

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 15-0232 BLA

PATSY MITCHELL)	
(Widow of HOWARD MITCHELL))	
)	
Claimant-Respondent)	
)	
v.)	
)	
C&R COAL COMPANY, INCORPORATED)	DATE ISSUED: 02/23/2016
)	
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 Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-5043) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) awarding benefits on a

survivor's claim¹ filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with 11 years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that the evidence established that the miner had clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b). The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act 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, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal

¹ The miner filed a claim on August 14, 1985, which was administratively denied by a claims examiner on December 9, 1986. The miner died on January 1, 2008. Director's Exhibit 17. Claimant, who is the miner's widow, filed her survivor's claim on August 3, 2009. Director's Exhibit 2.

² Because the administrative law judge's length of coal mine employment finding and his finding that the evidence established that the miner had clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The record indicates that the miner was employed in the coal mining industry in West Virginia. Decision and Order at 2; Claimant's Depo. at 8-9. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Employer contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge considered the reports of Drs. Perper and Rosenberg, as well as the discharge summary and death certificate of Dr. Anderson.⁴ Dr. Perper opined that coal workers' pneumoconiosis hastened the miner's death, Claimant's Exhibit 5, while Dr. Rosenberg opined that the miner's death was not caused by, contributed to, or hastened by, coal workers' pneumoconiosis, Employer's Exhibit 4. The administrative law judge determined that employer's brief mischaracterized the noted causes of death in Dr. Anderson's discharge summary. Further, the administrative law judge found that Dr. Perper's opinion outweighed Dr. Rosenberg's contrary opinion. Based on Dr. Perper's opinion, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis.

Employer asserts that "[the administrative law judge] erred in disregarding Dr. Rosenberg's opinion and relying on Dr. Perper's opinion." Employer's Brief at 5. We disagree. The administrative law judge permissibly found that Dr. Perper's opinion is well-reasoned and thoroughly documented.⁵ *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

⁴ Based on his review of the discharge summary, the administrative law judge noted that "[t]he miner sought treatment, initially, for a respiratory problem," and that "[t]he problem's severity and additional health problems were such [that] the miner remained hospitalized until his death." Decision and Order at 13. The administrative law judge also noted that "the death certificate lists the immediate cause of death as Respiratory Failure." *Id.*, citing Director's Exhibit 17.

⁵ The administrative law judge stated that "[Dr. Perper's] conclusions were explained clearly and consistently and withstood critical questioning by the [e]mployer's counsel during his deposition." Decision and Order at 12. The administrative law judge also stated that "[Dr. Perper] reviewed extensive medical records to inform his opinion." *Id.*

(1989)(en banc).⁶ In addition, the administrative law judge discounted Dr. Rosenberg's opinion on the bases that it is not supported by any objective tests,⁷ is based on medical evidence that exceeds the evidentiary limitations at 20 C.F.R. §725.414,⁸ and is inconsistent with the Department of Labor's recognition that pneumoconiosis can be latent and progressive.⁹ Employer does not contest any of the bases on which the administrative law judge discredited Dr. Rosenberg's opinion. Thus, we reject employer's assertion that the administrative law judge erred in according greater weight to Dr. Perper's opinion than to Dr. Rosenberg's contrary opinion.

Employer further asserts that the administrative law judge erred in determining that the discharge summary indicates that pneumoconiosis was a substantially

⁶ Employer, citing 65 Fed. Reg. 79,941 (Dec. 20, 2000), also asserts that because Dr. Perper did not determine the degree to which smoking and coal mine dust exposure each contributed to the miner's respiratory condition, Dr. Perper's views are contrary to the views expressed in the preamble to the Department of Labor's revised 2001 regulations. The preamble is an explanation of the regulation; it is the regulatory text, not the preamble, which is binding. Nonetheless, there is nothing in the preamble which requires precise quantification for acceptance of a physician's opinion that a miner's respiratory impairment was significantly related to, or substantially aggravated by, dust exposure. The Fourth Circuit, within whose jurisdiction this case falls, has held that a physician need not apportion a precise percentage of a miner's lung disease to cigarette smoke versus coal dust exposure in order to establish the existence of legal pneumoconiosis. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006).

⁷ The administrative law judge noted that "Dr. Rosenberg's opinion states that smoking alone caused [the miner's] pulmonary and respiratory complications, but he does not support the assertion with any objective studies." Decision and Order at 14.

⁸ In considering Dr. Rosenberg's view that negative x-rays supported his inference of "minimal disease," the administrative law judge stated: "The negative x-rays [Dr. Rosenberg] relies on are not admissible. The interpretations by Drs. Dumick, Felson, Spitz, Wiot, McDonald, Hawkins, and Grouse violate [20 C.F.R.] §725.414(a)(3)(ii)." Decision and Order at 14, *citing* Employer's Exhibit 4.

⁹ The administrative law judge noted that Dr. Rosenberg cited to a blood gas study from 1985 to support his opinion that the miner's impairment was due solely to smoking, and not coal mine dust. The administrative law judge also noted that Dr. Rosenberg stated that, "[F]ar removed from working in the coal mines, past dust exposure would not act as an irritant causing exacerbations of asthma or bronchitis." Decision and Order at 14, *citing* Employer's Exhibit 4 at 8.

contributing cause of the miner's death. Employer avers that a diagnosis of chronic obstructive pulmonary disease (COPD) does not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.201. Rather, employer maintains that "COPD only represents legal pneumoconiosis when it is determined to be significantly related to or substantially aggravated by coal mine dust exposure." Employer's Brief at 4. The administrative law judge found that employer mischaracterized Dr. Anderson's discharge summary conclusions. Specifically, the administrative law judge stated that "[employer's] quotation does not include the statements from Dr. Anderson immediately preceding and following the passage."¹⁰ Decision and Order at 13. In addition, the administrative law judge found that "[t]he noted causes of death [in Dr. Anderson's discharge summary] include pulmonary and respiratory impairments, *i.e.* legal pneumoconiosis." *Id.* Contrary to the administrative law judge's finding, however, Dr. Anderson did not opine that the miner had legal pneumoconiosis as defined at 20 C.F.R. §718.201(a)(2),¹¹ but only diagnosed the miner with severe COPD that was "mostly [the] asthmatic type." Claimant's Exhibit 3; *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Nevertheless, we hold that the administrative law judge's mischaracterization of Dr. Anderson's opinion is harmless error because the administrative law judge did not rely on it in finding that the miner's death was due to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As employer raises no other specific error with regard to the administrative law judge's weighing of the medical evidence of record, we affirm the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

¹⁰ The administrative law judge stated that "[t]he [e]mployer's list of potential causes of death left off at 13, but Dr. Anderson also included: 14) Pneumothorax; 15) Pneumonia; 16) CAD, CHF; and 17) Some history of coal mining, uncertain contribution to death. (CX 3 at 374)." Decision and Order at 13.

¹¹ Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge