

BRB No. 08-0688 BLA

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| R.M. |) | |
| (Surviving Spouse of J.M.) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| U.S. STEEL MINING COMPANY, LLC |) | DATE ISSUED: 06/18/2009 |
| |) | |
| 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 on Remand – Award of Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Patrick J. Nakamura (Nakamura, Quinn & Walls, LLP), Birmingham, Alabama, for claimant.

Kary B. Wolfe and Timothy M. Davis (Walston, Wells & Birchall, LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (03-BLA-5015) of Administrative Law Judge Janice K. Bullard (the administrative law judge) on 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).

This case has been before the Board previously.¹ In the original decision, Administrative Law Judge Paul H. Teitler found that the miner had forty-four years of coal mine employment in accordance with the parties' stipulation, and found that the miner had clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b). Judge Teitler also found that the evidence established a totally disabling respiratory impairment due to pneumoconiosis in the miner's claim pursuant to 20 C.F.R. §718.204(b), (c). In the survivor's claim, Judge Teitler found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded on both claims. Decision and Order dated May 9, 2006.

Pursuant to employer's appeal, the Board affirmed Judge Teitler's finding of total disability due to pneumoconiosis in the miner's claim and, therefore, affirmed his award of benefits in the miner's claim. The Board, however, vacated Judge Teitler's finding of death due to pneumoconiosis in the survivor's claim and, therefore, the award of benefits in that claim, and remanded the case for further consideration of the evidence on the issue of death causation at Section 718.205(c). Specifically, the Board held that Judge Teitler erred in relying on the opinions of Drs. Crain and Dossman: that the miner's pneumoconiosis hastened his death because it prevented him from having surgery for lung cancer, without considering the fact that these physicians also opined that the miner was not a candidate for surgery because his cancer had spread outside his lung. *See [R.M.] v. U.S. Steel Mining Co. LLC*, BRB No. 06-0677 BLA (May 11, 2007) (unpub.). On remand, the administrative law judge found that the opinions of Drs. Crain and Dossman were sufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, the administrative law judge awarded benefits on the survivor's claim.

On appeal, employer contends that the administrative law judge erred in finding death due to pneumoconiosis established at Section 718.205(c). Specifically, employer contends that the administrative law judge erred in relying on the opinion of Dr. Crain, as supported by that of Dr. Dossman, and in not considering the opinions of Drs. Rosenberg and Goldstein on death causation. Employer argues that there is no evidence in the record that supports a finding that pneumoconiosis hastened the miner's death. Claimant responds, urging affirmance of the decision awarding survivor's benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.

¹ The miner filed a claim for benefits on March 6, 2003. The miner died on December 10, 2003, while his claim was pending. Claimant, the miner's widow, filed a claim for survivor's benefits on January 7, 2004, and continued to pursue the miner's claim.

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, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed.² 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In a survivor's claim filed on or after January 1, 1982 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 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. *See* 20 C.F.R. §718.205(c)(5); *see also Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).

In finding that pneumoconiosis hastened the miner's death at Section 718.205(c), the administrative law judge first rejected, as unpersuasive, the opinions of Drs. Rosenberg and Goldstein, that the miner's death was not due to pneumoconiosis, because they failed to diagnose pneumoconiosis. Decision and Order on Remand at 2. Instead, the administrative law judge credited the opinion of Dr. Crain, as supported by the opinion of Dr. Dossman, as the most persuasive. The administrative law judge found that both Dr. Crain and Dr. Dossman diagnosed pneumoconiosis and found that because the miner's pneumoconiosis prevented him from undergoing surgery and other treatment for his lung cancer, it hastened his death. Pursuant to the Board's instructions to look at the totality of their opinions, the administrative law judge acknowledged that both doctors also opined that the miner was not a candidate for lung cancer surgery because his cancer had spread outside his lung. The administrative law judge noted, however, that there was a point in time that surgery was considered but rejected due to the miner's pneumoconiosis. Decision and Order on Remand at 5; Director's Exhibit 47. Accordingly, the administrative law judge found that the opinion of Dr. Crain, as supported by that of Dr. Dossman, established that the miner's death was hastened by his

² This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner was employed in coal mining in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 7.

pneumoconiosis. Decision and Order on Remand at 5. Further, the administrative law judge noted that the opinion of Dr. Crain was entitled to great weight because he was both the miner's treating physician and a pulmonary specialist,³ whose opinion was well-supported by the miner's treatment records. *Id.*

Employer argues, however, that the administrative law judge erred in crediting the opinions of Drs. Crain and Dossman. Specifically, employer asserts that Dr. Crain's January 9, 2006 letter should have been accorded little weight because 1) it was written two years after the miner's death, 2) it was written in response to an attorney's letter inquiring as to survivor's benefit, and 3) it was inconsistent with Dr. Crain's prior medical findings. Employer's Brief at 10. Employer also contends that it cannot establish death causation because Dr. Crain provided only a conclusory statement that pneumoconiosis contributed to the miner's death.⁴ Further, employer contends that Dr. Crain's statement that, "due to the extent of pneumoconiosis, [the miner] was felt to be a nonsurgical candidate from the standpoint of his lung cancer," Claimant's Exhibit 1, was insufficient to establish that pneumoconiosis hastened the miner's death because nothing in the letter indicated that the miner would have been a surgical candidate in the absence of any complications associated with pneumoconiosis, or that the miner's life expectancy was reasonably expected to be extended by surgery. Similarly, employer contends that Dr. Dosmann's March 14, 2003 hospital note that "[the miner was] not a surgical candidate due to his pulmonary condition and evidence of mediastinal lymph node extension," Employer's Brief at 13; Employer's Exhibit 3, was insufficient to show that the miner's death was hastened by pneumoconiosis because nothing in the note established that *but for* pneumoconiosis, the miner could have had surgery. Employer's Brief at 13. Employer also contends that the administrative law judge erred in failing to consider the reasoned opinions of Drs. Rosenberg and Goldstein, who found that the miner's death was not hastened by pneumoconiosis. Employer contends that the administrative law judge should have considered and credited the opinion of Dr. Rosenberg⁵ because he is Board-certified in Internal Medicine, Pulmonary Disease and

³ Dr. Crain is Board-certified in Internal Medicine, with a subspecialty in Pulmonary Disease and Critical Care. Director's Exhibit 47. Dr. Dossman is an oncologist. Director's Exhibit 47.

⁴ Dr. Crain stated, "In reviewing [the miner's] records, I do believe that pneumoconiosis contributed to his death." Claimant's Exhibit 1.

⁵ Dr. Rosenberg opined that the miner did not have coal workers' pneumoconiosis or an associated impairment, and that while the miner was disabled from a pulmonary standpoint (lung cancer), his death was due to lung cancer, which was not caused or hastened by his coal dust exposure. Employer's Exhibit 1.

Occupational Medicine and performed a thorough review of the miner's medical records. Likewise, employer contends that the administrative law judge should have considered and credited the opinion of Dr. Goldstein⁶ because he is Board-certified in both Internal Medicine and Pulmonary Disease, reviewed many of the miner's medical records, examined the miner, and performed a number of tests.

At the outset, we reject employer's argument regarding the opinions of Drs. Rosenberg and Goldstein. Contrary to employer's argument, the administrative law judge permissibly rejected the opinions of Drs. Rosenberg and Goldstein on death causation because they did not diagnose the existence of either clinical or legal pneumoconiosis. *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *see Cornett v. Benham Coal Corp.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Turning to employer's arguments concerning the opinions of Drs. Crain and Dossman, the administrative law judge permissibly found that the opinion of Dr. Crain was entitled to additional weight because he was both the miner's treating physician and a pulmonary expert. *See* 20 C.F.R. §718.104(d); *Dillon v. Peabody Coal Co.*, 11 BLR 13-113 (1988). Further, the administrative law judge rationally accorded the opinion great weight because it was well-supported by the miner's treatment records. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Contrary to employer's contentions, the administrative law judge was not required to accord Dr. Crain's 2006 opinion little weight because it was written two years after the miner's death or because it was written in response to an attorney's letter. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Further, contrary to employer's argument, the administrative law judge could, within his discretion as finder-of-fact, determine that Dr. Crain's opinion was supported by the miner's treatment records showing that the miner had pneumoconiosis and that his pneumoconiosis precluded him from having surgery for the lung cancer that ultimately caused his death, *i.e.*, the administrative law judge noted that Dr. Crain "unequivocally opined that because of the pneumoconiosis, the [m]iner was not a surgical candidate for the lung cancer that ultimately proved fatal." Decision and Order on Remand at 6; *see Clark*, 12 BLR at 1-155. Additionally, in keeping with the Board's instructions on

⁶ Dr. Goldstein concluded that a diagnosis of coal workers' pneumoconiosis or silicosis rests "on thin ground" and that the miner's death was not due to pneumoconiosis. Employer's Exhibit 7. Dr. Goldstein also concluded that the miner's disabling respiratory impairment was due to lung cancer. *Id.*

remand, the administrative law judge considered the opinions of Drs. Crain and Dossman in their entirety, including their reference to the fact that surgery for the miner's lung cancer was also precluded because the cancer had spread outside the miner's lung. The administrative law judge noted, however, that while that was true, "there was a point in time at which surgery was considered and rejected because of the [m]iner's pneumoconiosis." Decision and Order on Remand at 5. Further, employer contends that the administrative law judge erred in relying on the opinion of Dr. Crain because he did not opine that *but for* pneumoconiosis the miner could have had surgery. This contention is rejected. The administrative law judge was not required to find that pneumoconiosis alone hastened the miner's death. *See* 20 C.F.R. §718.205(c); *Bradberry*, 117 F.3d at 1367, 21 BLR at 2-178. Thus, the administrative law judge permissibly concluded, "I do not find that the fact that the [m]iner suffered from multiple medical conditions lessens the role pneumoconiosis had in hastening his death." Decision and Order on Remand at 6; *see* 20 C.F.R. §718.205(c); *Bradberry*, 117 F.3d at 1367, 21 BLR at 2-178.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley*, 12 BLR at 1-23. Consequently, we affirm the administrative law judge's determination that claimant has established that the miner's death was hastened by pneumoconiosis at Section 718.205(c), as it is rational, supported by substantial evidence, and is in accordance with law.

Accordingly, the administrative law judge's Decision and Order on Remand – Award 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