

BRB No. 06-0336 BLA

NORA MORGAN)
(Widow of FRED MORGAN))
)
Claimant-Petitioner)
)
v.)
)
KENTUCKY GEM COAL COMPANY)
)
and)
)
KENTUCKY CENTRAL INSURANCE) DATE ISSUED: 12/14/2006
COMPANY)
)
Employer/Carrier-)
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 Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Leroy Lewis, Hyden, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIUM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-6000) of Administrative Law Judge Robert L. Hillyard 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 miner died on December 16, 2002, and claimant filed her application for survivor’s benefits on February 27, 2003. Claimant’s

Exhibit 2; Director's Exhibit 3. In a Decision and Order dated January 3, 2006, the administrative law judge credited the miner with sixteen years of coal mine employment¹ and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and therefore, insufficient to 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 autopsy and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). Employer responds, urging affirmance of the administrative law judge's denial of benefits.² The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.³

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. §718.205(c), 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. §718.205(a)(1)-(3); *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 the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner's

¹ The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² Employer preserves an objection to the administrative law judge's exclusion from consideration, pursuant to 20 C.F.R. §725.414(a)(3)(i), of the opinions of Drs. Westerfield and Broudy. Employer's Brief at 10-12; Decision and Order at 10-11.

³ The administrative law judge's finding of sixteen years of coal mine employment and his findings 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).

death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). 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).

Claimant initially asserts that the autopsy evidence of record is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Claimant's Brief at 3. In evaluating the autopsy evidence, the administrative law judge properly noted that Dr. Abalos, the autopsy prosector, indicated that the plural surfaces of the lungs showed a few focal blackish discolorations, and listed simple coal workers' pneumoconiosis, minimal, among his final anatomic diagnoses. Claimant's Exhibit 1; Decision and Order at 7. Contrary to claimant's arguments, however, the administrative law judge permissibly concluded that as Dr. Abalos did not provide any support for his diagnosis of coal worker's pneumoconiosis beyond his description of blackish discolorations, and as the regulations specifically provide that the presence of black pigmentation, standing alone, is not sufficient to establish the existence of pneumoconiosis, Dr. Abalos' opinion was entitled to little weight. 20 C.F.R. §§718.106(a); 718.202(a)(2); Decision and Order at 9.

Claimant further challenges the administrative law judge's evaluation of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), specifically asserting that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Varghese and James. Claimant's Brief at 3-5. We disagree.

In considering the medical opinion evidence, the administrative law judge properly noted that Dr. Varghese, the miner's treating physician from 1992 to 2002, diagnosed chronic obstructive pulmonary disease (COPD) and "black lung" based on x-ray interpretations, and indicated that coal dust exposure was a minimal contributing cause of the miner's COPD. Claimant's Exhibit 3; Decision and Order at 6. Contrary to claimant's arguments, the administrative law judge acted within his discretion in finding that, despite the physician's status as the miner's treating physician, as Dr. Varghese neither listed the x-ray interpretations or other medical evidence he relied on in making his diagnosis, nor explained how the underlying documentation supported his conclusions, his opinion is neither reasoned nor documented and is entitled to little weight. See *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields*

v. Island Creek Coal Co., 10 BLR 1-19 (1987); Claimant's Exhibit 3; Decision and Order at 11-12.

Additionally, we reject claimant's assertion that the administrative law judge erred in failing to credit the opinion of Dr. James, as expressed on the death certificate and in his hospital report. Claimant's Brief at 3-5. The administrative law judge properly noted that on December 13, 2002, three days before his death, the miner was admitted to Memorial Hospital where he was attended by Dr. James. Following his examination, Dr. James noted that the miner had a history of COPD, listed cardiopulmonary arrest and status post cardiopulmonary resuscitation, status post intubation, probable acute myocardial infarction, acute pulmonary edema, COPD exacerbation, and diabetes mellitus among his tentative diagnoses, and indicated that pneumonitis and cerebral ischemic encephalopathy needed to be ruled out. Director's Exhibit 11; Decision and Order at 7. The administrative law judge further noted that the death certificate, also completed by Dr. James, listed the immediate cause of death as cardio-respiratory arrest, due to acute respiratory failure, due to COPD, due to coal miner's pneumoconiosis. Claimant's Exhibit 2; Decision and Order at 7.

Contrary to claimant's arguments, the administrative law judge properly found that because Dr. James' hospital report does not contain a diagnosis of coal workers' pneumoconiosis, and further does not indicate that the miner's COPD or other respiratory conditions were causally related to coal dust inhalation, this report is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). 20 C.F.R. §§718.201(a), 718.202(a)(4); Director's Exhibit 11; Decision and Order at 12. The administrative law judge further permissibly concluded that while Dr. James indicated on the death certificate that coal worker's pneumoconiosis was a contributing cause of the miner's death, because Dr. James failed to explain the discrepancy between his completion of the death certificate and his hospital evaluation of only three days prior, which did not diagnose pneumoconiosis, Dr. James' opinion as expressed on the death certificate does not constitute credible medical evidence sufficient to establish the existence of pneumoconiosis. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-149; *Fields*, 10 BLR at 1-19; *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-188 (1983); Claimant's Exhibit 2; Decision and Order at 12.

The administrative law judge exercises broad discretion in assessing the persuasiveness and reasoning of a medical opinion. *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-149. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and permissibly discredited the only evidence supportive of a finding of pneumoconiosis, we

affirm the administrative law judge's finding that the miner did not have pneumoconiosis and that, therefore, pneumoconiosis was not a substantially contributing cause of the miner's death. *See Mills*, 348 F.3d at 133, 23 BLR at 2-12; *Trumbo*, 17 BLR at 1-87-88. Accordingly, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.205(c).

Because claimant has failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits. *See Anderson, supra; Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge