

BRB No. 03-0617 BLA

MADGE SWIFT)
(Widow of MILES SWIFT))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 04/26/2004
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Paul Sotak, Scranton, Pennsylvania, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

BEFORE: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2002-BLA –5168) of Administrative Law Judge Janice K. Bullard rendered 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). Based on the filing date of February 9, 2001, the administrative law judge adjudicated this survivor's claim pursuant to 20 C.F.R Part 718. Director's Exhibit 2. The administrative law judge found that, although the existence of pneumoconiosis was previously established in the miner's case, the

¹ Claimant is the widow of the miner, Miles Swift, who died on January 28, 2001. Claimant filed a survivor's claim on February 9, 2001.

evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that death due to pneumoconiosis was not established. The Director, Office of Workers' Compensation Programs, (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

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. 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).

Contrary to claimant's arguments, the administrative law judge properly found that the medical opinion evidence was insufficient to establish death due to pneumoconiosis at Section 718.205. The administrative law judge permissibly credited the opinion of Dr. Sherman² which she found to be well-reasoned and detailed, rather than the opinions of Dr. Galardi, the treating physician, or Dr. Yanni, the physician who signed the death certificate, which she did not find to be well-reasoned. Director's Exhibits 4, 13, Claimant's Exhibits 1, 2. Additionally, based on Dr. Sherman's credentials as a board-certified internist with a subspecialty certification in pulmonary disease as well as on his position as an associate professor of medicine at two medical colleges and as the Medical Director of Pulmonary Services and the Pulmonary Diagnostic Laboratory at Hahnemann University Hospital, the administrative law judge accorded his opinion greater weight than the opinions of Drs. Yanni and Galardi, whose credentials were not in the record. This was rational. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). The administrative law judge also reasonably found that, in the absence of an autopsy, the death certificate signed by Dr. Yanni, attributing death due to respiratory failure due to pneumonia due to black lung, does not constitute a reasoned medical opinion. Director's Exhibit 9; *Id.*; *Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12, 2-21(3d Cir. 1997)(mere fact that death certificate refers to pneumoconiosis cannot be viewed as a reasoned medical finding); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988). Likewise, contrary to claimant's contention, the

² Dr. Sherman explained that pneumoconiosis caused neither urosepsis nor possible aspiration pneumonia, complications which the miner experienced before his death. Dr. Sherman observed that the record provided little evidence as to the cause of aspiration, and that neither chronic obstructive pulmonary disease, nor any other pulmonary process appeared to require significant treatment. Dr. Sherman further opined that a depressed mental status associated with the miner's urosepsis and dementia was the most likely etiology of aspiration pneumonia. Director's Exhibit 13.

administrative law judge acted properly in refusing to credit Dr. Galardi's opinion, which she found to be conclusory and neither sufficiently documented nor reasoned. Decision and Order at 5; *See* 20 C.F.R. §718.104(d)(5); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002)(administrative law judge must assess quality of physician's reasoning); *Lango*, 104 F.3d 573, 577, 21 BLR 2-12, 20-21 (administrative law judge may permissibly require treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to the miner's death).

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 nor substitute its own inferences on appeal, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, as the administrative law judge permissibly found that the medical opinion evidence was insufficient to establish claimant's burden of proving, on her survivor's claim, that the miner's death was caused, contributed to, or hastened by pneumoconiosis at Section 718.205(c), that finding is affirmed. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

There is evidence in this case, however, indicating that claimant may be the widow of a miner who was receiving benefits at the time of his death pursuant to a claim filed on December 31, 1979. *See* Director's Exhibit 1.³ The administrative law judge found that the miner was awarded benefits on a claim filed December 31, 1979. Accordingly, if claimant satisfies the criteria at 20 C.F.R. §725.212,⁴ she would not be

³ Claimant testified that she was married to the miner and living with him at the time of his death in 2001. Hearing Transcript at 9.

⁴ §725.212 Conditions of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:

(1) Is not married;

(2) Was dependent on the miner at the pertinent time; and

(3) The deceased miner either:

(i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving spouse or surviving

required to file a separate claim for benefits and would benefit from the substantive regulations and presumptions applicable, based on the filing date of the miner's claim (the record shows that the miner had twelve years of coal mine employment). *See e.g.*, 20 C.F.R. §718.303.⁵ This case is, therefore, remanded for the administrative law judge to determine whether claimant satisfies the criteria of Section 725.212 and therefore is entitled to benefits. 30 U.S.C. §§901, 932(1); 20 C.F.R. §§725.212; 718.303; *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988); *Smith v. Camco Mining, Inc.*, 7 BLR 1-17 (1989); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1987); *see Hillibush v. U.S. Dept. of Labor*, 853 F.2d 197, 207, 11 BLR 2-223, 2-232 (3d Cir. 1988).

divorced spouse of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under §718.306 or part 718 on a claim filed prior to June 30, 1982.

(b) If more than one spouse meets the conditions of entitlement prescribed in paragraph (a), then each spouse will be considered a beneficiary for purposes of section 412(a)(2) of the Act without regard to the existence of any other entitled spouse or spouses.

20 C.F.R. §725.212.

⁵ §718.303 Death from a respirable disease.

(a)(1) If a deceased miner was employed for ten or more years in one or more coal mines and died from a respirable disease, there shall be a rebuttable presumption that his or her death was due to pneumoconiosis.

(2) Under this presumption, death shall be found due to a respirable disease in any case in which the evidence establishes that death was due to multiple causes, including a respirable disease, and it is not medically feasible to distinguish which disease caused death or the extent to which the respirable disease contributed to the cause of death.

(b) The presumption of paragraph (a) of this section may be rebutted by a showing that the deceased miner did not have pneumoconiosis, that his or her death was not due to pneumoconiosis or that pneumoconiosis did not contribute to his or her death.

(c) This section is not applicable to any claim filed on or after January 1, 1982.

20 C.F.R. §718.303.

Accordingly, the administrative law judge's Decision and Order denying benefits on the survivor's claim is affirmed. The case is remanded, however for consideration of entitlement based on the filing date of the miner's claim.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge