

BRB No. 09-0242 BLA-A

N.S.)
(Widow of R.S.))
)
Claimant-Petitioner)
)
v.)
)
U.S. STEEL CORPORATION)
) DATE ISSUED: 09/22/2009
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 on Remand of Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

Jack R. Heneks, Jr., Uniontown, Pennsylvania, for claimant.

Christopher Pierson (Burns, White & Hickton), Pittsburgh, Pennsylvania,
for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (06-BLA-5451) of
Administrative Law Judge Daniel L. Leland denying benefits on a 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 involves a survivor's claim filed on
November 22, 2004 and is before the Board for the second time. In the initial decision,
the administrative law judge, after crediting the miner with thirteen years of coal mine

¹ Claimant is the surviving spouse of the deceased miner, who died on October 26,
2004. Director's Exhibit 10.

employment, found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further 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.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) as unchallenged on appeal. [*N.S.*] v. *U.S. Steel Corp.*, BRB No. 07-0788 BLA (May 28, 2008)(unpub.). However, the Board vacated the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends 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 in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.²

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).³ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

² The Director, Office of Workers' Compensation Programs (the Director), filed an appeal on December 8, 2008. However, on February 17, 2009, the Director filed a motion to have its appeal dismissed. By Order dated February 24, 2009, the Board granted the Director's motion and dismissed its appeal (BRB No. 09-0242 BLA). Claimant's appeal (BRB No. 09-0242 BLA-A) remains before the Board.

³ Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be 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). 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); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant contends that the administrative law judge erred in finding that Dr. Wecht's opinion did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Dr. Wecht, the autopsy prosector, opined that the miner died due to hypertensive, arteriosclerotic cardiovascular disease. Director's Exhibit 16. However, Dr. Wecht further stated that:

It is further my professional opinion that [the miner's] coal workers' pneumoconiosis, which was the basis for his chronic obstructive pulmonary disease, was a substantially contributing factor in his death.

It should be emphasized that the disease process of coal worker's pneumoconiosis, which was a substantial contributing factor in [the miner's] death, had manifested itself through various clinical signs and symptoms for several years preceding [the miner's] terminal illness and death.

Director's Exhibit 16.

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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.
 - (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
 - (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).

Following the Board's remand instruction to "address the significance of the fact that Dr. Wecht did not indicate that he was aware of the miner's smoking history," [*N.S.*] *v. U.S. Steel Corp.*, BRB No. 07-0788 BLA (May 28, 2008)(unpub.), slip op. at 8 n.9, the administrative law judge stated:

[T]here is no indication that Dr. Wecht considered, or was even aware of the miner's smoking history. As such, Dr. Wecht has not addressed what role, if any, the miner's forty-five pack year history might have played in causing his condition.

Decision and Order on Remand at 3.⁴ The administrative law judge, therefore, accorded less weight to Dr. Wecht's opinion. *Id.*

Claimant argues that the administrative law judge erred in according less weight to Dr. Wecht's opinion based on the fact that Dr. Wecht was unaware of the miner's smoking history. We disagree. The administrative law judge, within his discretion, permissibly accorded less weight to Dr. Wecht's opinion because the doctor had an incomplete picture of the miner's health. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984) (holding that an administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate or incomplete picture of the miner's health).

The administrative law judge also found that Dr. Wecht failed to explain how he concluded that the miner's pneumoconiosis contributed to his death. Decision and Order on Remand at 3. The administrative law judge found that:

Dr. Wecht has provided extensive medical documentation detailing how he was able to conclude that the miner had pneumoconiosis, but he has not explained how that condition caused, contributed to, or hastened the miner's death. Dr. Wecht has merely made vague and general statements regarding death causation with no substantive explanation or documentation to support his conclusions. Likewise, Dr. Wecht has not sufficiently explained his basis for attributing the miner's COPD to pneumoconiosis. Dr. Wecht has, again, made broad conclusory statements without substantiating documentation or explanation.

Decision and Order on Remand at 3. Substantial evidence supports the administrative

⁴ Because no party challenges the administrative law judge's finding of a forty-pack year smoking history, Decision and Order on Remand at 2, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

law judge's findings. The administrative law judge, therefore, permissibly determined that Dr. Wecht's opinion, regarding the cause of the miner's death, was not sufficiently reasoned. See *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As a result, the administrative law judge permissibly found that claimant failed to satisfy her burden of establishing, by a preponderance of the evidence, that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁵ See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994). We, therefore, affirm the administrative law judge's 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).

⁵ In his initial decision, the administrative law judge found that the miner's death certificate was entitled to "little weight" because Dr. Reilly provided "mere conclusory statements on the death certificate without preparing an explanatory report of his findings." Decision and Order at 9. The Board affirmed this finding as unchallenged on appeal. [*N.S.*] *v. U.S. Steel Corp.*, BRB No. 07-0788 BLA (May 28, 2008)(unpub.), slip op. at 4. The opinion of Dr. Oesterling, the only other physician of record to address the cause of the miner's death, does not support a finding that the miner's death was due to pneumoconiosis. Dr. Oesterling opined that the miner's coal workers' pneumoconiosis did not, in any way, hasten, cause, or contribute to his death. Employer's Exhibit 1 at 23-24.

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