

BRB No. 01-0407 BLA

JUANITA HANKINS)
(Widow of A.O. HANKINS))
)
 Claimant-Petitioner)
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 v.)
)
 STEADFAST FUELS, INCORPORATED) DATE ISSUED:
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 and)
)
 BITUMINOUS CASUALTY CORPORATION)
)
 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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (00-BLA-0270) of Administrative Law Judge Robert L. Hillyard 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).² The instant case involves a 1998 survivor's claim.³ After crediting the miner with thirty-three years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). The administrative law judge further found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the x-ray

¹Claimant is the surviving spouse of the deceased miner who died on February 6, 1996. Director's Exhibit 9.

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

³The miner filed a claim on April 21, 1981. Director's Exhibit 39. In a Decision and Order dated October 7, 1987, Administrative Law Judge Edward Terhune Miller found that the miner failed to establish that he was totally disabled due to pneumoconiosis. *Id.* By Decision and Order dated May 25, 1989, the Board affirmed Judge Miller's denial of benefits. *Hankins v. Steadfast Fuels, Inc.*, BRB No. 87-3327 BLA (May 25, 1989) (unpublished). There is no indication that the miner took any further action in regard to his 1981 claim.

evidence insufficient to establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, contending that the revised regulations do not affect the disposition of the instant case.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because the instant 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*,

⁴Section 718.205(c) provides, in pertinent part, 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

OWCP, 11 BLR 1-85 (1988). Pneumoconiosis is a “substantially contributing cause” of a miner’s death if it hastens the miner’s death.⁵ 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Claimant argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner’s death was due to pneumoconiosis. Claimant specifically contends that the revised regulations dictate that the opinion of his treating physician, Dr. Gallo, should have been accorded greater weight by the administrative law judge. We disagree. Revised Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). However, this regulation only applies to evidence developed after January 19, 2001. *See* 20 C.F.R. §718.101(b).

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- (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
 - (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

⁵Claimant contends that the case should be remanded for the administrative law judge to consider the “hastening death” standard set out at 20 C.F.R. §718.205(c)(5). We disagree. In his consideration of the evidence, the administrative law judge applied the “hastening death” standard, a standard already adopted by the United States Court of Appeals for the Sixth Circuit. *See Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); Decision and Order at 18.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). However, in considering whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge properly discredited Dr. Gallo's opinion regarding the cause of the miner's death because of its speculative nature.⁶ *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 1-639 (4th Cir. 1999) (An administrative law judge has the affirmative duty to qualify evidence as "reliable probative, and substantial" before relying upon it to grant or deny a claim); Decision and Order at 19; Director's Exhibit 30; Claimant's Exhibit 1. Because the administrative law judge properly discredited Dr. Gallo's opinion, the administrative law judge was not required to mechanically give greater weight to

⁶In a letter dated October 21, 1999, Dr. Gallo noted that he was enclosing a December 5, 1986 letter wherein he opined that the miner's "exposure to dusty conditions in the mining industry contributed to the development of his chronic obstructive pulmonary disease." *Id.* Dr. Gallo also noted, without explanation, that the miner's "chronic obstructive pulmonary disease was a contributing cause to his death at home." *Id.* In a subsequent letter dated April 11, 2000, Dr. Gallo stated:

In reference to [the miner's] death, since he died at home, **it would be a guess as to his cause of death.** However, chronic obstructive pulmonary disease does put stress on the cardiovascular system and would contribute to a sudden cardiac event.

Claimant's Exhibit 1 (emphasis added).

Dr. Gallo's opinion based upon his status as the miner's treating physician. See generally *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

The administrative law judge also properly found that Dr. Debandi's opinion was insufficient to support a finding that the miner's death was due to pneumoconiosis.⁷ Decision and Order at 18-19; Director's Exhibit 9. The administrative law judge further found that the opinions of Drs. Fino, Branscomb, Westerfield, and Broudy, that the miner's death was not caused or hastened by pneumoconiosis, were well reasoned, well documented and supported by the evidence. Decision and Order at 18; Employer's Exhibits 1, 2, 4-9. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis.⁸ See 20 C.F.R. §718.205(c); *Brown, supra*.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis, we need not address claimant's contentions of error regarding the administrative law judge's finding that

⁷Dr. Debandi completed the miner's death certificate. Director's Exhibit 9. The administrative law judge accurately noted that Dr. Debandi, while listing prostate cancer and COPD (chronic obstructive pulmonary disease) as underlying causes of the miner's death, indicated that he was uncertain as to the immediate cause of death. Decision and Order at 18. The administrative law judge also accurately noted that Dr. Debandi did not relate the miner's chronic obstructive pulmonary disease to his coal dust exposure on either the death certificate or on any of his previous progress notes. *Id.* at 18-19.

⁸Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that claimant was precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304 (2000). Decision and Order at 19. Section 718.304 has not been revised.

the evidence is insufficient to establish the existence of pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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