

BRB No. 07-0490 BLA

E.R.E.)
(Widow of C.C.E.))
)
Claimant-Petitioner)
)
v.)
)
STEVAN COAL COMPANY) DATE ISSUED: 02/28/2008
)
and)
)
WEST VIRGINIA CWP FUND)
)
Employer/Carrier-)
Respondents)
)
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order Denying Benefits (2005-BLA-5734) of Administrative Law Judge Richard A. Morgan on a survivor's claim filed on May 5, 2004 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-seven years of qualifying coal mine employment, and determined that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find that the evidence of record was sufficient to establish that the miner had pneumoconiosis and that pneumoconiosis was a substantially contributing cause of the miner's death at Sections 718.202(a)(4), 718.205(c). Claimant specifically argues that the administrative law judge erred in failing to assign probative weight to the opinion of the miner's treating physician, Dr. Sells.¹ Employer responds, urging that the Board affirm the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

¹ We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, as well as his finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² The law of the United States Court of Appeals for the Fourth Circuit is applicable as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Claimant's argument that the administrative law judge improperly weighed the opinion of the miner's treating physician, Dr. Sells, is without merit and essentially amounts to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR at 1-113. A review of the record³ indicates that, contrary to claimant's assertion, the administrative law judge adequately considered the opinion of Dr. Sells, and rationally found the opinion "both poorly documented and poorly reasoned" as the physician failed to identify any underlying support for his diagnosis of pneumoconiosis, and did not explain how pneumoconiosis contributed to or hastened the miner's death from heart disease.⁴ Decision and Order at 12; Director's Exhibit 15; *see Clark v. Kast Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, contrary to claimant's assertion, Dr. Sells's status as claimant's treating physician does not afford his properly discredited conclusions any additional weight. *See* 20 C.F.R. §718.104(d)(5); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Moreover, as the record contains no objective evidence indicating that the miner had pneumoconiosis, and the remaining medical opinions of Drs. Renn and Rosenberg neither diagnosed pneumoconiosis nor linked the condition to the miner's death, the administrative law judge rationally determined that claimant failed to establish that the miner suffered from pneumoconiosis pursuant to Section 718.202(a)(4), or that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Decision and Order at 14-15; 20 C.F.R. §718.205(c)(4);

³ The record contains two CT scans interpreted as negative for pneumoconiosis; the medical opinions of Drs. Sells, Renn, and Rosenberg; the miner's death certificate listing coronary artery disease as the immediate cause of death and coronary artery occlusion/myocardial ischemia and cardiac arrhythmia as contributory causes; and hospitalization records containing multiple x-rays that were not classified as positive for pneumoconiosis. An autopsy was not performed.

⁴ Dr. Sells's opinion is a one-page, five-sentence letter sent to the Department of Labor, stating in relevant part:

I think that [the miner's] black lung had a relevant cause in pertaining to his death and secondary to his heart condition. This was not put on his death certificate, for the death certificate was filled out by the ER physician, who was unaware of all the problems that he had been facing. I had been taking care of [the miner] while he was in the nursing home for the past 15 months and do know that he had been suffering from black lung for a significant number of years.

Director's Exhibit 15.

Neeley, 11 BLR at 1-86. Consequently, we affirm the administrative law judge's denial of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge