

BRB No. 07-0469 BLA

E.R.)
(Widow of W.R.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 02/27/2008
)
CONSOLIDATION COAL COMPANY)
)
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

E.R., Maidsville, West Virginia, *pro se*.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (2006-BLA-5029) of Administrative Law Judge Michael P. Lesniak rendered 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).¹

¹ Claimant, the miner's surviving spouse, filed a survivor's claim on December 1, 2004, following the death of the miner on August 6, 2004. Director's Exhibit 2. The district director denied benefits and claimant requested a hearing. Director's Exhibits 25,

The administrative law judge found that claimant established the existence of pneumoconiosis arising from coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). However, the administrative law judge further found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has declined to issue a substantive response unless specifically requested to do so.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. 20 C.F.R. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or if the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death.² 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert denied*, 506 U.S. 1050 (1993).

27. In a letter dated May 22, 2006, claimant waived her right to a hearing and requested that a decision be made on the record.

² The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Claimant generally challenges the administrative law judge's finding that claimant failed to meet her burden of establishing that the miner's death was due to pneumoconiosis. After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed.

The evidence relevant to Section 718.205(c) consists of hospital records, the death certificate, an autopsy report, and the medical opinions of Drs. Rosenberg, Bush, Oesterling, and Kolanko. Hospital records indicate that Dr. Bowlin treated the miner a few months prior to his death on August 6, 2004. Director's Exhibits 14, 15. As the certifying physician for the miner's death certificate, Dr. Bowlin identified the immediate cause of death as chronic renal failure, and listed coronary artery disease, chronic heart failure, chronic lung disease, and peripheral vascular disease as other significant conditions contributing to death, but he did not indicate whether the conditions were related to coal dust exposure. Director's Exhibit 9. The autopsy prosector, Dr. de la Mata, found evidence of pneumoconiosis, but did not address the cause of the miner's death, and offered no opinion as to whether pneumoconiosis played any hastening or contributing role. Director's Exhibits 10, 11.

Dr. Rosenberg, a pulmonary and occupational medicine specialist, reviewed the miner's medical records, including the autopsy report and the death certificate, and acknowledged that although the miner had pathologic findings of pneumoconiosis, his pulmonary function status was maintained such that the pneumoconiosis would not have placed undue stress on the heart, and did not aggravate the miner's coronary artery disease. Employer's Exhibit 2. Dr. Rosenberg concluded that the miner's death was due to multi-system failure associated with coronary artery disease, peripheral vascular disease, and renal disease, and that coal dust exposure did not cause, contribute to, or hasten the miner's death. *Id.*

Dr. Bush, a pathologist, reviewed similar medical records, including twenty slides from the miner's autopsy, and opined that although the miner had simple coal workers' pneumoconiosis, the miner's death was not caused by, contributed to, or hastened by any chronic dust disease arising from coal mine employment. Employer's Exhibit 1. Dr. Oesterling, also a pathologist and chair of the Department of Pathology at Ohio Valley General Hospital, issued a report based upon his review of the miner's medical records and the autopsy slides. Employer's Exhibit 4. Dr. Oesterling opined, based on the limited structural changes related to the miner's coal dust disease, and his consideration of the multiple system failures resulting from the miner's arteriosclerotic vascular disease, that coal workers' pneumoconiosis in no way hastened, contributed to, or caused the miner's death. *Id.*

Hospital records dating back to 2001 identify Dr. Kolanko as the miner's primary care physician. Director's Exhibits 13-15. In a supplemental letter dated June 3, 2005,

Dr. Kolanko indicated that the miner had severe peripheral vascular disease, end-stage renal disease with a fistula placement for dialysis, hypertension, anemia, and a history of gastrointestinal bleed. Director's Exhibit 15. Dr. Kolanko noted that the postmortem pathology report revealed changes in the miner's lungs that were consistent with pneumoconiosis, as well as severe arteriosclerosis and coronary artery disease. *Id.* Dr. Kolanko addressed the cause of the miner's death, stating:

My practice is internal medicine, and I admit that I do not know everything about coal workers' pneumoconiosis. I have had similar patients who have received their black lung benefits due to the effects of coal workers' pneumoconiosis on cardiovascular disease. I feel it is possible that it did contribute to his death.

Id.

The administrative law judge considered all of the relevant evidence under Section 718.205(c), and observed that the only medical evidence suggesting a link between pneumoconiosis and the miner's death was the supplemental letter from Dr. Kolanko. Decision and Order at 4. The administrative law judge found that Dr. Kolanko's opinion was equivocal, undocumented, and unreasoned, explaining that:

Dr. Kolanko considered the contribution of pneumoconiosis to the miner's death as only a possibility. His rationale was vague, based on cases of similar patients who received black lung benefits for what he stated were the effects of coal workers' pneumoconiosis on cardiovascular disease. Dr. Kolanko did not explain how and to what extent this particular miner's pneumoconiosis affected his cardiovascular disease and how and to what extent it would have played a role in the miner's death.

Decision and Order at 4. Discussing the contrary probative evidence, and observing that claimant did not offer a reasoned and documented medical opinion evidence linking the miner's pneumoconiosis to his death, as is required under Section 718.205(c), the administrative law judge concluded that the preponderance of the evidence established that the miner's death was not caused, contributed to, or hastened by coal workers' pneumoconiosis. Decision and Order at 4-5.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *White v. Director, OWCP*, 6 BLR 1-368, 1-370 (1983). The administrative law judge properly reviewed Dr. Kolanko's opinion, the only medical evidence supporting a link between pneumoconiosis and the miner's death and, notwithstanding Dr. Kolanko's status as the miner's treating physician, the administrative law judge reasonably found that his opinion relating the miner's pneumoconiosis to the miner's death was equivocal, his rationale was vague, and

his opinion was undocumented and unreasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 4. Consequently, because it is based upon substantial evidence, the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) is affirmed.

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

JUDITH S. BOGGS
Administrative Appeals Judge