

BRB No. 06-0431 BLA

PHYLLIS A. KILGORE)
(Widow of GARY KILGORE))
)
 Claimant-Petitioner)
)
 v.)
)
 BLACKHAWK MINING COMPANY) DATE ISSUED: 02/15/2007
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in Living Miner's and Survivor's Claims of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

David H. Neeley (Neeley Law Office, P.S.C.), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits in Living Miner's and Survivor's Claims (05-BLA-5029 and 05-BLA-5030) of Administrative Law Judge Linda S. Chapman (the administrative law judge) rendered on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹ Claimant is the widow of the deceased miner.

amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the miner with eleven and one-quarter years of qualifying coal mine employment and adjudicated both claims pursuant to the regulations contained in 20 C.F.R. Part 718.² With regard to the miner's subsequent claim,³ the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found the evidence insufficient to establish that claimant's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits in the miner's claim. Turning to the survivor's claim, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). However, the administrative law judge found the evidence 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 in the survivor's claim.

On appeal, claimant challenges the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim. Regarding the miner's claim, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). With regard to the survivor's claim, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at

² The miner's last coal mine employment occurred in Kentucky. Director's Exhibits 3, 5. Consequently, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ The miner filed his first claim on June 25, 1991. Director's Exhibit 1. On May 3, 1993, Administrative Law Judge Bernard J. Gilday issued a Decision and Order denying benefits. *Id.* Judge Gilday's denial was based on the miner's failure to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. *Id.* The denial became final because the miner took no further action on that claim. The miner filed his second claim on April 26, 2001. Director's Exhibit 3. However, while that claim was pending before the district director, the miner died on March 11, 2003. Director's Exhibit 46. Claimant, who continued to pursue the miner's claim, filed her survivor's claim on April 22, 2003. Director's Exhibit 42.

20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address claimant's contentions with regard to the miner's claim. In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Specifically, claimant asserts that the administrative law judge erred in discounting Dr. Sundaram's opinion. In a report dated May 16, 2001, Dr. Sundaram diagnosed occupational lung disease caused by coal mine employment and opined that the miner's pulmonary impairment was caused by prolonged exposure to coal dust. Director's Exhibit 18.

The administrative law judge properly discounted Dr. Sundaram's opinion because she found that it is not reasoned. *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). In considering Dr. Sundaram's opinion, the administrative law judge stated that "[Dr. Sundaram] provided no rationale or support for his [causation] conclusion, nor did he even address [the miner's] development of lung cancer, or his long history of cigarette smoking." Decision and Order at 21. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Sundaram's opinion.⁴ Since it is supported by substantial evidence, we affirm the

⁴ The administrative law judge also considered several other medical reports at 20 C.F.R. §718.204(c). Specifically, the administrative law judge considered the reports of Drs. Westerfield, Fritzhand, Vuskovich, Dahhan, Broudy, Branscomb, Lane, Wicker, Puram, Anderson, Myers and Potter. Decision and Order at 21. In a report dated August 16, 2001, Dr. Westerfield diagnosed coal workers' pneumoconiosis and opined that the

administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

Since claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), an essential element of entitlement under 20 C.F.R. Part 718, we hold that the administrative law judge properly denied benefits in the miner's claim. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Next, we address claimant's contentions with regard to the survivor's claim. Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.⁵ See 20 C.F.R. §§718.1, 718.205(c); *Neeley v.*

miner did not have a respiratory or pulmonary impairment. Director's Exhibit 20. Further, during a deposition dated April 18, 2003, Dr. Westerfield opined that the miner did not have a respiratory disability related to pneumoconiosis. Director's Exhibit 52. The administrative law judge stated that Dr. Westerfield's opinion is well reasoned and supported by the objective medical evidence. Decision and Order at 21. In addition, the administrative law judge stated that "Drs. Fritzhand, Vuskovich, Dahhan, Broudy, and Branscomb blamed cigarette smoking for [the miner's] pulmonary impairment." *Id.* Further, the administrative law judge stated that "Dr. Lane attributed [the miner's] mild impairment to heart disease, not coal dust exposure." Lastly, the administrative law judge stated that "Drs. Wicker, Puram, Anderson and Myers did not indicate an etiology for any disability; Dr. Potter did not address the issue of disability at all." *Id.* No party has challenged the administrative law judge's consideration of this medical opinion evidence.

⁵ 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 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.
- ...
- (5) 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).

Director, OWCP, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The record in the survivor's claim consists of a death certificate signed by Dr. Wright and the opinions of Drs. Broudy, Westerfield, Koura and Kumar. In the death certificate, Dr. Wright listed metastatic carcinoma as the immediate cause of death and oat cell carcinoma of the lung as the underlying cause of death. Director's Exhibit 46. In a July 26, 2004 report and during a deposition dated June 10, 2005, Dr. Broudy opined that coal workers' pneumoconiosis did not cause, contribute to, or hasten the miner's death. Director's Exhibit 53. Similarly, during a deposition dated April 18, 2003, Dr. Westerfield opined that there was no relationship between pneumoconiosis and the miner's lung cancer. Director's Exhibit 52. In a January 4, 2005 report, Dr. Kuora opined that the miner's death was caused by lung cancer mainly related to smoking. Claimant's Exhibit 3. Dr. Kuora also opined, however, that "the presence of the [coal workers' pneumoconiosis] diagnoses would have worsened [the miner's] condition and would be a contributing factor in causing [his] death." *Id.* Dr. Kumar did not render an opinion with regard to the cause of the miner's death. Director's Exhibit 50. The administrative law judge found that Dr. Broudy's opinion outweighed Dr. Kuora's contrary opinion, on the basis that Dr. Broudy's opinion is better reasoned and supported by the objective medical evidence.⁶ Decision and Order at 25-26.

Claimant asserts that the administrative law judge erred in failing to weigh all of the relevant medical evidence of record at 20 C.F.R. §718.205(c). Claimant's assertion is based on the premise that Drs. Koura, Sundaram and Westerfield provide a basis for the administrative law judge to consider the relationship between coal workers' pneumoconiosis and the cause of the miner's death. Contrary to claimant's assertion, the administrative law judge reasonably declined to consider Dr. Sundaram's opinion in the survivor's claim. See 20 C.F.R. §725.414; Decision and Order at 25. In a letter dated

⁶ The administrative law judge stated that "[Dr. Broudy] pointed to [the miner's] normal pulmonary function test results as late as 12 years after his last exposure to coal mine dust, concluding that it was 'extremely unlikely' coal workers' pneumoconiosis or coal mine dust exposure played any role in [the miner's] death or contributed to any disability or impairment." Decision and Order at 26.

March 19, 2003, Dr. Sundaram opined that the miner's death was caused in part by his exposure to coal dust.⁷ Director's Exhibit 49. As noted by the administrative law judge, Dr. Sundaram's letter was included in the record of the miner's claim but was not submitted in the survivor's claim. Instead, claimant submitted Dr. Kuora's January 4, 2005 report and Dr. Kumar's February 3, 2003 report in support of her affirmative case in the survivor's claim. Thus, the administrative law judge reasonably declined to consider Dr. Sundaram's opinion in the survivor's claim, because "[c]laimant has met her limitations on medical report submissions and Dr. Sundaram's report is not linked to any treatment records." *Id.*; see 20 C.F.R. §725.414. In addition, the administrative law judge properly discounted Dr. Kuora's opinion because she found it is not reasoned.⁸ *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Lucostic*, 8 BLR 1-46; *Fuller*, 6 BLR 1-1291. Finally, any error by the administrative law judge in failing to consider Dr. Westerfield's opinion at Section 718.205(c) is harmless, because it does not support a finding that pneumoconiosis contributed to the miner's death. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in failing to weigh all of the relevant medical evidence of record at 20 C.F.R. §718.205(c).

Furthermore, since the administrative law judge properly discounted the only medical opinion of record that could support a finding that pneumoconiosis contributed to the miner's death, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

In view 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 at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in the survivor's claim, *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2, we affirm the administrative law judge's denial of benefits therein.

⁷ Claimant submitted Dr. Sundaram's June 11, 2001 report as part of her affirmative evidence in the miner's claim.

⁸ In considering Dr. Kuora's opinion with regard to the cause of the miner's death, the administrative law judge stated:

[T]here is no indication that Dr. Kuora had ever treated [the miner], nor did he specify which of his medical records he reviewed. He did not provide any rationale or support for his bald conclusion, nor did he explain how pneumoconiosis would have worsened [the miner's] condition. In addition, I find his comments to be speculative."

Accordingly, the administrative law judge's Decision and Order Denying Benefits in Living Miner's and Survivor's Claims is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge