

BRB No. 07-0653 BLA

M.W.)	
(Widow of D.W.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
UNITED STATES STEEL MINING)	DATE ISSUED: 04/29/2008
COMPANY, L.L.C.)	
)	
Self-Insured)	
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 Survivor's Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn, Walls, Weaver & Davies, LLP), Birmingham, Alabama, for claimant.

James N. Nolan (Walston Wells & Birchall, LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits (2006-BLA-05510) of Administrative Law Judge Adele Higgins Odegard rendered 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 July 11, 2005.¹ The miner died on June 17, 2005, from lung cancer. The administrative law judge gave collateral estoppel effect to the findings in the miner's claim regarding the miner's length of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment. *See* n.1, *supra*. The administrative law judge found that the miner's death was not directly due to pneumoconiosis but that pneumoconiosis hastened the miner's death. Accordingly, pursuant to 20 C.F.R. §718.205(c)(2), (5), the administrative law judge awarded survivor's benefits to claimant.

On appeal, employer contends the administrative law judge erred in awarding benefits because the opinion of Dr. Lowenthal, on which the administrative law judge relied, is insufficient to carry claimant's burden of establishing that the miner's death was hastened by pneumoconiosis. Employer avers there is no evidence of record that the miner's death was hastened by pneumoconiosis. Employer also contends the administrative law judge erred in rejecting Dr. Rosenberg's opinion regarding the cause of the miner's death. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not participate in this appeal.

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).²

¹ The miner's claim was resolved in 2003 by way of employer's acceptance of the district director's proposed decision and order. In this proposed decision dated December 2, 2002, the district director found that the miner had thirty and one-quarter years of coal mine employment. The elements of entitlement were established by: (1) x-ray evidence of simple pneumoconiosis and Dr. Hawkins's opinion that the miner has moderate/severe emphysema and chronic obstructive pulmonary disease due in part to coal dust exposure; (2) the presumption at 20 C.F.R. §718.203(b) that the miner's pneumoconiosis was due to coal mine employment; (3) blood gas and pulmonary function studies demonstrating total disability; and (4) Dr. Hawkins's opinion that the miner's disability was due to "black lung disease."

² Employer does not challenge the administrative law judge's finding that the miner had pneumoconiosis arising out of coal mine employment, due to the collateral estoppel effect given to these findings in the miner's claim. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006); *Lewis Coal Co. v. Director, OWCP*, 373 F.3d 570, 23 BLR 2-184 (4th Cir. 2004), *Zeigler Coal Co. v. Director, OWCP*, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002). Therefore, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR-1-710 (1983).

See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c);³ *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of the miner's death, 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 hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).⁴ In *Bradberry*, the court stated that the hastening standard is not equivalent to a "de minimis effect on death" standard, but is a measure of a "substantially contributing cause." *Bradberry*, 117 F.3d at 1366 n.13, 21 BLR at 2-175 n.13.

Employer contends the administrative law judge erred in relying on Dr. Lowenthal's opinion to establish that pneumoconiosis hastened the miner's death, as her opinion is legally insufficient to carry claimant's burden in this regard. The miner's death certificate states that the cause of death was lung cancer. Chronic obstructive pulmonary disease (COPD) was listed as an "other significant condition contributing to death but not resulting in the underlying cause."⁵ Director's Exhibit 4. Dr. Lowenthal

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

- (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).

⁴ The miner's coal mine employment occurred in Alabama. Director's Exhibit 3. Thus, the law of the United States Court of Appeals for the Eleventh Circuit is applicable in this case. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

⁵ No autopsy was performed.

was the miner's oncologist. During the course of the miner's treatment for lung cancer, Dr. Lowenthal wrote that the cancer is inoperable and that the miner's "poor pulmonary reserve secondary to emphysema and asbestosis" might preclude radiation therapy. Claimant's Exhibit 1 at 1. Dr. Lowenthal noted that the miner's "past medical history" included, *inter alia*, "black lung, asbestosis, silicosis, . . . COPD, . . ." *Id.* at 6.

In contrast, Dr. Rosenberg stated that the miner did not have clinical pneumoconiosis. He also concluded that the miner's COPD and emphysema were not due to coal dust exposure, in light of the miner's extensive smoking history and the types of formations seen on the lung CT scans. Dr. Rosenberg concluded that the miner did not have clinical or legal pneumoconiosis and that his death due to lung cancer was not hastened by pneumoconiosis. Employer's Exhibit 1.

In finding that pneumoconiosis hastened the miner's death, the administrative law judge noted that the physicians agreed that the miner had COPD, and that this condition was listed on the death certificate as a factor contributing to death. Relying on the district director's finding, to which she gave collateral estoppel effect, that the COPD was due at least in part to coal dust exposure, the administrative law judge found that pneumoconiosis hastened the miner's death. The administrative law judge relied on Dr. Lowenthal's treatment notes demonstrating that the miner's compromised pulmonary condition prohibited radiation therapy as evidence that the miner's death was hastened by pneumoconiosis. The administrative law judge gave no weight to Dr. Rosenberg's opinion because the physician stated the miner did not have pneumoconiosis or COPD due to coal dust exposure, contrary to the administrative law judge's finding in this regard, and because the administrative law judge found that Dr. Rosenberg did not address whether COPD hastened the miner's death irrespective of the COPD's etiology. Decision and Order at 8.

We agree with employer that the administrative law judge's award of survivor's benefits is not supported by substantial evidence and must, therefore, be reversed. The record does not contain any medical opinions authored after the miner's death stating that it was hastened by clinical or legal pneumoconiosis. To the extent the administrative law judge relied on the death certificate stating that COPD was an "other significant condition contributing to death," it is insufficient to establish that the miner's death was hastened by legal pneumoconiosis, as the certificate, without further explanation, is not a "reasoned medical opinion." See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3^d Cir. 1997); *Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991). The death certificate was signed by Dr. Mikul, who was the miner's treating physician. His medical records pre-dating the miner's death are contained in the record, Director's

Exhibit 5, but he did not provide an opinion explaining the relationship between the miner's COPD and death.

Moreover, the administrative law judge erred in finding that Dr. Lowenthal's opinion is sufficient to establish that the miner's death was hastened by pneumoconiosis. Dr. Lowenthal wrote on January 27, 2005, shortly after the miner's cancer was diagnosed, that the cancer is inoperable "and due to poor pulmonary reserve secondary to emphysema and asbestosis, we are not sure if he will be able to undergo concomitant radiation therapy to the lung which would afford him the best chance of long-term survival." She noted that the miner was undergoing chemotherapy. Claimant's Exhibit 1 at 1. Neither Dr. Lowenthal's subsequent treatment notes nor the hospital records mention the miner's non-cancerous pulmonary condition. *Id.* Dr. Rosenberg stated that the miner's cancer was metastatic, Employer's Exhibit 1, and he died six months after Dr. Lowenthal's note was written. While the administrative law judge could rationally infer that, generally, the inability to undergo radiation therapy due to pneumoconiosis could hasten one's death, *see generally Zeigler Coal Co. v. Director, OWCP*, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000), there is no evidence in this case that it actually did so. Claimant did not offer into evidence any medical opinions post-dating the miner's death and thus there is no reasoned and documented evidence from which the administrative law judge could find that pneumoconiosis actually hastened the miner's death. As claimant failed to establish an essential element of her claim for survivor's benefits, the award of benefits is reversed.⁶ *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); 20 C.F.R. §702.205(c).

⁶ Given this disposition, we need not address employer's contentions regarding the administrative law judge's rejection of Dr. Rosenberg's opinion.

Accordingly, the administrative law judge's Decision and Order Awarding Survivor's Benefits is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge