

BRB No. 06-0744 BLA

WANDA MORGAN)	
(Widow of FRED MORGAN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SHAMROCK COAL COMPANY, INCORPORATED)	DATE ISSUED: 03/23/2007
)	
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 - Denying Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits (2003-BLA-6247) of Administrative Law Judge Edward Terhune Miller on a survivor's claim filed on April 3, 2001 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).² The administrative law

¹ Claimant is the widow of the deceased miner.

² The miner filed a claim for benefits on October 15, 1992. Director's Exhibit 1.

judge credited the miner with eighteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). However, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1)-(3). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.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, are rational, and are consistent with the 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).

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 mine employment and that his death was due to pneumoconiosis.⁴ See 20 C.F.R.

This claim was ultimately denied by Administrative Law Judge Daniel J. Roketenetz in a Decision and Order dated February 22, 2000, which the Board affirmed. *Morgan v. Shamrock Coal Co., Inc.*, BRB No. 00-0600 BLA (Mar. 28, 2001) (unpublished). The full procedural history of the miner's claim is set forth in *Morgan v. Shamrock Coal Co., Inc.*, BRB No. 00-0600 BLA (Mar. 28, 2001) (unpublished). The miner died on September 10, 2000 while his appeal of Judge Roketenetz's denial of benefits was pending before the Board. Director's Exhibit 3. Claimant filed a claim for survivor's benefits on April 3, 2001. Director's Exhibit 3.

³ We affirm the administrative law judge's length of coal mine employment finding and his findings that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) but failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1) and (3), as they are not challenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7, 9.

⁴ Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

§§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).⁵ Failure to establish any one of these elements precludes entitlement to benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death at 718.205(c)(2). Claimant specifically argues that the administrative law judge erred in rejecting Dr. Gilbert's "well reasoned" opinion. Claimant's Brief at 5. Claimant also argues that the administrative law judge erred in failing to consider Dr. Gilbert's status as the miner's treating physician pursuant to 20 C.F.R. §718.104(d). The administrative law judge considered Dr. Kline's autopsy report and the reports of Drs. Gilbert, Tomashefski, Tuteur and Rosenberg. Dr. Kline did not render an opinion with regard to whether pneumoconiosis contributed to the miner's death.⁶ Director's Exhibit 29. Dr. Gilbert opined that pneumoconiosis hastened the

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- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
 - (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
 - (3) Where the presumption set forth at §718.304 is applicable.
 - ...
 - (5) 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 This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's most recent coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Decision and Order at 2; Director's Exhibits 1, 4.

⁶ In his report of autopsy of the lungs, Dr. Kline diagnosed "focally complicated coal workers' pneumoconiosis (1 mm.) in a background of simple coal workers'

miner's death. Claimant's Exhibit 2. Dr. Tomashefski opined that "[t]he immediate cause of death is cerebral edema, necrosis and herniation caused by the tumor and the post-operative complications of subdural hematoma, cerebral infarction and hydrocephalus." Director's Exhibit 14. Dr. Tomashefski also opined that the miner's death was unrelated to his coal mining occupation. *Id.* Similarly, Dr. Tuteur opined that pneumoconiosis did not cause, hasten or substantially contribute to the miner's death. Director's Exhibit 28. Lastly, Dr. Rosenberg opined that the miner's past inhalation of coal mine dust did not cause or hasten his death. Employer's Exhibits 2-4. The administrative law judge found that the opinions of Drs. Tomashefski, Tuteur and Rosenberg outweighed Dr. Gilbert's contrary opinion, because he found that they are better reasoned and documented, and Drs. Tomashefski, Tuteur and Rosenberg have superior qualifications. Decision and Order at 12.

Contrary to claimant's assertion, the administrative law judge permissibly discounted Dr. Gilbert's opinion because he found that it is not well reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge stated that "[o]nly Dr. Gilbert opined that coal workers' pneumoconiosis contributed to the miner's death, and his opinion was essentially incredible." Decision and Order at 12. The administrative law judge specifically stated:

What records he might have reviewed before rendering his opinion is [sic] not disclosed. He concluded in his brief medical note that the miner had *simple and complicated* CWP based on history, multiple physical examinations, and the autopsy results, but there is no reference to x-rays or other objective tests.

Id. Further, the administrative law judge permissibly found that Dr. Gilbert's conclusion that "[i]f it were not for coal miners [sic] pneumoconiosis he may have had a chance to survive" was directly addressed and persuasively dismissed by Dr. Rosenberg. Decision and Order at 12. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Gilbert's opinion.

We also reject claimant's assertion that the administrative law judge erred in failing to accord greater weight to Dr. Gilbert's opinion based upon his status as the miner's treating physician. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of

pneumoconiosis." Director's Exhibit 29.

treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

In the instant case, the administrative law judge stated that “[d]espite Dr. Gilbert’s claim of numerous examinations of the miner and the suggestion that he might qualify as a treating physician, his opinion is not well-reasoned and does not qualify for extra probative weight under the ‘treating physician’ rule.” Decision and Order at 12. This finding is not supported by substantial evidence. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22-22; *Fuller*, 6 BLR at 1-1294. Thus, we reject claimant’s assertion that the administrative law judge erred in failing to accord greater weight to Dr. Gilbert’s opinion based upon his status as the miner’s treating physician. *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003)(noting that Section 718.104(d) does not call for automatic acceptance of treating physician’s opinion); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Furthermore, because the administrative law judge permissibly discounted the only medical opinion of record that could support a finding that pneumoconiosis substantially contributed to or hastened the miner’s death, we affirm the administrative law judge’s finding that claimant failed to establish that the miner’s death was due to pneumoconiosis at Section 718.205(c)(2), (5). *Brown*, 996 F.2d at 817, 17 BLR at 2-140.

In light of our affirmance of the administrative law judge’s findings that the evidence is insufficient to establish that the miner’s death was due to pneumoconiosis at 20 C.F.R. Part 718.205(c), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge’s denial of benefits. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge