

BRB No. 11-0266 BLA

WILMA P. SHORT)
(Widow of MILFORD SHORT))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 12/01/2011
)
 WESTMORELAND COAL COMPANY)
)
 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 of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Ronald C. Cox, Harlan, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (08-BLA-5314) of Administrative Law Judge John P. Sellers, III, denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case involves a survivor's claim filed on June 5, 2002. After crediting the

¹ Claimant is the surviving spouse of the deceased miner, who died on May 10, 2002. Director's Exhibit 5.

miner with thirty-six years of coal mine employment,² the administrative law judge noted that employer did not contest that the miner suffered from pneumoconiosis arising out of his coal mine employment. However, the administrative law judge determined that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.³

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, rational, and consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205(c); *Neely v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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, 16 BLR 2-90 (4th Cir. 1992).

² The record reflects that the miner's last coal mine employment was in Virginia. Hearing Transcript at 19; Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

³ Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the claim in this case, because it was filed before January 1, 2005.

Complicated Pneumoconiosis

Claimant argues that the administrative law judge erred in finding that claimant did not establish the existence of complicated pneumoconiosis and, therefore, failed to establish invocation of the irrebuttable presumption of death due to pneumoconiosis set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner was suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

Claimant argues that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(a). Claimant specifically argues that the administrative law judge erred in finding that Dr. Tiu's interpretations of the miner's December 26, 2000 and February 20, 2001 x-rays did not support a finding of complicated pneumoconiosis. We disagree. In order to support a finding of complicated pneumoconiosis, the regulations provide that an x-ray reading must specifically diagnose "one or more large opacities (greater than 1 centimeter in diameter) . . . [which] would be classified in Category A, B, or C" in the ILO-U/C International Classification of x-rays. 20 C.F.R. §718.304(a)(1). Although Dr. Tiu interpreted the miner's December 26, 2000 and February 20, 2001 x-rays as revealing changes of complicated pneumoconiosis, the doctor did not address the size of the opacities, or designate any opacities as Category A, B, or C. Director's Exhibits 10, 14. Consequently, the administrative law judge properly found that Dr. Tiu's x-ray interpretations were not properly classified, and, therefore, insufficient to support a finding of complicated pneumoconiosis. Decision and Order at 12.

Claimant next argues that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(b). Claimant specifically contends that the administrative law judge erred in finding that Dr. Ally's autopsy findings did not support a finding of complicated pneumoconiosis. Dr. Ally, the autopsy prosector, found "focal areas of indurated rubbery black areas resembling macronodules which vary from 1 to 3 cm in maximum dimension." Director's Exhibit 10. Dr. Ally also noted that "[t]he hilar lymph nodes are enlarged measuring up to 1.5 cm in maximum dimension with blackish-gray arthrotic [sic] cut surfaces." *Id.* In his consideration of the autopsy evidence, the administrative law judge accurately noted that the United States Court of Appeals for the Fourth Circuit has adopted an "equivalency approach," whereby an administrative law judge must perform equivalency determinations to make certain that, regardless of which diagnostic

technique is used, the same underlying condition triggers the irrebuttable presumption. Decision and Order at 12. Specifically, the Fourth Circuit has held that, “[b]ecause prong (A) sets out an entirely objective scientific standard” for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, an administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In this case, Dr. Ally did not indicate whether the nodules or lymph nodes he described would show as a greater-than-one-centimeter opacity if seen on a chest x-ray. Consequently, the administrative law judge properly found that Dr. Ally’s autopsy findings do not support a finding of complicated pneumoconiosis.⁴ Decision and Order at 12.

Because claimant does not raise any other contentions of error regarding the administrative law judge’s finding that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, this finding is affirmed.

Death Due to Simple Pneumoconiosis

Claimant next argues that the administrative law judge erred in finding that the evidence did not establish that the miner’s death was due to simple pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The miner’s death certificate indicates that the miner’s death was due to “metastatic carcinoma of [the] lung.” Director’s Exhibit 5. The miner’s death certificate also lists pneumoconiosis as a contributing cause of death. *Id.* While Drs. Caffrey, Swedarsky, and Rosenberg agreed that the miner’s death was due to metastatic carcinoma of the lung, they each opined that the miner’s pneumoconiosis did not cause, contribute to, or hasten, his death. Employer’s Exhibits 1, 2, 5-7.

⁴ The administrative law judge also found that Drs. Caffrey, Swedarsky, and Rosenberg did not diagnose complicated pneumoconiosis. Drs. Caffrey and Swedarsky each reviewed the miner’s autopsy slides. Although Drs. Caffrey and Swedarsky diagnosed simple pneumoconiosis, neither physician opined that the miner suffered from complicated pneumoconiosis. Employer’s Exhibits 1, 5, 6. Dr. Rosenberg reviewed the medical evidence. Dr. Rosenberg similarly opined that, while the miner had simple pneumoconiosis, he did not suffer from complicated pneumoconiosis. Employer’s Exhibit 2, 7. Dr. Rosenberg explained that, while the miner’s lungs revealed some large opacities, the opacities were related to the miner’s carcinoma. Employer’s Exhibit 7 at 10.

In evaluating the evidence relevant to the cause of the miner's death, the administrative law judge accorded little weight to the miner's death certificate because he found that it was not sufficiently reasoned. Because there was no other credible evidence linking the miner's death to his pneumoconiosis, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis. Decision and Order at 13-14.

Claimant argues that the administrative law judge erred in his consideration of the miner's death certificate. We disagree. The administrative law judge noted that, because the physician's signature is illegible, it is unclear who completed the miner's death certificate. Decision and Order at 13; Director's Exhibit 5. Moreover, the administrative law judge found that the physician who completed the miner's death certificate provided no explanation for his conclusions regarding the cause of the miner's death. Because the physician who completed the miner's death certificate provided no basis for his findings, we affirm the administrative law judge's finding that the miner's death certificate is insufficient to carry claimant's burden of proof.⁵ See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-264 (4th Cir. 2000); *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389-90, 21 BLR 2-639, 2-649-53 (4th Cir. 1999); see also *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

Claimant finally argues that the administrative law judge failed to adequately consider the significance of the opinion of Dr. Greenfield, the miner's treating physician, in regard to the cause of the miner's death. On September 5, 2000, over eighteen months prior to the miner's death, Dr. Greenfield completed a one-page affidavit in which he opined, *inter alia*, that the miner's lung cancer was the "result of his numerous years of exposure to the hazards of coal, rock, sandstone, and other dusts associated with the underground coal mining industry."⁶ Director's Exhibit 15. After noting that Dr. Greenfield has no expertise in the field of oncology or pathology, the administrative law judge found that Dr. Greenfield's opinion was not sufficiently reasoned, noting that he did not provide any support, or explanation, for his opinion that the miner's lung cancer was attributable to his coal dust exposure. Decision and Order at 13-14. The administrative law judge, therefore, found that Dr. Greenfield's opinion did not assist claimant in establishing that the miner's death was due to pneumoconiosis. *Id.*

⁵ We also reject claimant's contention that the administrative law judge erred in his consideration of Dr. Ally's autopsy report. The administrative law judge accurately found that Dr. Ally "failed to discuss the significance of pneumoconiosis in the miner's death." Decision and Order at 13. Dr. Ally, in fact, did not address the cause of the miner's death. Director's Exhibit 10.

⁶ If credited, Dr. Greenfield's diagnosis of lung cancer due to coal dust exposure would support a finding of "legal pneumoconiosis." 20 C.F.R. §718.201(a)(2).

Claimant argues that the administrative law judge erred in not according greater weight to Dr. Greenfield's opinion, based upon his status as the miner's treating physician. We disagree. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). In this case, the administrative law judge found that Dr. Greenfield did not offer any support for his opinion that the miner's lung cancer was attributable to his coal dust exposure. Decision and Order at 14. Substantial evidence supports this finding.⁷ The administrative law judge, therefore, permissibly determined that Dr. Greenfield's opinion was not sufficiently reasoned. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).

Because claimant does not allege any additional error, we affirm the administrative law judge's finding that the evidence does not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

⁷ The administrative law judge noted that Drs. Caffrey, Swedarsky, and Rosenberg each opined that there is no relationship between lung cancer and coal workers' pneumoconiosis. The administrative law judge accurately noted that Drs. Caffrey and Swedarsky are Board-certified in Anatomical and Clinical Pathology, and Dr. Rosenberg is Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 8-9; Employer's Exhibits 1, 2, 5.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge