

BRB No. 04-0650 BLA

RHODA L. SOUDER)
(Widow of WALTER SOUDER))
)
Claimant-Petitioner)
)
v.)
)
BLEDSOE DEEP MINING COMPANY) DATE ISSUED: 04/14/2005
)
and)
)
KENTUCKY COAL PRODUCERS SELF-)
INSURANCE FUND)
)
Employer/Carrier-)
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 Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

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

John T. Chafin (Chafin & Davis), Prestonsburg, Kentucky, for employer.

Helen H. Cox (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: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (03-BLA-5509) of Administrative Law Judge Alice M. Craft 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). The administrative law judge found, based upon the stipulation of the parties, that the miner worked six years in qualifying coal mine employment. Decision and Order at 3. The administrative law judge further found that while the x-ray evidence of record did not support a finding of the existence of pneumoconiosis, the pathology evidence of record established the existence of the disease, 20 C.F.R §§718.201(a), 718.202(a)(1), (2); Decision and Order at 10-11, and that such pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Decision and Order at 11-13. The administrative law judge concluded, however, that the evidence of record failed to establish that the miner's pneumoconiosis caused or hastened his death pursuant to 20 C.F.R. §718.205. Decision and Order at 13-15. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1), as the administrative law judge impermissibly allowed employer to submit seventeen x-ray interpretations, a number in excess of the regulatory limitations found at 20 C.F.R §725.414. Claimant further argues that the administrative law judge erred in determining that the evidence failed to support a finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) as the administrative law judge failed to accord proper weight to the opinion of Dr. Sullivan, the miner's treating physician, pursuant to 20 C.F.R. §718.104(d), in light of his multiple examinations of the miner. Employer, in response, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has filed a brief stating that while the administrative law judge erred in admitting employer's x-ray interpretations in excess of the regulatory limitation, such error was ultimately harmless because: none of the x-ray readings was classified as positive for the existence of pneumoconiosis; the administrative law judge found that the biopsy evidence established the existence of clinical pneumoconiosis; and all of the doctors who rendered credible medical opinions, as to the cause of death, acknowledged the existence of pneumoconiosis prior to death.

¹ Claimant, Rhoda L. Souder, is the widow of the miner, Walter Souder, who died on November 14, 2000. The survivor's claim was filed on April 12, 2001. The miner was last hospitalized from October 31, 2000 to November 14, 2000 when he died. During this time the miner underwent two failed lung transplants. Director's Exhibit 9. The death certificate lists the cause of death as chronic obstructive pulmonary disease (COPD) with no other causes or significant conditions listed. Further, the etiology of the COPD is not noted. Director Exhibit 8.

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. 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).

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. See 20 C.F.R. §§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 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 20 C.F.R. §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. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of pneumoconiosis based on the pathology evidence of record. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Accordingly, as we affirm the administrative law judge's determination that the existence of pneumoconiosis has been established at 20 C.F.R. §718.202(a)(2), we need not reach claimant's assertion that the administrative law judge improperly admitted x-ray interpretations in excess of the regulatory limitations at Section 725.414 and thus erred in not finding the disease established through the x-ray evidence pursuant to Section 718.202(a)(1). See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We thus have no occasion to consider employer's assertion, raised in its response brief, see Employer's Response Brief at 12-13, that claimant waived the regulatory limitations found at Section 725.414. We note, however, that the Board has recently held that 20 C.F.R. §725.456(b)(1) does not provide for parties to waive the regulatory limitations on medical evidence submitted in fulfillment of Section 725.414. *Smith v. Martin County Coal Corp.*, BRB No. 04-0126 BLA (Oct. 27, 2004); see *Dempsey v. Sewell Coal Co.*, 23 BLR 1-53 (2004)(*en banc*).

Turning to whether the miner's death was due to pneumoconiosis, claimant argues that the administrative law judge erred in failing to accord dispositive weight to the opinion of the miner's treating physician, Dr. Sullivan, who stated that the miner

suffered from pneumoconiosis and chronic obstructive pulmonary disease (COPD), and that pneumoconiosis played a role in the miner's death. Director's Exhibits 10, 11, 25. Claimant asserts that the administrative law judge failed to consider the opinions of Dr. Sullivan, who was the miner's treating physician, in a manner consistent with the regulatory requirements at 20 C.F.R §718.104(d). Claimant further asserts that there is no evidence in the record which supports the administrative law judge's finding that Dr. Sullivan's opinion, relating the miner's death to pneumoconiosis, was influenced by sympathy for the miner's family. Decision and Order at 14. Additionally, claimant asserts that the administrative law judge "may" have impermissibly selectively analyzed the evidence of record, Claimant's Brief at 4-5.

Section 718.104(d) provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

- 1) Nature of relationship.
- 2) Duration of relationship.
- 3) Frequency of treatment.
- 4) Extent of treatment.

20 C.F.R. §718.104(d)(1)-(4). The regulation also requires, however, that the administrative law judge consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

In concluding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205, the administrative law judge found that while Dr. Sullivan was the miner's treating physician for the last eleven years of his life, the basis for the physician's conclusion that the miner's death was due to pneumoconiosis was not reasoned. Decision and Order at 12. Specifically, the administrative law judge found that the record did not disclose what information Dr. Sullivan had available to her or what information she relied on to form her opinion. Further, the administrative law judge found that Dr. Sullivan did not mention the miner's coal mining history, the existence of pneumoconiosis or whether the miner's COPD may have been related to coal mine employment and instead concluded, throughout her treatment of the miner, that the miner's respiratory condition was entirely due to his lengthy smoking history. Decision and Order at 13-14. Thus, the administrative law judge concluded that Dr. Sullivan's opinion as to the cause of death, given two years after the miner death, was not entitled to dispositive weight, based on

her status as claimant's treating physician, because it was cursory and insufficiently supported by the evidence of record. This was rational. 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); see *Peabody Coal Co. v. McCandless*, 225 F.2d 465, 22 BLR 2-311 (7th Cir. 2001).

Moreover, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Fino, that the miner's pneumoconiosis did not contribute to his death, Employer's Exhibit 2, as the administrative law judge found that that physician offered better reasoned and supported conclusions than those of Dr. Sullivan. 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d 501, 22 BLR 2-623; *Stephens*, 298 F.3d 511, 22 BLR 2-495. Further, the administrative law judge permissibly found that Dr. Fino's conclusion were buttressed by the opinion of Dr. Mullett, who attended to the miner during his final illness and found that the miner suffered from COPD, but did not discuss the etiology of the COPD or state that the miner's death was due to pneumoconiosis. Director's Exhibit 9.

In conclusion, claimant has failed to demonstrate that the administrative law judge has selectively analyzed the evidence. We, therefore, affirm the administrative law judge's determination that the evidence of record was insufficient to establish that the miner's death was caused or hastened by his pneumoconiosis. 20 C.F.R. §718.205(c).

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