

BRB No. 07-0620 BLA

B.K.)
(Widow of B.K.))
)
Claimant-Petitioner)
)
v.)
)
WESTMORELAND COAL COMPANY) DATE ISSUED: 04/15/2008
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Paul H. Teitler,
Administrative Law Judge, United States Department of Labor.

B.K., Beckley, West Virginia, *pro se*.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order-Denial of Benefits (2006-BLA-05593) rendered by Administrative Law Judge Paul H. Teitler with respect to 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 administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, credited the miner with 36 years of coal mine employment, and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20

C.F.R. §718.202(a)(1)-(4) or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).¹ Accordingly, the administrative law judge denied benefits.

After the case was appealed to the Board, claimant's counsel withdrew his representation. Thus, the Board notified claimant that it will review the case under its general standard of review. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.

In an appeal by a claimant without counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304. *Trumbo v. Reading Anthracite Co.*, 7 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Death will be considered due to pneumoconiosis if it 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 the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).² Failure to establish any one of these elements precludes

¹ The miner filed a claim for benefits in 1980, which was denied in 1981. The miner filed a subsequent claim in 1985, and was awarded benefits by an administrative law judge in 1989. *[B.K.] v. Westmoreland Coal Co.*, 86-BLA-3757 (Sept. 26, 1985). This decision was affirmed on appeal by the Board, *[B.K.] v. Westmoreland Coal Co.*, BRB No. 89-1912 BLA (May 15, 1991) (unpublished) and by the United States Court of Appeals for the Fourth Circuit, 980 F.2d 728 (Dec. 2, 1992)(table).

² The law of the United States Court of Appeals for the Fourth Circuit applies in this case, as the miner's coal mine employment occurred in West Virginia. Director's Exhibits 1, 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

entitlement. *See generally Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

The miner was hospitalized on March 19, 2002, where he underwent a left posterior thoracotomy with biopsy and frozen section of the left lower lobe mass and biopsy of the pleura. Director's Exhibit 12. He was diagnosed with large cell carcinoma of the left lower lobe and advanced chronic obstructive pulmonary disease (COPD). *Id.* The miner died on May 3, 2002. Director's Exhibit 10. The death certificate prepared by Dr. Salon listed the cause of death as left lung carcinoma, due to or as a consequence of COPD and complicated pneumoconiosis.³ *Id.*

As claimant is entitled to an irrebuttable presumption that the miner's death was due to pneumoconiosis if the miner was suffering from complicated pneumoconiosis at the time of his death, 20 C.F.R. §718.304, the administrative law judge reviewed the evidence to determine whether claimant established the existence of complicated pneumoconiosis.⁴ He found that the x-ray and biopsy evidence is insufficient to establish the existence of complicated pneumoconiosis. Director's Exhibit 12; Employer's Exhibits 1, 3. We affirm this finding as neither the x-ray nor the biopsy evidence was interpreted pursuant to the regulatory criteria as showing that the miner had complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a), (b); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006).

We also affirm the administrative law judge's finding that the death certificate is insufficient to establish the existence of complicated pneumoconiosis. Director's Exhibit 10. Although Dr. Salon lists the miner's death as being due, in part, to complicated pneumoconiosis, Dr. Salon did not otherwise explain the basis for this conclusion. Thus, the death certificate is legally insufficient to establish that the miner had complicated pneumoconiosis. *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

³ An autopsy was not performed in the instant case.

⁴ Given our disposition, *infra*, of the issue of whether pneumoconiosis caused, substantially contributed to or hastened the miner's death, we need not address the administrative law judge's finding that claimant did not establish that the miner suffered from simple pneumoconiosis. *See generally Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *but see Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006).

In addition, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion that the miner suffered from complicated pneumoconiosis is undocumented and not well-reasoned. Dr. Rasmussen reviewed x-rays showing interstitial lung disease and concluded that they showed masses in both apical regions consistent with complicated coal workers' pneumoconiosis. Director's Exhibit 38. The administrative law judge rationally found that this conclusion is unfounded, given that the x-ray evidence was not interpreted as showing opacities classified as being greater than one centimeter consistent with Section 718.304(a), and as Dr. Rasmussen did not review any other medical records indicative of complicated pneumoconiosis. Thus, the administrative law judge properly rejected Dr. Rasmussen's opinion. See *United States Steel Mining Co. v. Director, OWCP*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). Therefore, as it is supported by substantial evidence and in accordance with law, we affirm the finding that the evidence does not establish that the miner suffered from complicated pneumoconiosis. *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); 20 C.F.R. §718.304. Claimant, therefore, is not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis.

The administrative law judge also found that claimant failed to meet her burden of establishing that pneumoconiosis caused, substantially contributed to or hastened the miner's death pursuant to 20 C.F.R. §718.205(c). In this case, only Dr. Salon, on the death certificate, and Dr. Rasmussen opined that the miner's death was due, at least in part, to pneumoconiosis or to a respiratory impairment arising out of coal mine employment. For the reasons stated above, we affirm the administrative law judge's finding that the death certificate is insufficient to establish that the miner's death was due to pneumoconiosis. *Bill Branch Coal Co.*, 213 F.3d at 192, 22 BLR at 2-263. Dr. Rasmussen opined that the miner's death was due to a combination of carcinoma and his underlying lung disease which was due to coal dust exposure and which resulted in complicated pneumoconiosis. He concluded that coal workers' pneumoconiosis was a "major contributing factor" in the miner's death. Director's Exhibit 38. The administrative law judge again rationally found that Dr. Rasmussen's opinion is not well-reasoned or well-documented, noting in addition that he is not a pulmonary specialist. The administrative law judge also accorded greater weight to the opinion of Dr. Hippensteel, a pulmonary specialist,⁵ noting that this opinion is supported by those of Drs. Caffrey, Bush and Oesterling.⁶ Decision and Order at 9. Dr. Hippensteel opined

⁵ Dr. Hippensteel is Board-certified in internal medicine, pulmonary disease, and critical care medicine. Employer's Exhibit 2.

⁶ Employer designated the report of Dr. Caffrey as rebuttal of the biopsy report dated March 20, 2002. On March 19, 2002, the miner underwent a biopsy at Thomas Memorial Hospital. Director's Exhibit 12 at 48-49. Dr. Figueroa wrote a report of the surgery on March 20, 2002, *id.*, and, on March 21, 2002, Dr. Fulks, a pathologist at the

that miner did not suffer from simple or complicated pneumoconiosis or from significant COPD, that the miner died due to metastatic carcinoma, and that pneumoconiosis did not cause or hasten the miner's death.⁷ Employer's Exhibits 2, 3. The administrative law judge is entitled to determine the sufficiency of the medical opinions of record and to give greater weight to opinions by better qualified physicians. *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). As the administrative law judge's weighing of the medical evidence is rational, his finding that claimant did not establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death is supported by substantial evidence and in accordance with law. Therefore, we affirm the denial of benefits.

hospital, provided his interpretation of the biopsy. *Id.* at 50-54. To the extent that these documents are treatment records, the regulation at 20 C.F.R. §725.414 does not provide for rebuttal of treatment records. Any error in the administrative law judge's reliance on Dr. Caffrey's opinion, however, is harmless, as he provided rational reasons for rejecting Dr. Rasmussen's opinion and for crediting Dr. Hippensteel's opinion. *See Larioni v. Director, OWCP*, 6 BLR -1-1276 (1984).

⁷ Dr. Bush, a Board-certified pathologist, stated that the miner died from metastatic carcinoma and that neither pneumoconiosis nor coal dust exposure played any role in the miner's death. Director's Exhibit 39; Employer's Exhibit 4 at 23-24. Dr. Oesterling is Board-certified in clinical and anatomical pathology and in nuclear medicine. He opined that any level of pneumoconiosis the miner had was not sufficient to have contributed to death. Director's Exhibit 12.

Accordingly, the administrative law judge's Decision and Order—Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge