

BRB No. 09-0354 BLA

GEORGIA ANN WALTON)
(Widow of ALLEN WALTON, SR.))
)
Claimant-Respondent)
)
v.)
)
PEABODY COAL COMPANY) DATE ISSUED: 02/26/2010
)
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 - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (08-BLA-5187) of Administrative Law Judge Daniel F. Solomon rendered on a survivor's claim¹ 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge initially credited the parties'

¹ Claimant, Georgia Ann Walton, is the surviving spouse of the miner, who died on October 25, 2006. Director's Exhibit 9. Claimant filed her survivor's claim for benefits on November 20, 2006. Director's Exhibit 3.

stipulations, that the miner worked in qualifying coal mine employment for at least twenty-one years and that the miner suffered from simple pneumoconiosis arising out of coal mine employment. Next, the administrative law judge determined that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded, commencing as of October 1, 2006.

On appeal, employer asserts that it stipulated only to the presence of clinical pneumoconiosis, and that the administrative law judge erred in failing to make an explicit finding as to whether the miner had legal pneumoconiosis, as defined in 20 C.F.R. §718.201, before determining the cause of the miner's death. Employer also argues that, even if legal pneumoconiosis were established, the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), (5). In response, claimant urges affirmance of the administrative law judge's award of benefits, and maintains that employer stipulated to the existence of both clinical and legal pneumoconiosis, as established in the living miner's claim. The Director, Office of Workers' Compensation Programs, has filed a letter indicating his intention not to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law,² they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where the death was caused by complications of pneumoconiosis, or where the irrebuttable presumption of death due to pneumoconiosis is applicable. 20 C.F.R. §718.205(c)(1), (2), and (3). 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock*

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment occurred in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Creek Mining Co., 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

In evaluating the evidence relevant to the cause of the miner's death at Section 718.205(c), the administrative law judge determined that the hospital records reflected that the miner developed a blood clot and/or emboli on the day of his death, leading to a fatal heart attack.³ Decision and Order at 7; Director's Exhibits 9, 12; Claimant's Exhibits 2, 3. On the discharge summary, Dr. Simpao, the miner's attending physician, indicated that the miner "developed myocardial infarction," and expired "from acute coronary artery occlusion with acute respiratory failure from pulmonary emboli, chronic obstructive pulmonary disease and angitis." Director's Exhibit 12; Claimant's Exhibit 2. At his deposition, Dr. Simpao testified that the miner had long-standing, end stage heart and lung problems, and suffered cardiopulmonary collapse from the pulmonary emboli. Dr. Simpao concluded that pneumoconiosis compromised the miner's heart condition and hastened death because "his condition is so wore out that anything could -- just a little bit of blockage there could cause you to die." Claimant's Exhibit 3 at 21-22. Drs. Fino, Caffrey and Rasmussen reviewed the medical records and, although they agreed that the miner suffered significant lung disease, Drs. Fino and Caffrey opined that the miner's death was unrelated to pneumoconiosis and that he could not have survived the terminal event even if his respiratory system were normal, whereas Dr. Rasmussen opined that pneumoconiosis hastened death because the miner's severe lung disease, superimposed on his heart condition, reduced his chances of survival and his life expectancy. Decision and Order at 6-7; Director's Exhibits 13, 14; Claimant's Exhibit 1.

The administrative law judge reviewed Dr. Simpao's opinion pursuant to the factors set forth at 20 C.F.R. §718.104(d), and declined to accord the opinion controlling weight, but concluded that it supported the opinion of Dr. Rasmussen. The administrative law judge further determined that Dr. Simpao's opinion documented that the miner was worn out, consistent with the observation at 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000), that persons weakened by pneumoconiosis may expire more quickly from other diseases. Decision and Order at 8. Despite acknowledging that Dr. Rasmussen agreed it was possible that the miner would have died when he did from a clot or heart attack, even with normal lungs, the administrative law judge credited Dr.

³ The miner's medical records also document that he suffered from coronary artery disease for over twenty years prior to his death, and underwent bypass surgery in 1983; had two coronary artery bypass grafts placed in 1992; had a pacemaker implant in 1993; sustained at least two myocardial infarctions prior to his hospitalization in October 2006; and suffered severe anemia, ischemic cardiomyopathy with unstable angina, congestive heart failure, chronic atrial fibrillation and hypotension. Claimant's Exhibit 2.

Rasmussen’s opinion as well-reasoned and the “most rational,” noting that “it is rational that the Miner had a weakened condition caused by pneumoconiosis as described by Dr. Rasmussen.” Decision and Order at 9. Citing *Griffith* and *Brown* for the proposition that pneumoconiosis is a substantially contributing cause or factor leading to the miner’s death if it serves to hasten that death in any way, the administrative law judge found that claimant satisfied her burden at Section 718.205(c). However, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has clarified that a claimant must prove that pneumoconiosis has hastened death by a “specifically defined process that reduces the miner’s life by an estimable time;” the basis for finding that pneumoconiosis contributed to a miner’s death may not be simply that the disease made a miner weaker and, thus, less resistant to some other trauma that directly caused the death. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

Subsequent to the issuance of the administrative law judge’s Decision and Order in this case, the Sixth Circuit issued its decision in *Conley v. National Mines Corp.*, --- F.3d ---, No. 09-3039 (6th Cir. Feb. 12, 2010). In *Conley*, the Sixth Circuit court applied *Williams* in reviewing the sufficiency of a medical opinion to support a finding of death due to pneumoconiosis at Section 718.205(c). The court concluded that the opinion of Dr. Potter, that legal pneumoconiosis hastened death from lung cancer by destroying alveolar sacs and reducing the miner’s respiratory reserve, thereby decreasing his physical resistance to the effects of his terminal condition, was conclusory, unsupported, and insufficient to support such a finding, noting that:

[W]e need not decide today whether a medical opinion may suffice under [*Williams*] without making some range-of-time estimate in describing the “specifically defined process” by which legal pneumoconiosis sped the demise of an individual already suffering from a deadly illness, because the issue is not presented. Here, Dr. Potter’s opinion fell well short of “specifically defin[ing]” the process by which pneumoconiosis hastened [the miner’s] death. As stated in [*Williams*], “[o]ne can always claim ... that if pneumoconiosis makes someone weaker, it makes them less resistant to some other trauma.” 338 F.3d at 517. Dr. Potter’s opinion, like that of the physician in [*Williams*], even if medically true, is legally inadequate to support his conclusion that legal pneumoconiosis hastened [the miner’s] death.

Conley, slip op. at 10-11. Accordingly, the court affirmed the Board’s decision reversing the administrative law judge’s award of benefits.

In the case at bar, we agree with employer’s argument that the evidence of record is insufficient, as a matter of law, to support a finding of death due to pneumoconiosis at

Section 718.205(c) under *Conley* and *Williams*. Neither Dr. Simpao nor Dr. Rasmussen documented that the miner's blood clot/pulmonary emboli and myocardial infarction were caused by legal pneumoconiosis, nor did either provide a range-of-time estimate of the miner's reduced life expectancy as a result of legal pneumoconiosis. Further, at his deposition, Dr. Rasmussen admitted that there were no studies accepted by the medical profession that show that exposure to coal dust causes coronary artery disease, Claimant's Exhibit 1 at 25; that pulmonary emboli can be a fatal problem in a healthy person, Claimant's Exhibit 1 at 17, 35; that the miner likely would have died from another heart attack even with completely normal lungs, Claimant's Exhibit 1 at 18-20; and that, without an autopsy, he could not state to a reasonable degree of medical certainty whether the miner died from a heart attack, a pulmonary embolus or both, or whether the miner's "bad lungs" were a contributing factor in his death. Claimant's Exhibit 1 at 21, 23, 40. As there is no evidence of record sufficient to meet the standard set forth in *Williams*,⁴ we reverse the administrative law judge's award of benefits.⁵

⁴ The record also contains the miner's death certificate, listing the cause of death as cardiopulmonary collapse due to or as a consequence of chronic obstructive pulmonary disease with acute chronic respiratory failure, ischemic coronary artery disease with coronary artery bypass graft, cor pulmonale, congestive cardiomyopathies with thrombocytopenia, and hypotension. Director's Exhibit 9; Claimant's Exhibit 3. The administrative law judge found that, while the death certificate alone could not establish the cause of death in this case, it was probative because it was supported by Dr. Simpao's opinion. However, in light of the fact that the administrative law judge did not attribute "controlling weight" to Dr. Simpao's opinion, which also is insufficient to establish that pneumoconiosis hastened the miner's death, the death certificate, standing alone, cannot establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). See *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Decision and Order at 8.

⁵ Because we hold that the evidence of record is insufficient as a matter of law to establish that pneumoconiosis hastened the miner's death, a requisite element of entitlement in a survivor's claim, see *Trumbo*, 17 BLR at 1-87, we need not address employer's argument concerning legal pneumoconiosis at Section 718.202(a).

Accordingly, the Decision and Order - Award of Benefits of the administrative law judge is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge