

BRB No. 06-0583 BLA

LONA VARNEY)
(Widow of WILLIE G. VARNEY))
)
Claimant-Respondent)
)
v.)
)
EASTERN COAL CORPORATION)
)
and)
) DATE ISSUED: 04/27/2007
THE PITTSOON COMPANY)
c/o ACORDIA EMPLOYERS SERVICE)
)
Employer/Carrier-Petitioners)
)
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (04-BLA-05576) 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). Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge accepted employer's concessions, as supported by the record, that it is the responsible operator and that the

miner had pneumoconiosis. Decision and Order at 2, 13; Hearing Transcript at 32; Director's Exhibits 21. The administrative law judge found that the miner had at least twenty-three years of coal mine employment and determined 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). Decision and Order at 2, 13; Director's Exhibit 26. The administrative law judge also found that there was no evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, but that the relevant evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 14-16. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence as it is insufficient to establish the miner's death was due to pneumoconiosis. Claimant¹ has not filed a response brief in this case. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 (1993). For a survivor's claim filed on or after January 1, 1982, death will

¹ Claimant is the miner's widow. The miner filed a claim for benefits, the denial of which was ultimately affirmed by the Board. Director's Exhibit 1. The miner died on July 8, 2002. Claimant filed a survivor's claim, the subject of the present appeal, on August 30, 2002, in which the district director issued a proposed Decision and Order awarding benefits on September 24, 2003. Director's Exhibits 3, 11, 26. Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 27.

² The administrative law judge's length of coal mine employment and responsible operator determinations, as well as her findings pursuant to 20 C.F.R. §§718.202, 718.203 and 718.304, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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), (c)(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).³

Employer contends that the administrative law judge did not properly weigh the medical opinion evidence and, therefore, erred in concluding that the miner's death was due to pneumoconiosis. Employer also argues that the administrative law judge erred in relying on Dr. Perper's post-hearing deposition testimony, as it exceeded the scope of the administrative law judge's ruling at the formal hearing that the sole purpose of Dr. Perper's deposition was to allow claimant to rehabilitate his opinion in light of the critical comments made by Drs. Rosenberg and Fino.

The evidence relevant to the issue of death due to pneumoconiosis includes the death certificate prepared by Dr. Musgrave, claimant's treating physician, Dr. Musgrave's treatment records, the autopsy report by Dr. Dennis, and the opinions of Drs. Caffrey, Perper, Rosenberg and Fino.⁴ Director's Exhibits 11-12, 15; Claimant's Exhibit 1-2; Employer's Exhibits 1, 3-5. Upon weighing this evidence, the administrative law judge stated that he was "persuaded" by the opinions of Drs. Musgrave and Dennis, as "corroborated by Dr. Perper's well-documented and well-reasoned opinion, that the [m]iner's pneumoconiosis contributed to his death." Decision and Order at 16. The administrative law judge accorded little weight to the contrary opinion of Dr. Rosenberg, that the miner had pneumoconiosis but that it did not cause or contribute to his death, because Dr. Rosenberg did not examine the miner. Decision and Order at 15. Regarding Dr. Fino's opinion, that the miner's death was due to lung cancer and severe coronary

³ The record indicates that the miner was last employed in the coal mine industry in Kentucky. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴ The administrative law judge advised the parties at the hearing that she would limit consideration of Dr. Caffrey's opinion to the physician's comments regarding the autopsy slides. The administrative law judge explained that if he addressed any other portion of the opinion, it would constitute a medical report in excess of the evidentiary limitations set forth in 20 C.F.R. §725.414. Decision and Order at 4 n.4; Hearing Transcript at 17; Director's Exhibit 15. Because employer has not raised any allegation of error with respect to the administrative law judge's finding, it is affirmed. *Skrack*, 6 BLR at 1-711.

disease and unrelated to his coal dust inhalation, the administrative law judge found that although it was reasoned and supported by the record, Dr. Perper's opinion was entitled to more weight on the ground that he examined the miner. Decision and Order at 15-16.

Initially, we address employer's argument that the administrative law judge abused her discretion by relying on Dr. Perper's post-hearing deposition, which employer argues went beyond rehabilitating Dr. Perper's opinion in response to the critiques offered by Drs. Rosenberg and Fino. Employer specifically asserts that because Dr. Perper admitted on cross-examination that he had not seen the reports from Drs. Rosenberg and Fino, Dr. Perper's post-hearing testimony should be stricken from the record.⁵ Employer's Brief at 11.

The regulation set forth at 20 C.F. R. §725.414(a)(2)(ii) states, in pertinent part, that:

Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

20 C.F.R. § 725.414(a)(2)(ii). In this case, in response to claimant's request at the hearing, the administrative law judge gave claimant the opportunity to rehabilitate Dr. Perper's opinion "with respect to Dr. Rosenberg and Dr. Fino." Hearing Transcript at 26. When considering Dr. Perper's opinion, including his post-hearing deposition, pursuant to Section 718.205(c), however, the administrative law judge did not consider whether the post-hearing deposition constituted appropriate rehabilitative evidence under Section 725.414(a)(2)(ii).

Because the administrative law judge did not make a specific finding on this evidentiary issue, which is committed to her discretion, we must vacate her finding that Dr. Perper's opinion is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) and remand the case to the administrative law judge for reconsideration. *Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). On remand, the administrative

⁵ Employer refers to Drs. Caffrey and Fino in its brief, but it is clear that the administrative law judge's evidentiary ruling concerned claimant's opportunity to rehabilitate Dr. Perper's opinion in light of critical comments made by Drs. Rosenberg and Fino. Hearing Transcript at 26.

law judge must determine if employer's rebuttal evidence "undermined" the conclusion of Dr. Perper and if so, whether Dr. Perper's subsequent testimony further explained his conclusion in light of employer's rebuttal evidence. *See* 20 C.F.R. §725.414 (a)(2)(ii). The administrative law judge must then reconsider whether claimant has established death due to pneumoconiosis pursuant to Section 718.205(c) in light of all the relevant and properly admitted evidence of record.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge