. Moreover, we hold that the administrative law judge substituted his opinion for that of a medical expert when he stated that Dr. Castle was "wrong" to read the miner's lifetime x-ray as negative for pneumoconiosis. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Consequently, we vacate the administrative law judge's discounting of the opinions of employer's pulmonologists, Drs. Castle and Dahhan, and remand this case to the administrative law judge for further consideration of these opinions. *Sparks*, 213 F.3d at 191, 22 BLR at 2-260, 2-261.

Lastly, we address employer's argument that the administrative law judge erred by finding Dr. Perper's opinion supported by the opinions of Drs. Nida, Ranavaya, and Rasmussen.⁷ Upon consideration of employer's argument, we hold that the administrative law judge failed to adequately explain why the opinions of Drs. Nida, Ranavaya, and Rasmussen, support Dr. Perper's opinion. Drs. Ranavaya and Rasmussen did not address death causation. Director's Exhibits 13, 14 (miner's claim). Moreover, Dr. Nida, as the miner's treating physician, completed the death certificate, but the administrative law judge did not consider the reasoning and documentation underlying Dr. Nida's opinion on the cause of death. We, therefore, vacate the administrative law judge's finding that the opinions of Drs. Nida, Ranavaya, and Rasmussen, support Dr. Perper's opinion, and remand the case to the administrative law judge for further consideration consistent with this opinion. On remand, the administrative law judge must adequately explain why the opinions of Drs. Ranavaya and Rasmussen support Dr. Perper's opinion. *Hicks*, 138 F.3d at 532-533, 21 BLR at 2-336. Additionally, the administrative law judge must consider the documentation and reasoning underlying the death certificate completed by Dr. Nida in determining how much weight to accord it.⁸ *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-442, 21 BLR 2-269, 2-274-2-

⁷ Contrary to employer's argument, the administrative law judge did not rely on Dr. Latimer's opinion on death causation, because the administrative law judge accurately found that Dr. Latimer did not list a cause of death. Decision and Order at 14; Director's Exhibit 13.

⁸ On remand, the administrative law judge may consider Dr. Nida's treatment records in conjunction with the death certificate to determine what weight to accord the death certificate. See Director's Exhibit 14 (treatment records of Dr. Nida from April 24, 2003, through May 19, 2004).

276 (4th Cir. 1997). Based on the foregoing, we vacate the administrative law judge's finding pursuant to Section 718.205(c), and remand the case to the administrative law judge for reconsideration of this issue.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge