

BRB No. 04-0539 BLA

ELIZABETH R. HUNT)
(Widow of VERNON HUNT))
)
 Claimant-Petitioner)
) DATE ISSUED: 02/16/2005
 v.)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

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

Raymond F. Keisling (Carpenter, McCadden & Lane, LLP), Wexford, Pennsylvania, for claimant.

Helen H. Cox (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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 (03-BLA-6129) of Administrative Law Judge Michael P. Lesniak 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.

¹Claimant is the surviving spouse of the deceased miner who died on December 27, 2001. Director's Exhibit 14.

§901 *et seq.* (the Act). This case involves a survivor's claim filed on April 3, 2002.² After crediting the miner with at least fourteen years of coal mine employment, the administrative law judge 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). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

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).³ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

²The miner filed a claim with the Social Security Administration (SSA) on March 29, 1973. Director's Exhibit 1. The SSA denied the claim on December 26, 1973, October 6, 1978 and April 18, 1979. *Id.* The Department of Labor denied the claim on September 12, 1980. *Id.* There is no indication that the miner took any further action in regard to his 1973 claim.

³Section 718.205(c) provides 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
- (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.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁴ There are two medical opinions relevant to the issue of whether pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. *See* 20 C.F.R. §718.205(c)(2), (5). While Dr. King, the miner's treating physician, opined that pneumoconiosis contributed to miner's death, Claimant's Exhibit 1, Dr. Spagnolo opined that pneumoconiosis did not contribute, in any way, to the miner's death.⁵ Director's Exhibit 31. The administrative law judge properly discredited Dr. King's opinion because the doctor failed to provide any reasoning or rationale for his conclusion that pneumoconiosis contributed to the miner's death.⁶ *See Director, OWCP*

20 C.F.R. §718.205(c).

⁴Because no evidence of record supports a finding that pneumoconiosis was the cause of the miner's death, claimant is precluded from establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1). Moreover, because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that claimant is precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3); Decision and Order at 7.

⁵Charles Morris, a coroner, completed the miner's death certificate. Mr. Morris attributed the miner's death to cardiopulmonary arrest due to "coronary arteries [sic] disease" and ASHD. Director's Exhibit 14. The administrative law judge properly discredited the miner's death certificate because he found that Mr. Morris did not provide any explanation for his findings. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 7.

⁶Although Dr. King was the miner's treating physician, he limited his discussion of the cause of the miner's death to a one paragraph letter that he sent to claimant's attorney on February 28, 2003. In this letter, Dr. King states:

v. Rowe, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 8; Claimant's Exhibit 1.

We reject claimant's contention that the administrative law judge erred in failing to accord greater weight to Dr. King's opinion based upon his status as the miner's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.⁷ *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* In this case, the administrative law judge found that Dr. King, in finding that pneumoconiosis contributed to the miner's death, failed to provide a basis for his conclusion. Decision and Order at 8; Claimant's Exhibit 1. Consequently, the administrative law judge properly found that Dr. King's opinion was insufficient to establish that the miner's death was due to pneumoconiosis

In answer to your questions regarding [the miner], he had been a patient of ours for several years. He did have a history of pneumoconiosis and had been on home O2 therapy. He also had coronary artery disease. Although [the miner's] pneumoconiosis did not directly cause his death, it did significantly contribute to this miner's death, as it affected his ability to absorb oxygen into his bloodstream, which then affected his coronary circulation. As such, this indeed hastened his demise. Therefore, it is within reasonable medical probability and medical certainty that his coal workers' pneumoconiosis contributed to his death by hastening it.

Claimant's Exhibit 1.

The Director, Office of Workers' Compensation Programs, correctly notes that claimant failed to identify any specific error with respect to the administrative law judge's finding that Dr. King's opinion regarding the cause of the miner's death is not sufficiently reasoned. Director's Brief at 4-5.

⁷Section 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). The Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

pursuant to 20 C.F.R. §718.205(c).

The administrative law judge also permissibly credited Dr. Spagnolo's opinion, that pneumoconiosis did not contribute to the miner's death, over Dr. King's contrary opinion, based upon Dr. Spagnolo's superior qualifications.⁸ *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 8; Director's Exhibit 31. The administrative law judge also properly found that Dr. Spagnolo's opinion was well reasoned and well documented.⁹ *See Clark, supra; Lucostic, supra*; Decision and Order at 8. Because it is based upon 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 pursuant to 20 C.F.R. §718.205(c).¹⁰

⁸Dr. Spagnolo is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 32. Dr. King's qualifications are not found in the record.

⁹Dr. Spagnolo attributed the miner's death to progressive cardiac failure and coronary ischemia that resulted in a fatal cardiac arrhythmia. Director's Exhibit 31. Dr. Spagnolo opined that the miner's death was not hastened, even briefly, from his pneumoconiosis. *Id.* Dr. Spagnolo explained that he based his opinion on the following findings:

First, [the miner] did not have consistent physical findings, or consistent laboratory evidence of impaired lung function from his pneumoconiosis prior to his death. Second, the available spirometry values do not demonstrate an obstructive or restrictive impairment. Third, his lungs were consistently reported to be clear until obvious congestive heart failure was noted in 2001. Fourth, without evidence of an obstructive or restrictive lung impairment there will be no reduction in the ability of the lung to transfer oxygen into the blood and blood gas values will remain normal. Thus, abnormal lung function from a lung condition could not be the explanation for [the miner's] complaint of exertional dyspnea.

Director's Exhibit 31.

¹⁰Claimant argues that the administrative law judge failed to provide a basis for his finding that the miner had a fifty pack year smoking history. Claimant, therefore, argues that the administrative law judge erred in discrediting Dr. King's opinion because the doctor did not address the effect of the miner's "substantial smoking history" on his death. *See* Decision and Order at 8. However, because the administrative law judge provided a proper basis for discrediting Dr. King's opinion, *i.e.*, that it was not sufficiently reasoned, and provided a proper basis for crediting Dr. Spagnolo's opinion over that of Dr. King, *i.e.*, Dr. Spagnolo's superior qualifications, the administrative law

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

judge's error, if any, in discrediting Dr. King's opinion because the doctor failed to address the effect of the miner's smoking history on the miner's death, constitutes harmless error. *See Kozele v. Rochester and Pirtsburgh Coal Co.*, 6 BLR 1-378 (1983).