

BRB No. 05-0481 BLA

COZETTE L. WALKER)
(Widow of ORA WALKER))
)
Claimant-Respondent)
)
v.)
)
BETHENERGY MINES, INCORPORATED) DATE ISSUED: 02/28/2006
)
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 – Awarding Survivor Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot and Kathy L. Synder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Survivor Benefits of Administrative Law Judge Joseph E. Kane 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).¹ Claimant filed her survivor's claim on May 28, 2002. Director's

¹ Mr. Ora Walker filed three living miner's claims, all of which were denied prior to his death on March 28, 2002. These claims are contained at Director's Exhibit 1.

Exhibit 3. The district director issued a Proposed Decision and Order awarding benefits on February 10, 2003. Director's Exhibit 20. Employer requested a hearing, which was held on December 3, 2003.² The administrative law judge accepted the parties' stipulation that the miner suffered from clinical pneumoconiosis prior to his death. The administrative law judge also found the medical evidence sufficient to establish the existence of legal pneumoconiosis. The administrative law judge further found that claimant established, pursuant to 20 C.F.R. §718.205(c), that the miner's "pneumoconiosis, specifically his severe chronic bronchitis, contributed or hastened the miner's death as a result of pneumonia." Decision and Order at 12. Accordingly, the administrative law judge awarded survivor's benefits.

Employer appeals, challenging the administrative law judge's decision to exclude the medical opinions of Drs. Zaldivar and Castle because they reviewed evidence in the miner's claim that was ruled inadmissible. Employer also argues that the administrative law judge erred in excluding the reports of Drs. Bush and Branscomb as exceeding the evidentiary limitations.³ On the merits, employer maintains that claimant's evidence is insufficient as a matter of law to carry her burden of proving that the miner's death was due to pneumoconiosis. Employer further argues that the administrative law judge erred in his treatment of Dr. Naeye's opinion relevant to the existence of legal pneumoconiosis and the cause of the miner's death. Claimant has not filed a brief. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's appeal, urging the Board to remand this case for further consideration based on evidentiary errors committed by the administrative law judge.

² Prior to the hearing, employer submitted an evidence summary form, designating the medical reports of Drs. Zaldivar and Castle as affirmative evidence. Director's Exhibit 19, Employer's Exhibits 3, 5. Employer also tendered treatment records from Holzer Medical Center along with the autopsy report and deposition testimony of Dr. Naeye. Director's Exhibit 15-16; Employer's Exhibit 3. At the hearing, employer proffered two additional reports from Drs. Bush and Branscomb, marked as Employer's Exhibits 1 and 2. Claimant objected to the admission of Employer's Exhibits 1 and 2 on the grounds that the exhibits exceeded the evidentiary limitations. Hearing Transcript 6-8. The administrative law judge found that employer failed to show good cause for the admission of the reports of Drs. Bush and Branscomb, and therefore, that the reports should be excluded pursuant to 20 C.F.R. §725.414. Decision and Order at 3-4.

³ In this regard, employer challenges the validity of the revised regulations and contends that all of the evidence that the administrative law judge excluded in this case pursuant to 20 C.F.R. §725.414 should be admitted under the "good cause" exception of 20 C.F.R. §725.456(b)(1) because such evidence is relevant. We reject employer's arguments based on our holding in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

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.⁴ 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).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under Section 718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Claimant may establish that pneumoconiosis was a substantially contributing cause of a miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Brown*, 996 F.2d at 817, 17 BLR at 2-140.

In this case, the administrative law judge awarded benefits, crediting the death certificate, autopsy report and a short medical statement from claimant's treating physician, Dr. Linder, as establishing that "pneumoconiosis hastened the miner's death due to pneumonia." Decision and Order at 12. After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the briefs of the parties, we are compelled to reverse the administrative law judge's award of benefits.

A death note prepared by Dr. Al-Ataie on March 28, 2002 relates the course of the miners' treatment at Holzer Medical Clinic prior to his death. Dr. Al-Ataie reports that the miner suffered an acute cerebrovascular accident (CVA) with left hemiparesis, requiring his admission to Holzer on February 25, 2002. Director's Exhibit 16. The miner was released to inpatient medical rehabilitation after three days of treatment. *Id.* The miner subsequently developed cardiac symptoms and became unresponsive, requiring his transfer back to the medical unit on March 10, 2002. *Id.* Dr. Al-Ataie reported that a head CT confirmed that the miner's initial CVA was healing with no evidence of a stroke. Director's Exhibit 16. A chest x-ray, however, showed that the miner had pneumonia and was in congestive heart failure. *Id.* At the family's request,

⁴ Because the miner's last coal mine employment occurred in the State of Ohio, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

the miner did not receive any life prolonging medical care and he subsequently died on March 28, 2002.⁵ *Id.*

Dr. Al-Ataie prepared the death certificate on March 28, 2002 and listed the immediate cause of the miner's death as acute CVA. Director's Exhibit 5. Other significant conditions contributing to death included pneumonia, congestive heart failure, chronic lymphocytic leukemia, and pneumoconiosis. *Id.* Dr. Al-Ataie ordered a chest autopsy at claimant's request. Director's Exhibit 16. The autopsy was performed by Dr. Jelic with final anatomic diagnoses of acute bronchopneumonia, involving all lung lobes (formation of hyaline membranes in the left upper lung), simple coal workers' pneumoconiosis (multiple macules throughout all lung lobes containing black anthracotic pigment and numerous silica particles), chronic silicosis, chronic bronchitis, moderate emphysema, and pleural plaque on the right diaphragm compatible and asbestosis body compatible with exposure to asbestos. Director's Exhibit 6. The miner's treating physician, Dr. Linder, prepared a statement on August 7, 2002 stating that the miner had been seen for "COPD, pneumoconiosis, and Black Lung". Director's Exhibit 8. Dr. Linder noted that the miner's x-rays showed a mild to moderate amount of interstitial fibrosis, and that the miner was on home oxygen due to his symptoms of shortness of breath. *Id.* Dr. Linder opined that "black lung disease contributed to his death in part." *Id.*

In weighing the evidence, the administrative law judge found that the death certificate constituted evidence that the miner's death was due in part to pneumoconiosis. With respect to Dr. Linder's opinion, the administrative law judge stated as follows:

Admittedly, [Dr. Linder's] assertion that the miner died due in part to his pneumoconiosis is not well-reasoned or well-documented because Dr. Lindner [sic] [Linder] does not state the basis of his opinion on this issue, nor does he provide the objective data that he relied on to form his conclusion. Despite these shortcomings and the brevity of his report, I find that the opinion is worthy of some albeit only slight, weight in favor of a finding that the miner's pneumoconiosis contributed to his death where Dr. [Linder] had the benefit of treating the miner's pulmonary conditions over several years, had the benefits of his treating records and the attendant objective testing and furthermore, where his findings and diagnoses are supported by the autopsy/pathology report and the treatment records.

Decision and Order at 12.

⁵ Dr. Al-Ataie recorded the course of the miners' treatment in a death note dated March 28, 2002. Director's Exhibit 16.

Employer correctly argues on appeal that the administrative law judge erred in his treatment of Dr. Linder's opinion. Employer's Petition for Review and Brief at 6-7. Contrary to the administrative law judge's analysis, to the extent that the Dr. Linder's opinion was found to be neither reasoned nor documented, it is not entitled to weight simply based on Dr. Linder's status as the miner's treating physician. Section 718.104(d)(5) recognizes that:

In appropriate cases the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion *in light of its reasoning and documentation*, other relevant evidence and the record as a whole (emphasis added).

20 C.F.R. §718.104(d). Because Dr. Linder's opinion was determined to be neither reasoned nor documented by the administrative law judge, it necessarily follows that the opinion is legally insufficient to satisfy claimant's burden of proof on causation of the miners' death. A physician's statement that pneumoconiosis hastened a miner's death, without any explanation of that conclusion is generally insufficient to support such a finding. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-264 (4th Cir. 2000); *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20 (3d Cir. 1997).

Furthermore, the administrative law judge erroneously found that the autopsy report buttressed Dr. Linder's opinion on the cause of the miner's death. Although the autopsy report diagnosed the presence of several respiratory conditions, which would include clinical and legal pneumoconiosis, the autopsy prosector did not mention whether pneumoconiosis caused or hastened the miner's death. Because the autopsy report is silent as to the cause of the miner's death, it cannot serve to corroborate Dr. Linder's opinion. The autopsy report establishes only that the miner had pneumoconiosis, and not that his death was hastened by that disease.

Thus, we must conclude that the sole basis for the administrative law judge's award of benefits is the miner's death certificate listing pneumoconiosis as a significant condition in the miner's death. We, however, cannot affirm an award of benefits in this case based solely on the death certificate. The miner's death certificate, in and of itself, is insufficient to carry claimant's burden of proof since there is no indication as to how Dr. Al-Ataie reached his conclusion that pneumoconiosis was a significant condition leading to the miner's death. Although Dr. Al-Ataie treated the miner during his hospitalization, he specifically acknowledged on the death certificate that he did not have

the benefit of the autopsy results at the time he prepared the death certificate. He therefore did not know the extent or degree of either clinical or legal pneumoconiosis in the miner's lungs at the time he proffered his opinion on the cause of death.

We further note that the administrative law judge's finding as to the direct cause of the miner's death also conflicts with Dr. Al-Ataie's statement on the death certificate. Dr. Al-Ataie listed the immediate cause of the miner's death as acute CVA while the administrative law judge inexplicably stated that the death certificate supported a finding that pneumoconiosis hastened the miner's death due to "pneumonia." Decision and Order at 12; *see* Director's Exhibit 6. Since Dr. Al-Ataie did not opine that the miner's immediate cause of death was due to pneumonia, and since Dr. Al-Ataie did not address in the hospitalization records what role, if any, pneumoconiosis played in the development of the miner's pneumonia, we are unable to affirm the administrative law judge's reliance on the death certificate to establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c).

Thus, we conclude that the death certificate, standing alone in this case, is insufficient to carry claimant's burden of proof as it is unreasoned, in and of itself, and is not supported by any additional reasoned or documented medical opinions addressing the cause of the miner's death.⁶ *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). The notation of pneumoconiosis on the death certificate as a contributing cause of death is entirely unexplained and unsupported by the other evidence of record, and therefore fails to establish claimant's entitlement at Section 718.205(c). *See Lango*, 104 F.3d at 577, 21 BLR at 2-21.

In order to establish her entitlement, claimant was required to establish every element of entitlement by a preponderance of the evidence. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Based on the administrative law judge's credibility rulings and the evidence of record, claimant is unable to establish that the miner's death was due to pneumoconiosis as a matter of law. Consequently, claimant is not entitled to benefits.⁷

⁶ Although the administrative law judge rejected Dr. Naeye's opinion, Dr. Naeye's opinion does not aid claimant in establishing her entitlement as he specifically opined that the degree of pneumoconiosis demonstrated by the autopsy was too minimal to have caused or hastened the miner's death. Director's Exhibit 15. Claimant also did not offer any lay testimony to support a finding that the miner died as a result of pneumoconiosis.

⁷ Because we reverse the award of benefits, we decline to address employer's arguments concerning alleged evidentiary errors committed by the administrative law judge and his consideration of Dr. Naeye's opinion.

Accordingly, the administrative law judge's Decision and Order – Awarding Survivor Benefits is reversed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge