

BRB No. 09-0102 BLA

N.L.B.)
(Widow of R.L.B.))
)
Claimant-Petitioner)
)
v.)
)
CLINCHFIELD COAL COMPANY)
) DATE ISSUED: 08/28/2009
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Denial of Survivor Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

N.L.B., Clintwood, Virginia, *pro se*.¹

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

¹ Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant² appeals, without the assistance of counsel, the Decision and Order – Denial of Survivor Benefits (07-BLA-6009) of Administrative Law Judge Richard T. Stansell-Gamm 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). In a Decision and Order dated September 10, 2008, the administrative law judge accepted the parties’ stipulation that the miner had at least twenty-eight years of coal mine employment³ and suffered from clinical pneumoconiosis⁴ arising out of his coal mine employment. Decision and Order at 3-4; Hearing Tr. at 8. The administrative law judge found, however, that the evidence failed to establish that pneumoconiosis contributed to the miner’s death, pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits in her survivor’s claim. Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs, has not filed a brief in this appeal.⁵

² Claimant is the widow of the deceased miner, who died on April 26, 2005. Director’s Exhibit 8. Claimant filed her claim for survivor’s benefits on October 27, 2006. Director’s Exhibit 2.

³ The record indicates that the miner’s coal mine employment was in Virginia. Director’s Exhibit 3. 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*).

⁴ A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). “Clinical pneumoconiosis” is defined as “those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by 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).

“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). None of the physicians of record diagnosed legal pneumoconiosis.

⁵ We affirm, as unchallenged, the administrative law judge’s findings of at least twenty-eight years of coal mine employment, and that claimant established the existence

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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'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(a), 718.203, 718.205(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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). 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 (1987).

In considering the medical evidence relevant to the cause of the miner's death pursuant to 20 C.F.R. §718.205(c), the administrative law judge initially found, correctly, that all of the physicians agreed that the immediate cause of the miner's death was lung cancer with metastasis, and that the record contains no evidence of complicated pneumoconiosis. Decision and Order at 5. Thus, the administrative law judge properly found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (3). The administrative law judge also found, correctly, that the record contains medical evidence that, if credited, could support a finding that pneumoconiosis substantially contributed to, or complicated, the miner's death from lung cancer, pursuant to 20 C.F.R. §718.205(c)(2). Specifically, Drs. Shamiyeh and Miller, the miner's treating physicians, opined that coal workers' pneumoconiosis contributed to, and complicated, the miner's death. By contrast, Drs. Caffrey, Naeye, and Hippensteel opined, based on the pathology evidence, that the

of simple coal workers' pneumoconiosis. 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).

miner's coal workers' pneumoconiosis was too mild to have hastened his death in any way.⁶

The administrative law judge noted that Dr. Shamiyeh, a Board-certified internist and treating physician, indicated on the miner's death certificate that the immediate cause of death was lung cancer with metastasis, due to "[chronic obstructive pulmonary disease]/pneumoconiosis, coal." Decision and Order at 11; Director's Exhibit 8. In addition, in a letter dated March 26, 2007, Dr. Shamiyeh noted that the miner had a history of chronic obstructive pulmonary disease (COPD), coal workers' pneumoconiosis and coronary artery disease, and concluded that the miner's "death was related to his coal workers' pneumoconiosis, which contributed to his problem."⁷ Decision and Order at 11; Director's Exhibit 11. The administrative law judge initially found that, as the miner's treating physician, Dr. Shamiyeh had a "solid documentation foundation" from which to offer a probative opinion as to the cause of death. Decision and Order at 18; *see* 20 C.F.R. §718.104(d). However, the administrative law judge permissibly accorded little weight to Dr. Shamiyeh's opinion, as insufficiently reasoned, because the physician failed to explain his conclusion and did not identify any objective medical evidence to support his opinion that coal worker's pneumoconiosis contributed to the miner's death.

⁶ The administrative law judge also considered the opinion of Dr. Bluemink, the autopsy prosector, who diagnosed carcinoma of the lung, atherosclerotic heart disease, coal workers' pneumoconiosis without progressive massive fibrosis, moderate panacinar emphysema, bronchopneumonia, non-insulin-dependent diabetes, and degenerative arthritis. Director's Exhibit 9. Dr. Bluemink opined that while pneumoconiosis was present, "there [was] no prominent destructive interstitial fibrosis and no evidence of silica deposition." Director's Exhibit 9. Dr. Bluemink concluded that the "pathologic evidence appears to implicate to a larger degree panacinar emphysema with superimposed congestive heart failure. It is the examiner's additional opinion that the final medical complication which compromised [the miner's] ability to survive was the bronchopneumonia." Decision and Order at 12; Director's Exhibit 9. Dr. Bluemink did not specifically comment on the role of coal workers' pneumoconiosis, if any, in the miner's death.

Similarly, the administrative law judge correctly found that Dr. Bechtel, who performed a lung biopsy during the miner's lifetime, and Drs. Istfan and Coen, who treated the miner for his cardiac condition, did not offer an opinion as to the cause of the miner's death. Decision and Order at 9-11; Director's Exhibit 10.

⁷ Dr. Shamiyeh did not offer an opinion as to whether the miner's chronic obstructive pulmonary disease (COPD) was due to coal dust exposure. *See* 20 C.F.R. §718.201(a)(2); Director's Exhibit 11.

See Sparks, 213 F.3d at 192, 22 BLR at 2-263; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-31 (4th Cir. 1997); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Hutchens v. Director, OWCP*, 8 BLR 1- 16 (1985); Decision and Order at 18; Director’s Exhibits 8, 11.

The administrative law judge also considered the opinion of Dr. Miller, who is a Board-certified internist and was the miner’s treating oncologist, that the miner died “due to metastatic lung carcinoma complicating chronic obstructive lung disease, Coal Worker’s [sic] pneumoconiosis and coronary artery disease.” Decision and Order at 16-18; Director’s Exhibit 11. Dr. Miller stated that the miner’s carcinoma had “arisen in an area of Coal Worker’s [sic] pneumoconiosis and had recurred in the same area,” and that “the carcinoma was associated with fibrosis and contained anthracotic pigment diagnostic of Coal Worker’s [sic] pneumoconiosis.” Director’s Exhibit 11 at 1. The administrative law judge permissibly found that, to the extent Dr. Miller implied that the miner’s pneumoconiosis had caused his lung cancer, his opinion was of diminished probative value because he failed to explain whether the “mere co-location [of the miner’s cancer and pneumoconiosis] established a causation relationship,” and further failed to address the extent to which the miner’s lengthy smoking history might have caused his lung cancer.⁸ *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274; Decision and Order at 16.

The administrative law judge next considered Dr. Miller’s opinion that pneumoconiosis hastened the miner’s death by inhibiting his ability to receive treatment:

Because of his severe shortness of breath associated with his Coal Worker’s [sic] pneumoconiosis he was quite symptomatic throughout the terminal course of his disease and it was difficult for him to tolerate the chemotherapy which we tried to give him. . . .

My chart notes indicate that he became progressively weaker with increased difficulty breathing and coughing. I am sure that his Coal Worker’s [sic] pneumoconiosis contributed to these symptoms and made it

⁸ The administrative law judge noted, correctly, that Drs. Caffrey and Hippensteel opined that the fact that cancer was growing where coal workers’ pneumoconiosis was present did not establish a causal relationship between the two diseases. Rather, it simply suggested that the growing cancer had engulfed the lesions of coal workers’ pneumoconiosis. Decision and Order at 16; Employer’s Exhibits 6 at 14-15, 7 at 13-14.

harder for him to tolerate his adenocarcinoma of the lung which had occurred in the same area as his coal Worker's [sic] pneumoconiosis.⁹

Director's Exhibit 11 at 2. The administrative law judge permissibly accorded diminished weight to Dr. Miller's conclusion because Dr. Miller did not take into account the autopsy and pathology evidence that called into question his opinion.¹⁰ *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274; *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997); Decision and Order at 18. The administrative law judge also permissibly found Dr. Miller's opinion to be unreasoned, because the physician again failed to discuss whether the miner's lengthy smoking history may have caused his shortness of breath. Thus, the administrative law judge acted within his discretion in concluding that, despite Dr. Miller's status as the miner's treating physician, his opinion was entitled to diminished weight. 20 C.F.R. §718.104(d); *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; Decision and Order at 18; Director's Exhibit 11.

By contrast, the administrative law judge permissibly found that the opinions of Drs. Caffrey, Naeye, and Hippensteel, that the miner's coal workers' pneumoconiosis did not cause or contribute to the development of the miner's lung cancer, and was too mild to have impacted his death in any way, were better reasoned and documented, and more consistent with the credible objective evidence of record, including the absence of destructive fibrosis noted in the autopsy prosector's opinion, and the degree of pneumoconiosis seen by Drs. Caffrey and Naeye on the autopsy tissue slides. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; Decision and Order at 19; Director's Exhibit 10; Employer's Exhibits 2, 3, 6 at 24-26, 7 at 21.

As the administrative law judge correctly analyzed the medical evidence and explained his reasons for crediting the opinions of Drs. Caffrey, Naeye, and Hippensteel

⁹ Dr. Miller did not offer an opinion as to whether the miner's COPD was due to coal dust exposure. *See* 20 C.F.R. §718.201(a)(2); Director's Exhibit 11.

¹⁰ Dr. Bluemink, the autopsy prosector, stated that while coal workers' pneumoconiosis was present, there was "no prominent destructive interstitial fibrosis." Director's Exhibit 9. Drs. Caffrey and Naeye stated that the degree of pneumoconiosis evidenced on the autopsy tissue slides was mild. Director's Exhibit 10; Employer's Exhibits 2, 7 at 21.

over the opinions of Drs. Shamiyeh and Miller, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge