

BRB No. 07-0346 BLA

S.S. ON BEHALF OF AND SURVIVOR OF)
L.S.)
)
 Claimant-Petitioner)
)
 v.)
)
 JAMES I. COWFER CONTRACTING) DATE ISSUED: 01/16/2008
)
 and)
)
 STATE WORKERS INSURANCE FUND)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

Scott A. White (Achille, Ellermeyer & French), Brookville, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denying Benefits (2005-BLA-6168, 2005-BLA-6169) of Administrative Law Judge Daniel L. Leland with respect to claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

¹ Claimant, S.S., is the widow of the miner, L.S., and is pursuing both the miner's claim and her own survivor's claim.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The miner filed a claim for benefits on June 29, 2004. After the miner's death on August 7, 2004, claimant filed for survivor's benefits on August 31, 2004. On April 26, 2005, the district director awarded benefits in both claims and the employer/carrier requested hearings. The claims were referred to the Office of Administrative Law Judges for a hearing, which was held on July 26, 2006. The administrative law judge issued his Decision and Order - Denying Benefits on December 7, 2006.

After crediting the miner with eleven years of qualifying coal mine employment, the administrative law judge found that the evidence was sufficient to establish clinical pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), and the existence of a totally disabling pulmonary impairment under 20 C.F.R. §718.204(b)(2). The administrative law judge additionally found, however, that the evidence was insufficient to establish that pneumoconiosis substantially contributed to the miner's totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1), or that it hastened his death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge abused his discretion in allowing the treatment records contained in Employer's Exhibits 2-4 to be entered into the record over her objection; and in denying claimant's Motion For Post-Hearing Expert Deposition. Claimant further contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish that pneumoconiosis was a substantially contributing factor in the miner's total disability and death pursuant to 20 C.F.R. §§718.204(c)(1), 718.205(c). Employer has not filed a response. The Director, Office of Workers' Compensation Programs, has declined to file a response.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 rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30

² We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence of record establishes the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), and the existence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 5; *Skrack v. Island Creek Coal*, 6 BLR 1-710 (1983).

³ The law of the United States Court of Appeals for the Third Circuit is applicable as the miner was employed in the coal mining industry in Pennsylvania. Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement in a miner’s claim under the Act, it must be demonstrated by a preponderance of the evidence that the miner is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In order to establish entitlement to survivor’s benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, that the miner’s death was caused by complications of 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.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). 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); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

We first address claimant’s procedural arguments. Claimant initially argues that the administrative law judge abused his discretion in allowing the prior treatment records of Dr. Romeo, Dr. Cardamone, and Clearfield Hospital, Employer’s Exhibits 2-4, to be admitted into evidence over counsel’s objection at the formal hearing. Claimant asserts that this evidence was not provided to claimant within twenty days of the hearing, and thus should have been excluded pursuant to 20 C.F.R. §725.456.⁴ Claimant further argues that Dr. Oesterling’s report and post-hearing deposition, Employer’s Exhibits 1 and 6, should be excluded from the record because Dr. Oesterling, whose report was given probative weight, used the treatment records to develop his report and testimony. Claimant’s Brief at 19. We reject claimant’s arguments.

⁴ Employer’s counsel assured the administrative law judge that he had “without a doubt” submitted this evidence well before the twenty-day deadline. Hearing Transcript at 9-10. On August 2, 2006, employer provided a copy of a letter to claimant and the administrative law judge indicating that the treatment records had been sent on June 9, 2006. After receiving no response from claimant, the administrative law judge admitted employer’s evidence into the record on August 22, 2006. Claimant subsequently renewed her objection to the admission of the evidence on August 25, 2006.

In evaluating the conflicting medical opinion evidence of record, the administrative law judge did not rely on the miner's prior treatment records. While the administrative law judge credited Dr. Oesterling's opinion, that the miner's clinical pneumoconiosis was very mild and insufficient to have altered pulmonary function or to have contributed to or hastened death, the administrative law judge determined that the opinion was based on a careful review of the autopsy slides.⁵ Decision and Order at 6; Employer's Exhibit 1. Dr. Oesterling specifically states, in his report and deposition, that his opinion was based on the lack of scar tissue surrounding the coal dust deposits and the lack of coal dust around the areas of emphysema that he observed in the slides. Decision and Order at 6; Employer's Exhibit 1 at 2, 3; Employer's Exhibit 6 at 45, 57. Because Dr. Oesterling based his conclusions on his review of the autopsy slides and the administrative law judge did not rely on the treatment records in making his determinations, claimant was not prejudiced as a result of the treatment records being admitted into evidence. Consequently, any error in admitting the prior treatment records was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Clifford v. Director, OWCP*, 7 BLR 1-817, 1-819 (1985).

Claimant next argues that the administrative law judge abused his discretion in denying her Motion For Post-Hearing Expert Deposition of Dr. Rizkalla. Specifically, claimant argues that the deposition should have been permitted in response to employer's post-hearing expert deposition of Dr. Oesterling, because "claimant's doctor should be allowed to correct erroneous interpretations by Defendant's doctor and explain his opinion." Claimant's Brief at 20-21. Claimant's argument is without merit.

The applicable regulation specifies that post-hearing depositions are permitted at the discretion of the administrative law judge. 20 C.F.R. §725.458. In denying claimant's motion to submit a post-hearing deposition, the administrative law judge noted that such motions should be made at or before the hearing. While employer moved for a Post-Hearing Expert Deposition on July 24, 2006, prior to the hearing on July 26, 2006, claimant waited until September 8, 2006, to make a similar motion. Consequently, contrary to claimant's argument, the administrative law judge acted within his discretion in denying claimant's motion on the ground that it would unduly delay processing of the case. 20 C.F.R. §725.458. Moreover, the due process rights of confrontation and cross-

⁵ In his report, Dr. Oesterling references Employer's Exhibits 2-4 only with respect to his analysis of the miner's heart disease. After finding evidence of prior heart attacks and severe arteriosclerosis in the autopsy slides, Dr. Oesterling stated that the treatment records indicate that the miner had previously suffered from heart attacks and severe arteriosclerosis, and that he was hyperlipidemic. The administrative law judge did not assess the credibility of this part of the report, however, as none of the evidence of record described a connection between the miner's pneumoconiosis and his death due to heart disease.

examination, as they are incorporated into 20 C.F.R. §725.455(c), require only that the parties be allowed a reasonable opportunity to know the claims of the opposing party and to meet them. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). The record reflects that claimant received Dr. Oesterling's report containing all allegedly "erroneous interpretations" of Drs. Rizkalla/Bargaje's report,⁶ on May 4, 2006, more than twenty days prior to the hearing, as required under 20 C.F.R. §725.456(b)(2). As claimant had adequate notice of Dr. Oesterling's report, and no new evidence was introduced in his deposition, claimant had reasonable opportunity to know and meet employer's arguments. *Miller*, 12 BLR at 2-226. Accordingly, we reject claimant's arguments that the administrative law judge abused his discretion in denying claimant's Motion For Post-Hearing Expert Deposition. *Id.*; *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983).

We now address claimant's appeal on the merits of the claims. With regard to the miner's claim, claimant maintains that the administrative law judge erred in finding that the evidence of record does not establish total disability due to pneumoconiosis pursuant to Section 718.204(c)(1). Specifically, she argues that the evidence of record is sufficient to establish total disability due to pneumoconiosis and that "Judge Leland improperly joined the issues of whether [the miner] was totally disabled and whether that disease arose out of [his] coal mine employment." Claimant's Brief at 11-12. Claimant's argument is without merit. The administrative law judge concluded that the miner was

⁶ Dr. Oesterling took issue in his report with Drs. Rizkalla/Bargaje's statement in the autopsy protocol that, "[o]n inspection, the pleural surfaces of the lungs display a black reticular pigmentation on 60% of the lung parenchyma." Employer's Exhibit 1; Director's Exhibit 11. Specifically, Dr. Oesterling said, "[o]bviously this pigment is not evident in the pleural sections which are included within the photomicrographs and it is difficult to accept the statement that 60% of the pleural surface did contain pigment since it cannot be demonstrated on most of the tissue sections including those from the upper lobe which typically would concentrate dust if it were present." Employer's Exhibit 1 at 4. At the deposition, Dr. Oesterling similarly stated; "[w]hat he's saying is that the surface covering 60 percent of the parenchyma shows black reticulation. He's not specifying in that statement that the parenchyma itself shows the same degree of pigmentation. He says the pleural surface covering the parenchyma shows that degree." Employer's Exhibit 6 at 61. After claimant's counsel suggested that Dr. Oesterling should defer to what Drs. Rizkalla/Bargaje say they saw because they examined the lung, Dr. Oesterling still did not accept the statement. He stated, "[t]he other thing we have to realize, reticulated pattern doesn't mean it's solid. It's not solid black. So [if he were saying that] 60 percent of the surface of the lung shows articulated patterns, ... [h]e's describing reticulation. He's not describing total black pigmentation involving 60 percent of the surface of the lungs." Employer's Exhibit 6 at 63-64.

totally disabled, after acknowledging that the only pulmonary function study of record produced qualifying results, and that Dr. Lucas diagnosed a moderate to severe pulmonary impairment. Decision and Order at 5. However, as no physician attributed the miner's pulmonary impairment, chronic obstructive pulmonary disease, or emphysema to coal mine employment, and because Dr. Oesterling found that the miner's clinical pneumoconiosis was insufficient to have altered pulmonary function, the administrative law judge reasonably concluded that claimant failed to establish disability causation. *Id.*; 20 C.F.R. §§718.201(a)(2); 718.201(b); *see Perry v. Director, OWCP*, 9 B.L.R. 1-1, 1-2 (1986); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLA 2A-1 (1994); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. As the evidence of record does not establish that the miner was totally disabled due to pneumoconiosis, claimant has not met her burden of proof. We, therefore, affirm the administrative law judge's findings at Section 718.204(c)(1) in the miner's claim.

With regard to the survivor's claim, claimant argues that the administrative law judge erred in failing to find that the evidence of record was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Specifically, claimant argues that the administrative law judge "erroneously discounted the findings of Drs. Rizkalla/Bargaje." Claimant's Brief at 14, 17. Claimant's argument is without merit and essentially amounts to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR at 1-113.

Contrary to claimant's arguments, the administrative law judge adequately considered the opinion of Drs. Rizkalla/Bargaje that the miner's death was due to heart disease and that pneumoconiosis was a substantially contributing cause of death. The administrative law judge permissibly found the opinion "not well reasoned" because it failed to explain how pneumoconiosis contributed to the miner's death. Decision and Order at 6; Director's Exhibit 11; *see Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, as the record does not contain any evidence describing a connection between the miner's simple pneumoconiosis and his death due to heart disease, the administrative law judge rationally determined that claimant did not prove the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Decision and Order at 6; 20 C.F.R. §718.205(c)(4); *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Neeley*, 11 BLR at 1-86. We, therefore, affirm the denial of benefits in the survivor's claim.

As claimant failed to establish that pneumoconiosis substantially contributed to the miner's totally disabling pulmonary impairment or caused, substantially contributed to or hastened his death pursuant to 20 C.F.R. §§718.204(c)(1), 718.205(c), we affirm the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim.

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