

BRB No. 08-0621 BLA

C.L.)
(Widow of P.L.))
)
Claimant-Petitioner)
)
v.)
)
DUNAMIS RESOURCES,)
INCORPORATED)
)
and)
) DATE ISSUED: 04/20/2009
AMERICAN MINING INSURANCE)
COMPANY)
)
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 – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (Law Care), Greensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (07-BLA-5122) of Administrative Law Judge Richard A. Morgan (the administrative law judge) on

claimant's request for modification of the denial of 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). This claim has been before the Board previously. Following the miner's death on November 13, 2000, claimant filed a survivor's claim on May 23, 2001. Director's Exhibit 2, 8. Administrative Law Judge Daniel L. Leland issued a Decision and Order denying benefits on March 18, 2004. Director's Exhibit 45. Claimant appealed, and the Board affirmed Judge Leland's denial of benefits based on his determination that the evidence established that the miner did not have pneumoconiosis, and that, therefore, pneumoconiosis was not a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). [*C.L.*] *v. Dunamis Resources, Inc.* BRB No. 04-0754 BLA (May 27, 2005)(unpub.). Claimant filed a petition for review of the Board's decision with the United States Court of Appeals for the Third Circuit. However, the appeal was dismissed on September 25, 2005, in accordance with the agreement of the parties. Director's Exhibit 52.

On October 11, 2005, claimant filed a second claim, which was treated as a timely request for modification by the district director, and she submitted additional medical evidence in support of her request. Director's Exhibits 53-55. Following the district director's denial of claimant's request for modification, claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges.

In a Decision and Order dated April 21, 2008, the administrative law judge credited the miner with twenty-six years of coal mine employment.¹ Considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge determined that the evidence did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or, assuming *arguendo* the presence of the disease, that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge found that claimant failed to establish grounds for modification of the prior decision, and denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the issues of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and the cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative

¹ The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 55. 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, 1-202 (1989)(*en banc*).

law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202, 718.203, 718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(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); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 205, 22 BLR 2-467, 2-471 (3d Cir. 2002); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989). 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).

Pursuant to 20 C.F.R. §725.310, a claimant may, within a year of a final order, request modification of a denial of benefits. In this case involving a survivor's claim, the sole ground available for granting modification is that a mistake in a determination of fact was made in the prior denial of benefits. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge has the authority to reconsider all the evidence for any mistake in fact, including whether the ultimate fact of entitlement was wrongly decided. See *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-63 (3d Cir. 1995).

² The administrative law judge's findings that the miner had twenty-six years of coal mine employment and that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), are affirmed as unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant contends that, in finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge erred in according greater weight to the opinion of Dr. Fino, that the miner did not suffer from clinical or legal pneumoconiosis,³ but instead had smoking-related chronic obstructive pulmonary disease (COPD) and lung cancer, than to the opinion of Dr. Wald, that the miner's COPD was due to both smoking and coal dust exposure. Claimant's Brief at 8-14. Claimant contends that Dr. Fino's opinion lacks reasoning, and is based on medical views that were rejected by the Department of Labor when it adopted the revised regulations. Claimant's arguments lack merit.

Considering the medical evidence relevant to the existence of pneumoconiosis, the administrative law judge initially found that the miner's hospital and treatment records reflect that the miner was treated for coronary artery disease, abdominal aortic aneurysm, and small cell carcinoma of the left lung, which was diagnosed by biopsy on January 21, 2000. Decision and Order at 5; Director's Exhibit 10. These records do not contain any diagnoses of pneumoconiosis or describe any coal mine dust-related disease. Decision and Order at 5. The miner's death certificate listed the immediate cause of death as "metastatic small cell lung carcinoma," and no underlying causes or conditions were listed. Decision and Order at 5; Director's Exhibit 8. No autopsy was conducted. Decision and Order at 5.

The administrative law judge also considered the medical reports and deposition testimony of Drs. Wald and Fino. Dr. Wald, who is a Board-certified internist, reviewed the medical evidence and, in a report dated November 26, 2005, opined that, in addition to lung cancer, the miner suffered from legal pneumoconiosis, in the form of COPD, chronic bronchitis, and emphysema due to both smoking and coal mine dust exposure. Director's Exhibit 58. Dr. Wald explained that chronic bronchitis and pulmonary emphysema, the underlying causes of COPD, are caused by the chronic inhalation of irritant substances. He stated that the miner's cigarette smoking was a substantial contributing cause of the development of his COPD, but that the miner's exposure to irritant dusts from both his underground and above ground coal mining further exposed him to respiratory irritants, which were also contributing factors to his COPD. Director's Exhibit 58. In a deposition given on April 26, 2006, Dr. Wald reiterated his opinion that,

³ "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive disease arising out of coal mine employment." A disease "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

while the miner's smoking history was a substantial contributing factor in causing the miner's COPD, coal mine dust exposure had also contributed. Director's Exhibit 61 at 19. Dr. Wald further testified that, while he could not quantify the contributions made by smoking and coal dust, he believed that both were substantial factors in causing the progression of the miner's underlying COPD. Director's Exhibit 61 at 37-38, 42.

By contrast, Dr. Fino, who is Board-certified in Internal Medicine with a subspecialty in Pulmonary Disease, opined in reports dated October 23, 2002 and January 22, 2007, that the miner did not suffer from coal workers' pneumoconiosis or any coal dust-related lung disease, and attributed the miner's respiratory impairment to lung cancer and vascular disease, unrelated to coal dust exposure. In depositions given on April 30, 2003 and April 2, 2007, Dr. Fino reiterated and further explained his conclusions. Dr. Fino acknowledged that pulmonary function studies showed that the miner suffered from an obstructive impairment, and also acknowledged that coal dust can cause disabling obstruction, and that the effects of coal dust can be additive with the effects of smoking. Employer's Exhibit 1 at 12, 14-15. Dr. Fino explained, however, that while he could not exclude the possibility that some portion of the miner's obstruction was related to coal mine dust, the results of the objective data, including the pulmonary function studies, and x-rays and computerized tomography (CT) scans that were negative for the existence of pneumoconiosis, indicated that the miner's obstruction was due to his extensive smoking habit and that any contribution from coal mine dust would have been insignificant. Dr. Fino emphasized that negative x-rays do not rule out the existence of pneumoconiosis as defined in the regulations. Employer's Exhibit 1 at 22. Rather, Dr. Fino explained that x-rays and CT scans indicate the amount of dust retention in the lungs, and thus, help to correlate, and quantify, the contribution, if any, of coal mine dust exposure to obstructive lung disease. Employer's Exhibit 1 at 21-22. Dr. Fino concluded, based on the evidence he reviewed, that the miner would have had the same degree of obstruction had he never worked in the mines. Employer's Exhibit 1 at 23.

Weighing the conflicting medical opinions, the administrative law judge chose to accord greater weight to Dr. Fino's opinion than to that of Dr. Wald, because Dr. Fino's opinion was better reasoned and documented, and more consistent with the objective medical evidence. In so finding, the administrative law judge considered, and rejected, claimant's assertion that Dr. Fino's opinion is hostile to the Act. Decision and Order at 10; Claimant's Brief at 3-13. Contrary to claimant's contention, a review of Dr. Fino's medical reports and deposition testimony in this claim, summarized above, do not reflect that his conclusions are based on medical views regarding coal dust and obstructive lung disease that were rejected by the Department of Labor when it adopted the revised regulations. Claimant's Brief at 8-13. Dr. Fino agreed that coal dust can cause obstructive lung disease, and explained why, in this case, he believed that it had not. Employer's Exhibit 1 at 12, 14, 21-23. We, therefore affirm, as supported by substantial

evidence, the administrative law judge's conclusion that Dr. Fino's opinion is not hostile to the Act. *Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 10.

We further reject claimant's assertion that Dr. Fino's opinion is based solely on negative x-ray evidence, and therefore, cannot constitute a reasoned medical judgment. Claimant's Brief at 12. First, as the administrative law judge correctly noted, Dr. Fino specifically acknowledged that negative x-rays do not rule out the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(b), but explained why, in this case, the negative x-rays supported his conclusion that the miner had not inhaled enough coal dust to render it a clinically significant contributing factor to this miner's COPD, and that, therefore, the miner did not suffer from legal pneumoconiosis. *See* 20 C.F.R. §718.201(c); *Mancia v. Director, OWCP*, 130 F.3d 579, 580 n.1, 21 BLR 2-215 (3d Cir. 1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 312, 20 BLR 2-76 (3d Cir. 1995); Decision and Order at 9. In addition, contrary to claimant's contention, the administrative law judge acted within his discretion in crediting Dr. Fino's opinion as better reasoned and documented than Dr. Wald's opinion, because it was more consistent with the negative x-ray and biopsy evidence, and with the miner's employment, cigarette smoking, and medical histories.⁴ *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002). The administrative law judge permissibly found that Dr. Fino based his conclusions on his analysis of the clinical test results in conjunction with those histories. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Decision and Order at 10.

It is the function of the administrative law judge to evaluate the physicians' opinions, *see Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8, and the Board will not substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). As the administrative law judge properly analyzed the medical opinions and explained his reasons for crediting or discrediting the opinions he reviewed, we affirm his finding that the medical opinion evidence does not establish the existence of pneumoconiosis. *See Soubik*, 366 F.3d at 233, 23 BLR at 2-97; *Trumbo*, 17 BLR at 1-88-89 and n.4; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Because claimant did not establish the existence of pneumoconiosis, an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's

⁴ The administrative law judge specifically found that, while the record supports a coal mine employment history of approximately twenty-six years, the medical treatment records document an "even more extensive" smoking history of "1 to 1 ½ pack[s] per day for most of [the miner's] adult life." Decision and Order at 10.

denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge