

BRB No. 09-0445 BLA

MARTHA M. TILLEY)
(Widow of DANIEL TILLEY))
)
 Claimant-Respondent)
)
 v.)
)
 SHREWSBURY COAL COMPANY) DATE ISSUED: 12/23/2009
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of Decision and Order – Awarding Benefits of Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC) Morgantown, West Virginia, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2008-BLA-5513)
of Administrative Law Judge Daniel L. Leland rendered on a survivor's claim¹ 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

¹ Claimant is the widow of a miner who was awarded benefits on a lifetime claim
on August 24, 1988. The miner's award was affirmed by the Board on January 16, 1992.
The miner died on June 20, 2007. Claimant filed this survivor's claim on July 23, 2007.
Director's Exhibit 2.

adjudicated this claim pursuant to the regulations contained at 20 C.F.R. Part 718. The administrative law judge noted that employer stipulated that the miner had twenty-five years of coal mine employment. The administrative law judge also noted, citing *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006), that employer was collaterally estopped from relitigating the existence of clinical and legal pneumoconiosis, as both of those diseases were established in the miner's claim and no autopsy was performed in connection with this survivor's claim. Turning to the issue of death due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law judge concluded that the evidence established that pneumoconiosis was a substantially contributing cause of the miner's death. Accordingly, benefits were awarded in the survivor's claim.

On appeal, employer contends that the administrative law judge erred in crediting the opinion of Dr. Akerberg, the miner's treating physician, over the contrary opinions of Drs. Spagnolo and Hippensteel. Employer also contends that the administrative law judge erred in discrediting the opinions of Drs. Spagnolo and Hippensteel regarding death causation, on the ground that they found that the miner was not totally disabled from a respiratory impairment during his lifetime. Additionally, employer contends that the administrative law judge erred in crediting the opinion of Dr. Rasmussen, finding that the miner's pneumoconiosis significantly contributed to his death, based on Dr. Rasmussen's finding of a totally disabling respiratory impairment in the miner's claim. Claimant responds, urging that the administrative law judge's decision awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs, declined to file a brief in this appeal.

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.² 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202; 718.203; 718.205. Failure to establish any one of these elements precludes entitlement. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivor's claims filed on or after January 1, 1982, the cause of

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, pursuant to Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of 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).

After consideration of the arguments on appeal, the administrative law judge's decision and the evidence³ of record, we conclude that the administrative law judge's

³ The record contains four medical opinions relevant to death causation at 20 C.F.R. §718.205. Dr. Akerberg, the miner's treating physician, concluded that the miner's death was due to a pulmonary embolus, complicated by chronic obstructive pulmonary disease and coal workers' pneumoconiosis, among other conditions. Director's Exhibit 12.

Dr. Rasmussen stated that the cause of the miner's death was a pulmonary embolus, and that in an individual with severe chronic lung disease, or severe chronic cardiac disease, even a small pulmonary embolus can increase the risk of death. He stated that both heart disease and lung disease contributed to the miner's death, and that coal dust exposure was a significant factor in his death. Claimant's Exhibit 1.

Dr. Spagnolo, assuming the existence of simple pneumoconiosis, nonetheless stated that there was insufficient evidence for him to render an opinion with a reasonable degree of medical certainty. Claimant's Exhibit 1. Based on his review of the medical records, he stated that there was no evidence that pneumoconiosis "worsened," led to or contributed to the miner's death, nor did pneumoconiosis contribute to any disability prior to the miner's death. Claimant's Exhibit 3.

Dr. Hippensteel, assuming the existence of simple pneumoconiosis, stated that the miner had no evidence of a pulmonary disability prior to death, and that his qualifying blood gas study could be explained by his heart disease. Employer's Exhibit 2. He concluded that the miner's death was not due to pneumoconiosis and that coal dust exposure did not contribute to his death. *Id.* At his deposition, Dr. Hippensteel admitted that the miner's pulmonary function study and blood gas study results indicated a significant pulmonary impairment, but opined that the blood gas study results could be due to heart disease and that coal workers' pneumoconiosis did not contribute to the miner's death. Employer's Exhibit 4.

decision denying benefits is rational, supported by substantial evidence, and in accordance with applicable law. It is, therefore, affirmed.

In finding that the medical evidence established that the miner's death was due to pneumoconiosis at Section 718.205(c), the administrative law judge credited the opinions of Drs. Akerberg and Rasmussen. The administrative law judge noted that Dr. Akerberg, the miner's treating physician, opined that the miner's death was from a pulmonary embolus, complicated by the miner's chronic obstructive pulmonary disease and coal workers' pneumoconiosis. Specifically, the administrative law judge noted that he credited Dr. Akerberg's opinion because the doctor treated the miner for pulmonary problems while he was alive and he was the miner's primary care physician for the last twenty-four years of the miner's life. The administrative law judge noted that he did not believe that Dr. Akerberg's failure to refer to pneumoconiosis in his medical history of the miner or to have referred the miner to a pulmonologist for further treatment of pulmonary problems made his opinion less probative than the opinions of Drs. Spagnolo and Hippensteel, who never treated or examined the miner and based their opinions solely on the miner's medical records. Further, the administrative law judge found the opinions of Drs. Spagnolo and Hippensteel, that the miner's death was unrelated to pneumoconiosis, entitled to little weight because they did not believe that the miner had a totally disabling respiratory impairment during his lifetime, even though that issue had been stipulated to by employer in the miner's case. In addition, the administrative law judge credited the opinion of Dr. Rasmussen, who concluded that the miner's coal mine dust-induced lung disease significantly contributed to his death, in a well-reasoned and well-documented opinion. Accordingly, the administrative law judge found that the medical opinion evidence established that the miner's death was due to pneumoconiosis at Section 718.205(c).

Contrary to employer's argument, the administrative law judge considered the factors cited at 20 C.F.R. §718.104(d)(1)-(4), in determining that Dr. Akerberg's opinion was entitled to greater weight. The administrative law judge noted that, while medical evidence as to the frequency and extent of Dr. Akerberg's treatment of the miner was not in the record, there was evidence in the record that Dr. Akerberg was the miner's primary care physician for the last twenty-four years of the miner's life and that he had treated the miner for pulmonary problems with prescriptions for inhalers and oxygen. Contrary to employer's argument, we discern no error in the administrative law judge's accordance of greater weight to Dr. Akerberg's opinion based on these factors, rather than to the opinions of Drs. Hippensteel and Spagnolo, who, as the administrative law judge found, never treated or examined the miner. *See* 20 C.F.R. §718.104(d); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 571, 22 BLR 2-494 (6th Cir. 2002). Further, contrary to employer's contention, the administrative law judge permissibly found that Dr. Akerberg's failure to refer the miner to a pulmonary specialist did not indicate that the doctor did not have any respiratory concerns regarding the miner. Nor, contrary to

employer's argument, did the administrative law judge err in relying on Dr. Akerberg's opinion because the doctor failed "to reference pneumoconiosis in his medical history of the miner." Decision and Order at 7.⁴ It is not within an administrative law judge's purview to second guess the medical experts, or to assess the medical evidence independently. See *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Finally, employer's contention that Dr. Akerberg exhibited an impermissible bias in favor of claimant, citing *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), that "cautioned that treating physicians may harbor strong pro-claimant biases....," Employer's Brief at 10, is rejected. Dr. Akerberg's statement that he mourned the passing of patients and friends, such as the miner, is not evidence that shows an impermissible bias in favor of claimant's case. Director's Exhibit 12. Reports prepared in the course of litigation are probative evidence and are not presumptively biased. *Richardson v. Perales*, 401 U.S. 389 (1971); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1992). Employer's assertions are not, by themselves, sufficient to show bias. Accordingly, we affirm the administrative law judge's finding that the opinion of Dr. Akerberg, the miner's treating physician, was entitled to significant weight on the issue of death causation.

Employer next argues that the administrative law judge erred in discrediting the opinions of Drs. Spagnolo and Hippensteel on the ground that they were inconsistent with employer's stipulation and the finding made in the miner's claim, that the miner had a totally disabling respiratory impairment. Specifically, employer contends that, in discrediting these opinions, the administrative law judge, in fact, erroneously applied the doctrine of collateral estoppel to preclude the proper litigation of the issue of death causation in this survivor's claim, based on the findings of total disability and disability causation made in the miner's claim. Employer contends that this was error because death causation was not an issue in the miner's claim.

In finding that the miner's death was not due to pneumoconiosis, Drs. Spagnolo and Hippensteel assumed the existence of pneumoconiosis, but found that the miner did not have a totally disabling respiratory impairment during his lifetime. Employer's Exhibits 1, 2, 3, 4. In evaluating this evidence at Section 718.205(c), the administrative law judge permissibly accorded less weight to the opinions of Drs. Spagnolo and Hippensteel on the issue of death causation because they had found that the miner did not have a totally disabling respiratory impairment during his lifetime:

⁴ Further, as claimant notes, there is evidence in the record, *i.e.*, the Charleston Area Medical Center Emergency Department Evaluation Form and the Charleston Area Medical Center Discharge Summary Form, that lists coal workers' pneumoconiosis and black lung as diagnoses. Director's Exhibit 12 at 41-43, 47.

The conclusions of Dr. Spagnolo and Dr. Hippensteel are therefore based in part on an assumption that contradicts the stipulation made by employer's counsel in the lifetime claim. Their assumption significantly diminishes the probative value of their opinions that the miner's pneumoconiosis did not cause, contribute to, or hasten his death. I find that their opinions on the cause of death are entitled to little weight.

Decision and Order at 7. Contrary to employer's assertion, the administrative law judge was not, in fact, applying the doctrine of collateral estoppel to preclude the litigation of the issue of death causation based on the affirmative findings of total disability and disability causation in the miner's claim. Rather, the administrative law judge was permissibly according less weight to the opinions of Drs. Spagnolo and Hippensteel on the issue of death causation, because the doctors did not find that the miner suffered from a totally disabling respiratory impairment prior to his death,⁵ an issue stipulated to by employer and found by the administrative law judge in the miner's lifetime claim. See *Collins*, 468 F.3d at 224, 23 BLR at 2-412; *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Accordingly, the administrative law judge permissibly accorded "little weight" to the opinions of Drs. Spagnolo and Hippensteel on the issue of death causation.

Employer also contends that the administrative law judge erred in crediting Dr. Rasmussen's opinion that the miner "died from a pulmonary embolus and that his heart disease and cigarette smoke-induced and coal mine dust-induced lung disease significantly contributed to his death," Decision and Order at 7, on the ground that it was consistent with the findings of total disability and disability causation made in the miner's claim. Dr. Rasmussen examined the miner and diagnosed total disability due to pneumoconiosis. Claimant's Exhibit 2. Thus the administrative law judge permissibly relied on Dr. Rasmussen's death causation opinion because it was supported by the objective evidence of record showing that the miner had a totally disabling respiratory impairment due to pneumoconiosis while he was alive. See *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

⁵ While Drs. Spagnolo and Hippensteel suggested that the miner's objective study results could have been related to cardiac disease, when confronted with Dr. Rasmussen's study results, the administrative law judge noted that "neither physician acknowledged that the miner had a totally disabling pulmonary impairment...." Decision and Order at 7.

In conclusion, we affirm the administrative law judge's finding that the medical opinion evidence establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge