

BRB Nos. 08-0648 BLA
and 08-0648 BLA-A

J.H.)
(Widow of D.H.))
)
Claimant-Petitioner)
Cross-Respondent)
v.)
) DATE ISSUED: 04/29/2009
APPALACHIAN MINING,)
INCORPORATED)
)
and)
)
WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)
)
Employer/Carrier-)
Respondents)
Cross-Petitioners)
)
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.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for
employer/carrier.

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

PER CURIAM:

Claimant¹ appeals and employer cross-appeals the Decision and Order Denying Benefits (05-BLA-5357) of Administrative Law Judge Richard A. Morgan 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). The administrative law judge credited the miner with twenty-two years of coal mine employment.² Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the autopsy and medical opinion evidence established that the miner suffered from clinical pneumoconiosis³ arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b). However, the administrative law judge found that the medical evidence did not establish that the miner's emphysema with chronic obstructive pulmonary disease (COPD) arose out of his coal mine employment, and thus, did not establish that he suffered from legal pneumoconiosis.⁴ *See* 20 C.F.R. §718.201(a)(2). The administrative law judge further found that claimant 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 his analysis of the medical opinion evidence in determining that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In

¹ Claimant is the miner's widow. The miner died on May 19, 2003, and claimant filed her survivor's claim on November 21, 2003. Director's Exhibits 4, 9. The district director awarded benefits and employer/carrier requested a hearing. Director's Exhibits 24, 26, 31.

² The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 5, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ Clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

⁴ Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). 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(b).

its combined response brief and brief in support of cross-appeal, employer/carrier urges affirmance of the denial of benefits, but if the denial is not affirmed, it argues that the administrative law judge erred in discrediting Dr. Fino's opinion regarding whether the miner's death was due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response in this appeal.

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. 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),(c); *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 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

Regarding whether the miner had legal pneumoconiosis,⁵ the administrative law judge considered the opinions of the pathologists, namely, Drs. Bush, Crouch, and Green, and of the pulmonologists, namely, Drs. Fino and Gaziano, and he considered the physicians' respective credentials.⁶ Dr. Green opined that the miner's emphysema was due to both his smoking and coal mine dust exposure. Claimant's Exhibit 1. Drs. Bush and Crouch concluded that the miner's emphysema was due solely to his smoking, noting

⁵ Before discussing the medical evidence as to legal pneumoconiosis, the administrative law judge found that the miner had twenty-two years of coal mine employment and "a significant smoking history" of approximately forty to fifty pack-years. Decision and Order at 4.

⁶ The administrative law judge noted that neither the autopsy prosector, Dr. Chang, nor the reviewing pathologist, Dr. Stefanini, rendered an opinion as to whether the miner had legal pneumoconiosis. Decision and Order at 18 nn. 20, 21.

that the emphysema was not associated with any deposits of coal mine dust. Director's Exhibit 23; Employer's Exhibits 5, 6. Dr. Gaziano concluded that the miner's emphysema could have been caused by smoking, but since there was no way to separate the effects of smoking and coal dust exposure, the impairment was probably due to both smoking and coal dust exposure. Director's Exhibit 11; Employer's Exhibit 4. Dr. Fino opined that the miner's emphysema was caused by his smoking. Employer's Exhibits 7, 12.

The administrative law judge chose to accord greater weight to the opinions of Drs. Bush and Crouch that the miner's emphysema was due solely to his smoking. Specifically, the administrative law judge found that although Drs. Bush and Crouch acknowledged that coal mine dust exposure can cause emphysema, they explained their opinion that the miner's emphysema was due to smoking, based on their observations of the pattern of the miner's emphysema, and because the emphysema was not associated with coal dust in the miner's lungs. Decision and Order at 18. The administrative law judge further found that, although Dr. Green referenced scientific studies in support of his view that both smoking and coal dust exposure can cause emphysema, he did not provide facts or observations specific to the miner to explain why he determined that the miner's emphysema was related to coal dust exposure. *Id.* Further, the administrative law judge found that Drs. Fino and Gaziano did not provide sufficient support and explanation for their opinions as to the etiology of the miner's emphysema. Decision and Order at 18-19. Therefore, the administrative law judge determined that the miner's emphysema with COPD was not legal pneumoconiosis.

With respect to whether the miner's death was due to, or hastened by, pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the miner's death certificate, and the autopsy and medical reports of Drs. Chang, Crouch, Bush, Green, Stefanini, Fino, and Gaziano. The miner's death certificate listed the immediate cause of death as "chronic obstructive lung disease" due to "pulmonary embolism." Director's Exhibit 9. Dr. Chang opined that the miner's clinical coal workers' pneumoconiosis "might accelerate" the miner's COPD, and thus may have hastened the miner's death. Director's Exhibit 10 at 1; Employer's Exhibit 1 at 21-24. Dr. Stefanini opined that clinical coal workers' pneumoconiosis "would have aggravated" the miner's COPD, and thus was a contributing factor in his death. Claimant's Exhibit 2 at 2. Dr. Green opined that coal workers' pneumoconiosis and coal-dust induced emphysema significantly contributed to the miner's death, and Dr. Gaziano opined that clinical coal workers' pneumoconiosis might have contributed to the miner's death by aggravating his COPD. Director's Exhibit 11; Claimant's Exhibit 1. By contrast, Drs. Bush and Crouch opined that the miner's clinical pneumoconiosis was too mild to have contributed to his death. Employer's Exhibits 2, 6, 10. Dr. Fino stated that there was insufficient information for him to determine the cause of the miner's death, and that

therefore, it was speculative to say that pneumoconiosis contributed to the miner's death.⁷ Employer's Exhibit 7; Employer's Exhibit 12 at 19-23.

The administrative law judge discounted Dr. Green's opinion, because the medical evidence did not establish that the miner's emphysema was coal mine dust-related. Decision and Order at 21. The administrative law judge further discounted Dr. Green's opinion because he found that Dr. Green did not adequately explain how clinical coal workers' pneumoconiosis hastened the miner's death. Decision and Order at 22. Additionally, the administrative law judge accorded less weight to the opinions of Drs. Chang, Gaziano, and Stefanini, finding that these physicians did not provide well-reasoned or documented opinions explaining their conclusions. Decision and Order at 20-21. The administrative law judge chose to accord greater probative weight to Dr. Bush's opinion, that the miner's death was unrelated to his clinical pneumoconiosis, finding that the opinion was better reasoned and documented.⁸ The administrative law judge therefore found that the evidence failed to establish that pneumoconiosis was a substantially contributing cause of the miner's death.

In response to these findings by the administrative law judge, claimant states that the evidence establishes that pneumoconiosis contributed to the miner's death. Claimant's Brief at 6. Noting that Drs. Gaziano and Green attributed the miner's emphysema to both smoking and coal dust exposure, claimant argues that the administrative law judge's conclusion "that the weight of the evidence . . . failed to meet [claimant's] burden is in error and should be reversed," because the preponderance of the evidence "would indicate" that pneumoconiosis arising out of coal mine employment contributed to the miner's death. Claimant's Brief at 6-7.

However, claimant, who is represented by counsel, alleges no specific error in regard to the administrative law judge's analysis of the medical opinions on the existence of legal pneumoconiosis and on whether pneumoconiosis hastened the miner's death. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v.*

⁷ Dr. Fino added that, since Drs. Bush, Chang, and Crouch found either no coal workers' pneumoconiosis or minimal coal workers' pneumoconiosis in the miner's lungs, the disease was either not present, or its role in the miner's death was "insignificant." Employer's Exhibit 7 at 3.

⁸ The administrative law judge discounted Dr. Crouch's opinion because she had not diagnosed the miner with clinical pneumoconiosis, contrary to the administrative law judge's finding. The administrative law judge further found that Dr. Fino's opinion was inconsistent and not well-reasoned, and he accorded it less weight. Decision and Order at 22.

Director, OWCP, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. Consequently, we affirm the administrative law judge's finding that the evidence did not establish the existence of legal pneumoconiosis, and did not establish that the miner's death was due to or hastened by pneumoconiosis, pursuant to 20 C.F.R. §§718.201, 718.202(a)(2),(4),718.205(c).⁹

Based on the foregoing, we affirm the administrative law judge's denial of benefits in this survivor's claim. *See Trumbo*, 17 BLR at 1-85. In view of our decision to affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we need not address employer's cross-appeal alleging that the administrative law judge erred in discrediting Dr. Fino's opinion.

⁹ Moreover, substantial evidence supports the administrative law judge's permissible credibility determinations. Specifically, the administrative law judge acted within his discretion when he found that Drs. Green, Chang, Gaziano, and Stefanini did not adequately document and explain their opinions as to whether the miner had legal pneumoconiosis, and regarding whether the miner's death was due to or hastened by pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Further, the administrative law judge permissibly found that Drs. Bush and Crouch rendered better documented and reasoned opinions regarding the etiology of the miner's emphysema, and that Dr. Bush had provided the more probative opinion as to the cause of the miner's death. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-144 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Claimant's assertion that the weight of the evidence contradicts the administrative law judge's findings at best amounts to a request that the Board reweigh the evidence, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

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

BETTY JEAN HALL
Administrative Appeals Judge