BRB No. 98-1603 BLA

ELEANOR MILLS)
(Widow of DAVID MILLS))
)
Claimant-Respondent)
)
v.)
)
U.S. STEEL MINING COMPANY) DATE ISSUED:
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

D. Scott Newman (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0777) of Administrative Law Judge Michael P. Lesniak awarding benefits 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 thirty-nine years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. After accepting employer's concession that the miner suffered from pneumoconiosis arising out of coal mine employment, *see* Hearing Transcript at 7; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988), the administrative law judge found the evidence sufficient to establish that

the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[1] Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Neither claimant[2] nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[3]

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[1]The administrative law judge found the evidence insufficient to establish invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

[2]Claimant is the widow of the miner, David Mills, who died on May 8, 1996. Director's Exhibits 1, 5, 27. The miner filed claims in March 1984, November 1990 and May 1994. Director's Exhibit 27. After several denials, the miner's claim was finally denied by Administrative Law Judge Gerald M. Tierney in a Decision and Order dated September 19, 1996. *Id.* Claimant filed her survivor's claim on May 22, 1996. Director's Exhibit 1.

[3]Inasmuch as the administrative law judge's length of coal mine employment finding, his finding that the evidence is insufficient to establish invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304 and his finding and employer's concession that the

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

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miner suffered from pneumoconiosis arising out of coal mine employment are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We disagree. Inasmuch as 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, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Third Circuit, wherein jurisdiction for this case arises, held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) in a case in which the disease actually hastens his death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Whereas Dr. Mittal opined that the coal workers' pneumoconiosis contributed to the miner's death, Director's Exhibits 6, 7, 27; Claimant's Exhibit 1, Drs. Naeye and Oesterling opined that coal workers' pneumoconiosis did not contribute to the miner's death, Director's Exhibit 22; Employer's Exhibits 1, 2. The death certificate signed by Dr. Bobak lists respiratory failure and pneumoconiosis as the immediate causes of the miner's death. Director's Exhibits 5, 27. In an autopsy report, Drs. Diaz and Mittal found simple

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[4]Section 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 established that the miner's death was due to pneumoconiosis, or
> (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).

coal workers' pneumoconiosis, predominately macular type. Director's Exhibits 6, 27.

We reject employer's assertion that the administrative law judge erred in according greater weight to the medical opinion of Dr. Mittal than to the contrary opinions of Drs. Naeye and Oesterling because of Dr. Mittal's status as the autopsy prosector, inasmuch as an administrative law judge, within his discretion, may rationally accord greater weight to the medical opinion of an autopsy prosector than to the medical opinions of other pathologists, when the autopsy prosector alone has had the benefit of the gross examination at autopsy.[5] *See Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Cantrell v. United States Steel Corp.*, 6 BLR 1-1003 (1984); *cf. Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). In reaching his conclusion, Dr. Mittal relied, at least in part, on a gross examination, in addition to the microscopic slides.[6] Director's Exhibits 6, 7, 27; Claimant's Exhibit 1.

Employer also asserts that the administrative law judge erred in relying on the opinion of Dr. Mittal because it is not reasoned and documented. In his decision, the administrative law judge indicated that Dr. Mittal's conclusions are based on his "findings on autopsy [which] are far more probative and reliable, with regard to the condition of the Miner at the time of his death, than any records compiled during the Miner's lifetime." Decision and Order at 8. The administrative law judge observed

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[5]The administrative law judge stated, "I accord the most weight to the opinion of Dr. Mittal, the autopsy prosector, as he had an opportunity to examine the Miner's lung tissue." Decision and Order at 8. The administrative law judge found that "Dr. Mittal's actual examination of the tissue at the time of death provides a far more accurate picture of the conditions which contributed to the Miner's death than do the medical records compiled during the Miner's lifetime." *Id.*

[6]The autopsy report prepared by Drs. Diaz and Mittal contains a gross description of the miner's lungs which indicates that "[o]n inspection the pleural surfaces of the lungs display multiple foci of black pigmentation covering approximately 70 to 75 percent of the surface." Director's Exhibits 6, 7. In a subsequent report, Dr. Mittal opined that the miner "was found to have coal worker's pneumoconiosis, predominately macular in type" and that, "[i]ncluding the pleural surface and parenchyma, the total involvement was approximately 70 percent." Director's Exhibit 7. Dr. Mittal also opined that the miner's "coal worker's pneumoconiosis would be considered a significant contributing factor in his demise." *Id.*

that "the most recent x-ray was performed on the Miner nearly a year prior to his death and no pulmonary function tests or arterial blood gas studies were performed during the two years leading up to his death." *Id.* Thus, inasmuch as the administrative law judge rationally found the opinion of Dr. Mittal to be reasoned and documented,[7] *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), we reject employer's assertion that the administrative law judge erred in relying on Dr. Mittal's opinion.

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[7]In contrast, the administrative law judge found the opinion of Dr. Naeye to be not reasoned. After observing that "Dr. Naeye determined that the Miner's pneumoconiosis was not severe enough to contribute to the Miner's death because it was not severe enough to cause [an] impairment at the time he left the mines and simple coal workers' pneumoconiosis does not progress once the Miner ceases his mining employment," the administrative law judge, citing *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), found that Dr. Naeye's opinion "is in direct contradiction to the legal definition of pneumoconiosis." Decision and Order at 8.

Further, inasmuch as the administrative law judge rationally found that Dr. Oesterling did not provide an explanation for testifying "[a]t the outset [of his deposition]...that the slides which he reviewed contained a sufficient sample of the Miner's lung tissue upon which he was able to base his opinion," and for testifying "at the end of his deposition...as to the limited nature of the autopsy and the samples which he reviewed,"[8] Decision and Order at 9, we reject employer's assertion that the administrative law judge erred in discrediting the opinion of Dr. Oesterling because he found it to be internally inconsistent. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, since the administrative law judge rationally found "the opinion of Dr. Mittal in conjunction with the death certificate sufficient to support a finding that the Miner's pneumoconiosis contributed to his death," *id.* at 9; *see Wagner v. Beltrami Enterprises*, 16 BLR 1-65 (1990), we hold that substantial evidence supports the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Lukosevicz, supra*.

[8]The administrative law judge observed that "[i]n fact, Dr. Oesterling testified that he believes that the autopsy and report had been 'improperly done.'" Decision and Order at 9.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge