

BRB No. 05-0825 BLA

MARVELLA KAY COOPER)
(Widow of FOREST P. COOPER))
)
Claimant)
) DATE ISSUED: 04/27/2006
v.)
)
U.S. STEEL CORPORATION, LLC)
)
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 – Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Howard G. Salisbury, Jr. (Kay, Castro & Chaney PLLC), Charleston, West Virginia, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-6057) of Administrative Law Judge Richard A. Morgan (the administrative law judge) awarding benefits 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). Adjudicating the survivor’s claim pursuant to 20 C.F.R. Part 718, based on claimant’s April 16, 2003 filing date, the administrative law judge credited the miner with at least twenty-five years of coal mine employment. In addition, the administrative law judge found that the medical evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge further found that the evidence established that pneumoconiosis substantially contributed to the miner’s death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded survivor’s benefits, commencing as

of July 1, 2002.

On appeal, employer generally contends that the administrative law judge erred in finding that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c). In particular, employer contends that the administrative law judge erred in according determinative weight to the medical opinion of Dr. Ward, the miner's treating physician, over the contrary opinions of Drs. Bush and Walker. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.¹

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *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).

In challenging the administrative law judge's award of benefits, employer contends that the administrative law judge did not properly weigh the evidence of record, as he should have credited the opinions of Drs. Bush and Walker, whom employer contends have "vastly superior qualifications," over the opinion of Dr. Ward, the miner's

¹ As the parties do not challenge the administrative law judge's decision to credit the miner with at least twenty-five years of coal mine employment, or his findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.205(c)(1) and (3), these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

treating physician.² Employer's Brief at 6-7, 12. This contention essentially constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *Anderson*, 12 BLR at 1-113. It is the duty of the administrative law judge, in his role as fact-finder, to determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

In this case, the administrative law judge rationally found that Dr. Ward's opinion was sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c). Contrary to employer's contention, the administrative law judge acknowledged the superior qualifications possessed by Drs. Bush and Walker, but acted within his discretion as fact-finder in determining that Dr. Ward's opinion was, nevertheless, entitled to greater weight based upon his status as the miner's treating physician and because his conclusions were better supported by the evidence of record.³

² Dr. Ward completed the death certificate and listed renal cell carcinoma as the immediate cause of death and coal workers' pneumoconiosis as an "other significant condition contributing to death but not resulting in the underlying cause of death." Director's Exhibit 8. In a subsequent report, Dr. Ward opined that the miner's terminal event was respiratory failure secondary to severe lung disease, which was largely due to tumors associated with the metastasis of the miner's renal cell carcinoma to his lungs. Dr. Ward further stated that it was also due to the miner's chronic lung disease, which was related to coal workers' pneumoconiosis. Dr. Ward concluded, therefore, that the miner's pneumoconiosis contributed to his death as it "hastened the process of his demise." Claimant's Exhibit 1. Dr. Bush reviewed the miner's medical records, including some evidence not in the formal record, *see* Decision and Order at 11-12, and opined that the miner's coal dust disease was too limited at autopsy to be considered causally related to death with any degree of reasonable medical certainty. Employer's Exhibit 1. Dr. Walker, in testimony before the West Virginia Occupational Pneumoconiosis Board, agreed with Dr. Bush's opinion that pneumoconiosis was not a substantially contributing cause of the miner's death. Employer's Exhibits 2-3. Dr. Walker acknowledged that pneumoconiosis was a contributing cause of the miner's respiratory impairment. Employer's Exhibit 2.

³ The administrative law judge indicated that "Dr. Ward is a Doctor of Osteopathy and Family Practitioner, whereas Dr. Bush is a Board-certified pathologist and Dr. Walker is a member of the West Virginia Occupational Pneumoconiosis Board." Decision and Order at 11.

The administrative law judge rationally found that because Dr. Ward had treated the miner for respiratory and pulmonary problems on at least thirty-two occasions from January 4, 1991 until Mr. Cooper's death on July 20, 2002, Dr. Ward had "superior and relevant information concerning the miner's condition, as provided in §718.204(d)(1)-(4)." Decision and Order at 11; 20 C.F.R. §718.204(d); see *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). In addition, the administrative law judge reasonably concluded that:

[U]nder the particular facts of this case, I find Dr. Ward's opinion is most probative, because it is most consistent with Mr. Cooper's 25-year coal miner employment history, the 2/2 and 3/3 findings on chest x-rays, the miner's significant lifetime respiratory problems as evidenced by subjective complaints, physical findings on multiple lung examinations, abnormal findings on various pulmonary function studies, all of which pre-date the diagnosis of renal cancer, the autopsy findings which confirm the diagnosis of simple pneumoconiosis, and the severe respiratory distress caused by the metastasizing of the miner's renal cancer into the miner's lungs. Therefore, as stated by Dr. Ward, even though Mr. Cooper's death was primarily due to the effects of metastatic renal cancer, the miner's chronic, longstanding lung disease, which was related to pneumoconiosis, substantially contributed to and/or hastened the miner's death.

Decision and Order at 12; Director's Exhibits 8, 10, 11; Claimant's Exhibit 1; Employer's Exhibits 1-3. Because the administrative law judge's finding with respect to Dr. Ward's opinion is rational and supported by substantial evidence, it is affirmed. *Sparks*, 213 F.3d at 190, 22 BLR at 2-259; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence established that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2), (4) and (5). 20 C.F.R. §718.205(c)(2), (4), (5); *Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259; *Shuff*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge