

BRB No. 06-0912 BLA

V. G.)
(Widow of R. G.))
)
Claimant-Respondent)
)
v.)
)
G M & W COAL COMPANY)
)
and)
) DATE ISSUED: 08/30/2007
STATE WORKERS' INSURANCE FUND)
)
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 Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

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

Brian S. Quinn (Zimmer Kunz, PLLC), Pittsburgh, Pennsylvania, for
employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (05-BLA-5822) of Administrative Law Judge Daniel L. Leland on a survivor's claim¹ 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). In the Decision and Order, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and, after crediting the parties' stipulation that the miner² worked in qualifying coal mine employment for fourteen and three-quarter years, found that claimant established that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's pneumoconiosis substantially contributed to his death. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(c). Accordingly, benefits were awarded, commencing December 1, 2001, the first day of the month in which the miner died.

On appeal, employer argues that the administrative law judge erred in finding that claimant established that the miner's death was due to pneumoconiosis. Specifically, employer contends that the administrative law judge erred in according greater weight to the opinion of Dr. Perper because Dr. Perper's opinion was based on scientific literature that was irrelevant to coal miners and the issue of death due to pneumoconiosis. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not to participate in this appeal.³

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant is the surviving spouse of the miner, who died on December 25, 2001. Director's Exhibit 11. Claimant filed her application for survivor's benefits on March 5, 2004. Director's Exhibit 2.

² The miner filed an application for benefits on June 11, 1998 that was finally denied by Administrative Law Judge Richard A. Morgan in a Decision and Order dated June 12, 2000. Director's Exhibit 1.

³ We affirm the administrative law judge's determinations with respect to length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a), 718.203(b) as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 5-6.

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3rd Cir. 1989).⁴

Employer's sole argument on appeal is that the administrative law judge erred in crediting Dr. Perper's opinion, that the lung cancer that caused the miner's death developed as a result of fibrosis caused by his exposure to coal mine dust, because, employer asserts, the underlying research and studies upon which Dr. Perper relied were irrelevant. Citing to *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and the Federal Rules of Evidence for the proposition that expert testimony that does not relate to any issue in the case is not relevant, employer contends that Dr. Perper's reliance upon two studies—*Pooled Exposure-Response Analysis and Risk Assessment for Lung Cancer in Ten Cohorts of Silica-Exposed Workers: An AIRC Multicenter Study* and *Pneumoconiosis-Related Lung Cancers: Preferential Occurrence from Diffuse Interstitial Fibrosis*—to corroborate his opinion was flawed, because the studies failed to demonstrate any causal nexus between the miner's pulmonary condition, his coal mine employment history, and his lung cancer. Employer asserts that while the studies were scientifically valid, their premises and conclusions were not applicable to the facts in this particular case because the miner was not exposed to high concentrations of silica and did not suffer from silicosis or mixed dust disease. Therefore, employer argues that Dr. Perper's reliance on such irrelevant studies undermined the credibility of his opinion. We need not address employer's challenge to the probative value of Dr. Perper's opinion, however, because the administrative law judge found that the opinion of Dr. Pickerill was sufficient to satisfy claimant's burden of establishing that pneumoconiosis substantially contributed to the miner's death.

Dr. Pickerill diagnosed the existence of pneumoconiosis based on biopsy reports, chest x-rays, CT scans, and pulmonary function studies, and opined that the fibrosis in the miner's lungs caused by exposure to coal dust was a significantly contributing factor

⁴ Because claimant's last coal mine employment occurred in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. See *Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

to the development of the miner's adenocarcinoma and death from respiratory failure. Claimant's Exhibit 4. The administrative law judge found that Dr. Pickerill's opinion was credible and entitled to the greatest weight because Dr. Pickerill was the miner's treating pulmonologist for three years between October 1998 and June 2001 and his opinion was based on the miner's extensive medical records. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 397, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 6. As employer fails to challenge the administrative law judge's discounting of the medical opinions of Drs. Fino and Oesterling, and fails to set forth any allegations of error with respect to the administrative law judge's weighing of Dr. Pickerill's opinion or his determination that Dr. Pickerill's opinion was sufficient to establish entitlement, *see Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983), we affirm the administrative law judge's determination that claimant affirmatively satisfied her burden of establishing that pneumoconiosis contributed to the miner's death pursuant to Section 718.205(c). *See* 20 C.F.R. §718.205(c); *Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-108; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge