

BRB No. 08-0547 BLA

A.H.)
(Widow of C.H.))
)
Claimant-Petitioner)
)
v.)
)
GREENWICH COLLIERIES COMPANY)
) DATE ISSUED: 04/16/2009
and)
)
PENNSYLVANIA POWER & LIGHT)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (06-BLA-5707) of Administrative Law

¹ Claimant is the surviving spouse of the deceased miner, who died on April 4,

Judge Pamela Lakes Wood denying benefits 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 May 6, 2005.² The administrative law judge properly noted that the only issue before her was whether the evidence established that the miner's death was due to pneumoconiosis.³ The administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁴ *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

2004. Director's Exhibit 8.

² The miner filed two claims on September 16, 1980, and June 7, 1996. The miner's 1980 claim was finally denied on April 9, 1987, and the miner's 1996 claim was finally denied on November 21, 1996.

³ At the hearing, employer stipulated that the miner suffered from pneumoconiosis arising out of his coal mine employment. Hearing Transcript at 11. The parties also stipulated to thirty years of coal mine employment. *Id.* at 10.

⁴ 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

OWCP, 11 BLR 1-85 (1988). 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 hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).⁵

In her consideration of whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge addressed the miner's treatment and hospitalization records, the miner's death certificate, Dr. Rizkalla's autopsy report, the autopsy reports of three reviewing pathologists, Drs. Perper, Bush, and Tomashefski, and the medical reports of Drs. Perper, Begley, Hurwitz and Pietragallo.⁶

The administrative law judge found that the miner's treatment and hospitalization records did "not indicate that pneumoconiosis, emphysema, or [chronic obstructive pulmonary disease] caused, significantly contributed to, or hastened his death." Decision and Order at 19. The administrative law judge further found that the miner's death

(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 a 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).

⁵ The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁶ Dr. Perper's report was admitted both as claimant's rebuttal autopsy evidence, and as one of claimant's two affirmative medical reports. *See* 20 C.F.R. §725.414(a)(2)(i), (ii); Decision and Order at 4-5; Director's Exhibit 10; Claimant's Exhibit 1.

certificate⁷ did “not support or refute a finding of causation by pneumoconiosis.” *Id.* at 20.

The administrative law judge noted that Dr. Rizkalla, the autopsy prosector, and Drs. Perper and Begley, opined that the miner’s coal workers’ pneumoconiosis, and associated emphysema, caused cor pulmonale and hypoxemia, which, in turn, caused a cardiac arrhythmia that resulted in the miner’s death. The administrative law judge, however, discredited these opinions because she found that they were based on generalities, rather than on the miner’s specific condition. The administrative law judge further questioned those opinions because Drs. Bush, Tomashefski, Hurwitz, and Pietragallo opined that the limited nature of the miner’s autopsy (confined to the heart and lungs) prevented a definitive determination regarding the cause of the miner’s death. The administrative law judge noted that these physicians explained that the miner’s limited autopsy prevented them from excluding other plausible causes of the miner’s sudden death. The administrative law judge, therefore, found that claimant failed to satisfy her burden of establishing that the miner’s death was due to pneumoconiosis pursuant to 20 CF.R. §718.205(c).

Claimant contends that the administrative law judge’s evaluation of the opinions of Drs. Perper and Begley was “so flawed as to be irrational.”⁸ Claimant’s Brief at 4. Dr. Perper, a Board-certified pathologist, opined that the miner’s coal workers’ pneumoconiosis, and associated emphysema, caused cor pulmonale and hypoxemia, which, in turn, caused a cardiac arrhythmia that resulted in the miner’s death. In support of this opinion, Dr. Perper explained that:

Coal workers’ pneumoconiosis is . . . well recognized on its own as a cause of significant mortality through a number of mechanisms, which in the case

⁷ The miner died suddenly at his residence on April 4, 2004. Director’s Exhibits 8, 9. Dr. Paronish completed the miner’s death certificate. Dr. Paronish attributed the miner’s death to “sudden death” and “cardiopulmonary arrest.” Director’s Exhibit 8. In the section requesting a list of “Other Significant Conditions,” Dr. Paronish listed “malignant lymphoma,” “aortic valve replacement,” and “anticoagulated state.” *Id.*

⁸ Dr. Rizkalla, the autopsy prosector, opined that the miner’s coal dust exposure caused cor pulmonale that caused a terminal arrhythmia. Claimant’s Exhibit 2 at 15, 23, 28. The administrative law judge accorded less weight to Dr. Rizkalla’s opinion because the doctor did not provide adequate support for his conclusions. Decision and Order at 19. Because no party challenges the administrative law judge’s basis for discrediting Dr. Rizkalla’s opinion, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

of [the miner] included:

- i. Pulmonary insufficiency and hypoxemia by direct [sic] and replacement of normal lung tissue by non-breathing pneumoconiotic lesions and associated centrilobular chronic emphysema.
- ii. Through hypoxemia precipitating/aggravating a cardiac arrhythmia in an individual with heart disease.

Director's Exhibit 10 at 25.

Dr. Perper also cited scientific literature in support of his opinion that coal workers' pneumoconiosis can cause hypoxemia that can precipitate or aggravate a cardiac arrhythmia:

Conte *et al.* noted [that] "patients with chronic obstructive pulmonary disease (COPD), especially during acute exacerbations of their disease show a greater incidence of cardiac arrhythmia than healthy subjects of the same age." (*Evaluation of Hyperkinetic Cardiac Arrhythmia in Chronic Obstructive Bronchopneumopathy*[,] Conte G, Lauro S, Lazzarin M, Rigon N, Perrone Minerva Cardioangiol 1997 Sep: 45(9) 429-33)[.] Biggs *et al.* also found that "patients with chronic obstructive lung disease have a high incidence and wide variety of cardiac arrhythmias[.]" (*Disturbances of Rhythm in Chronic Lung Disease*[,] Biggs FD, Lefrak SS, Kleiger RE, Senior RM, Oliver, Heart Lung 1997 Mar-Apr: 6(2): 256-61).

Director's Exhibit 10 at 25-26.

In considering Dr. Perper's opinion, the administrative law judge found that Dr. Perper did not adequately support his conclusions with facts specific to the miner's case:

[Dr. Perper's] broad-based etiological evidence does not serve as case-specific support that [the] Miner's death was in fact caused by pneumoconiosis. That cor pulmonale or other lung dysfunction may have precipitated an arrhythmia in another case does not mean that it occurred here. Objective, case-specific evidence showing there was an arrhythmia is lacking here. Dr. Perper responded to a physician who asserted that no objective basis existed for concluding that the Miner's death was caused by pneumoconiosis by stating: "He's absolutely incorrect because the . . . pathological findings as I describe them in my report and as I show them in the micrographs, show clearly the presence of significant coal workers'

pneumoconiosis.” The mere presence of simple coal workers’ pneumoconiosis, however, does not give rise to an objective basis to conclude that it caused or hastened the Miner’s sudden death. Likewise, assuming the presence of cor pulmonale does not provide a basis for concluding that it precipitated an arrhythmia, or that an arrhythmia even occurred. Without pointing to specific evidence to buttress his findings, Dr. Perper’s opinion is speculative, and it does not provide an adequate basis to grant this claim.

Decision and Order at 20-21 (citation omitted).

Although Dr. Perper provided an explanation of his opinion that the miner’s coal workers’ pneumoconiosis contributed to his death, substantial evidence supports the administrative law judge’s finding that Dr. Perper’s general statements were not linked to the miner’s specific circumstances. Because Dr. Perper’s opinion was based on generalities, rather than on the miner’s specific condition, the administrative law judge permissibly found that it did not satisfy claimant’s burden of establishing that the miner’s coal workers’ pneumoconiosis contributed to his death. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). We, therefore, reject claimant’s contention that the administrative law judge erred in her consideration of Dr. Perper’s opinion.

Dr. Begley, a Board-certified pulmonologist, provided the following explanation for his opinion that the miner’s coal workers’ pneumoconiosis was a significant contributing cause of his death:

This conclusion is based upon the fact that [the miner] had significant coal workers['] pneumoconiosis documented on autopsy at the time of his death, he had progressive symptoms of shortness of breath, and he had documented pulmonary impairment by pulmonary function test criterion. His respiratory status had deteriorated for many years, which is consistent with the nature of coal workers['] pneumoconiosis. In addition, although he did smoke, he had quit many years prior to his untimely death. Pulmonary dysfunction, as demonstrated in [the miner’s] class [sic], *can* lead to cardiac arrhythmias and untimely death. It is important to note that his lymphoma was in remission at the time of his death and that his cardiac status was stable.

It is my opinion that within a reasonable degree of medical certainty . . . [the miner’s] progressive coal workers pneumoconiosis with significant pulmonary dysfunction precipitated a cardiac arrhythmia or myocardial

ischemia which ultimately resulted in his death.

Claimant's Exhibit 3 at 1 (emphasis added).

Dr. Begley further opined that "coal workers' pneumoconiosis, with the stress that it can contribute to the whole system, *can* . . . precipitate cardiac arrhythmias or perhaps acute cardiac ischemia which can contribute to sudden death." Claimant's Exhibit 4 at 13 (emphasis added).

The administrative law judge found that Dr. Begley, like Dr. Perper, failed to provide sufficient evidence in support of his conclusions:

[M]erely stating that pneumoconiosis *can* lead to cardiac arrhythmias which can, in turn, lead to sudden death is not affirmative evidence that the disease *did* substantially contribute to [the] Miner's death. The record contains evidence that [the] Miner suffered from pneumoconiosis, but its effects on the time and manner of death remain unclear particularly where, as here, it is undisputed that the Miner's death was sudden. Dr. Begley fails to provide a concrete causal link between the disease and [the] Miner's demise but has rested on hypothesis and conjecture. Such failure is a fatal flaw in Dr. Begley's opinion.

Decision and Order at 21.

In this case, contrary to claimant's contention, the administrative law judge permissibly accorded less weight to Dr. Begley's opinion, regarding the cause of the miner's death, because it was generalized, and not focused on the miner's specific condition. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103-04; *Knizer*, 8 BLR at 1-7.

Further, the administrative law judge reasonably found that the opinions of Drs. Perper and Begley were called into question because Drs. Bush, Tomashefski, Hurwitz, and Pietragallo each opined that the limited nature of the miner's autopsy (confined to the heart and lungs) prevented a definitive determination regarding the cause of the miner's death. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Director's Exhibits 14, 15; Employer's Exhibits 1, 3. The administrative law judge noted that these physicians explained that the miner's limited autopsy prevented them from excluding other equally plausible causes of the miner's sudden death.⁹ Decision and Order at 22.

⁹ Dr. Bush, a Board-certified pathologist, opined that bleeding into the abdominal or cranial cavity, complicating anticoagulant therapy, may have caused the miner's death. Director's Exhibit 14. Dr. Tomashefski, a Board-certified pathologist, noted that "a

Claimant argues that the administrative law judge improperly insisted on “absolute proof” that the miner’s pneumoconiosis caused his arrhythmia. Claimant’s Brief at 5. Claimant contends that “[s]uch an approach would render claims where the death of a miner occurred outside of a hospital setting impossible to establish.” *Id.* We disagree. In this case, the administrative law judge did not deny benefits because there was no medical evidence documenting the last hours of the miner’s life. *See Hill v. Director, OWCP*, - - - F.3d - - -, 2009 WL 946899 (3d Cir. 2009). Rather, the administrative law judge properly accorded less weight to the opinions of claimant’s physicians because they based their opinions on generalities rather than on the miner’s specific condition, and noting that a majority of the physicians opined that the limited nature of the miner’s autopsy precluded ruling out other plausible causes of sudden death, found their explanations were speculative. As a result, the administrative law judge permissibly found that claimant failed to satisfy her burden of establishing, by a preponderance of the evidence, that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

Claimant’s remaining statements regarding the opinions of her experts amount to a request to reweigh the evidence of record. Such a request is beyond the Board’s scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

In considering whether the evidence established that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge properly addressed the comparative credentials of the respective physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Substantial evidence supports the administrative law judge’s permissible credibility determinations. We, therefore, affirm the administrative law judge’s finding that the evidence did not establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

cause of death due to intra-abdominal hemorrhage or a massive cerebral hemorrhage [could not] be excluded” Employer’s Exhibit 3. Dr. Hurwitz, a Board-certified cardiologist, opined that it “is impossible to know whether [the miner] . . . sustained a sudden intracranial bleed or a ruptured abdominal viscus resulting in sudden death.” Director’s Exhibit 15. Dr. Pietragallo, a Board-certified hematologist, commented that “[n]ot infrequently, elderly patients who are treated aggressively with chemotherapy for lymphoma, die of acute cardiovascular or infectious causes.” Employer’s Exhibit 1.

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

JUDITH S. BOGGS
Administrative Appeals Judge