

BRB No. 09-0389 BLA

CLAUDIA HILL)
(Widow of EDWIN T. HILL))
)
Claimant-Respondent)
)
v.)
)
ARCH ON THE GREEN, INCORPORATED)
)
and)
)
LIBERTY MUTUAL INSURANCE) DATE ISSUED: 02/04/2010
COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand Award of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Award of Benefits (03-BLA-6477) of Administrative Law Judge Joseph E. Kane 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). This case is before the Board for the second time. In the initial decision, the administrative law judge credited the miner with 10.37 years of coal mine employment,¹ and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the award of benefits and remanded the case for the administrative law judge to initially address whether employer was entitled to respond to Dr. Houser's opinion, pursuant to 20 C.F.R. §725.456(b), since claimant submitted Dr. Houser's report just prior to the twenty-day deadline for the timely submission of evidence. *C.L.H. [Hill] v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA (Oct. 31, 2007)(unpub.). In the interest of judicial economy, the Board addressed, where possible, employer's arguments on the merits of entitlement. The Board rejected employer's allegations of error, and affirmed the administrative law judge's finding that the existence of clinical pneumoconiosis² was established by both the x-ray and autopsy evidence pursuant to 20 C.F.R. §718.202(a)(1),(2).³ The Board did not address employer's arguments regarding the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), as the evidentiary record was not complete. The Board, therefore, directed the administrative law judge, on remand, to consider whether employer was entitled to further evidentiary

¹ The record indicates that the miner's last coal mine employment was in Illinois. Director's Exhibits 3, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

³ As Section 718.202(a) provides alternative methods of establishing the existence of pneumoconiosis, in view of the Board's affirmance of the findings that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1),(2), the Board declined to address employer's challenges to the administrative law judge's finding that pneumoconiosis was established by the medical opinion evidence at Section 718.202(a)(4). *C.L.H. [Hill] v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA slip op. at 9 n.5 (Oct. 31, 2007)(unpub.).

development pursuant to 20 C.F.R. §725.456(b). If the record was found to be complete, the Board instructed the administrative law judge to weigh the evidence of record as to whether pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c), to explain his reasons for finding the physicians' opinions to be reasoned and documented, and to provide the bases for his credibility determinations. *Hill*, slip op. at 10.

On remand, by order dated May 16, 2008, the administrative law judge provided employer with 120 days in which to submit evidence in response to Dr. Houser's opinion. Employer did not submit any additional evidence.

In a Decision and Order on Remand issued on January 22, 2009, the administrative law judge initially noted that, although the Board affirmed his finding that clinical pneumoconiosis was established, he found it necessary to determine whether the medical opinion evidence established that the miner also suffered from legal pneumoconiosis.⁴ Decision and Order on Remand at 7. The administrative law judge therefore reconsidered the medical opinions on that issue, pursuant to 20 C.F.R. §718.202(a)(4), and found that the better reasoned medical opinion evidence established that the miner had legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due in part to coal mine dust exposure. The administrative law judge further found that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence in determining that claimant established the existence of legal pneumoconiosis and that the miner's death was due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal. Additionally, claimant's counsel has filed a fee petition for services rendered in the prior 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 by 30

⁴ Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor’s benefits, claimant must prove 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). In a survivor’s claim 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, if pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, if death was caused by complications of pneumoconiosis, or if the irrebuttable presumption related to complicated pneumoconiosis, provided 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. 20 C.F.R. §718.205(c)(5); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to 20 C.F.R. §718.202(a)(4),⁵ the administrative law judge considered the opinions of Drs. Houser, Fino, and Jarboe, each of whom is Board-certified in Internal Medicine and Pulmonary Disease. Dr. Houser reviewed the medical evidence of record and opined that, in addition to clinical coal workers’ pneumoconiosis, the miner had emphysema and chronic bronchitis with associated obstructive airway disease due, at least in part, to his inhalation of coal and rock dust during his coal mine employment.⁶ Claimant’s Exhibit 5 at 3. Drs. Fino and Jarboe reviewed the medical evidence of record and opined that the miner did not have clinical pneumoconiosis, and that his disabling emphysema and chronic bronchitis were due solely to smoking. Director’s Exhibit 13; Employer’s Exhibits 1, 3, 4.

The administrative law judge found Dr. Houser’s opinion diagnosing legal pneumoconiosis to be “thoroughly documented, [and] well-reasoned,” noting that Dr. Houser “supported his opinion with medical studies and the [m]iner’s clinical data.” Decision and Order on Remand at 9. The administrative law judge further found that Dr.

⁵ We will address employer’s challenges to the administrative law judge’s finding of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), as it is relevant to the administrative law judge’s finding that pneumoconiosis hastened the miner’s death, pursuant to 20 C.F.R. §718.205(c).

⁶ Dr. Houser referred to the emphysema and chronic bronchitis, collectively, as “chronic obstructive pulmonary disease” (COPD). Claimant’s Exhibit 5 at 4.

Houser's opinion was "thoroughly detailed," and was consistent with the findings of the Department of Labor (DOL) regarding the medical studies concerning coal mine dust and obstructive impairments. *Id.* The administrative law judge therefore accorded "substantial weight" to Dr. Houser's opinion. *Id.*

By contrast, the administrative law judge found that the opinions of Drs. Fino and Jarboe were poorly reasoned. He found their view that the absence of clinical pneumoconiosis on the miner's autopsy suggested that his emphysema and chronic bronchitis were unrelated to coal dust, to be contradicted by the autopsy and x-ray evidence establishing that the miner had clinical pneumoconiosis. Further, the administrative law judge found that Dr. Fino did not adequately explain his opinion that the miner's "clinical course" was more consistent with a smoking related disease. Additionally, the administrative law judge found Dr. Jarboe's reasoning that a purely obstructive impairment is not seen with coal dust inhalation, to be inconsistent with DOL's findings concerning the medical science that coal mine dust can cause obstructive impairments. Based on Dr. Houser's opinion, the administrative law judge's found that "the miner suffered from legal pneumoconiosis as well as clinical pneumoconiosis." Decision and Order on Remand at 10.

Employer contends that the administrative law judge erred in relying on Dr. Houser's opinion, which, employer asserts, is unreasoned. Employer's Brief at 11-12. Employer essentially asks the Board to reweigh the medical evidence, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. In this case, substantial evidence supports the administrative law judge's finding that Dr. Houser based his diagnosis of COPD due in part to coal dust exposure on the miner's smoking and coal mine employment histories, his medical treatment records, the report of his autopsy, as well as his pulmonary function studies and blood gas studies. Claimant's Exhibit 5. Further, substantial evidence supports the administrative law judge's finding that Dr. Houser supported his opinion with references to both relevant medical literature and the miner's specific clinical data. *Id.* Thus, contrary to employer's contention, the administrative law judge permissibly found that Dr. Houser's opinion was well-reasoned and documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Employer argues that the administrative law judge failed to provide an adequate rationale for discrediting the contrary opinions of Drs. Jarboe and Fino. We disagree.

Contrary to employer's contention, the administrative law judge reasonably discounted the view of Drs. Fino and Jarboe that the lack of pathological changes of coal workers' pneumoconiosis in the miner's lung tissue supported that his emphysema and chronic bronchitis were unrelated to coal dust, because the x-ray and autopsy evidence established that the miner had clinical pneumoconiosis. *See Stalcup v. Peabody Coal*

Co., 477 F.3d 482, 484, 22 BLR 2-35, 2-37, (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001). Further, the administrative law judge acted within his discretion as the fact-finder when he found that Dr. Fino did not adequately explain why the miner’s “clinical course” was more consistent with a smoking related disease than a disease related to coal mine dust exposure. Employer’s Exhibit 4 at 6; see *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 336, 22 BLR 2-581, 2-589 (7th Cir. 2002); *Clark*, 12 BLR at 1-155. Additionally, the administrative law judge permissibly discounted Dr. Jarboe’s opinion that a purely obstructive impairment is not seen with coal mine dust exposure, because it was inconsistent with the medical literature credited by DOL when it revised the definition of pneumoconiosis.⁷ See *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O. [Obush] v. Helen Mining Co.*, BLR, , BRB No. 08-0671 BLA (June 24, 2009). Whether a physician’s opinion is adequately reasoned and documented is committed to the discretion of the administrative law judge, see *Clark*, 12 BLR at 1-155, and substantial evidence supports the administrative law judge’s credibility determinations in this case. We therefore affirm the administrative law judge’s finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4).⁸

⁷ We reject employer’s assertion that the administrative law judge, in assessing the reasoning of the opinions, was prohibited from referring to the Department of Labor’s findings in the preamble to the revised regulations, concerning the medical literature on coal mine dust and obstruction. See *J.O. [Obush] v. Helen Mining Co.*, BLR, , BRB No. 08-0671 BLA (June 24, 2009). Moreover, we reject employer’s argument that, in assessing the quality of the reasoning of the medical opinions, the administrative law judge shifted the burden of proof to employer. The administrative law judge maintained the burden on claimant to establish the existence of legal pneumoconiosis by a preponderance of the evidence, and he found that Dr. Houser’s well-reasoned opinion outweighed those of Drs. Fino and Jarboe. Decision and Order on Remand at 3, 5, 7, 10.

⁸ After determining that the existence of legal pneumoconiosis was established, the administrative law judge considered whether the miner’s pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §718.203. The administrative law judge found that employer did not rebut the presumption, set forth at 20 C.F.R. §718.203(b), that the miner’s clinical pneumoconiosis arose out of coal mine employment. That finding is affirmed, as it is unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). With respect to the miner’s legal pneumoconiosis, the administrative law judge correctly noted that no separate inquiry as to its cause was required under 20 C.F.R. §718.203(b). See *Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

Employer next contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer's contention lacks merit. The administrative law judge permissibly accorded the opinions of Drs. Jarboe and Fino less weight on the issue of whether pneumoconiosis hastened the miner's death due to bronchopneumonia and chronic lung disease, as they did not diagnose either clinical or legal pneumoconiosis, contrary to the administrative law judge's finding that the miner had both diseases. *See Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 890, 22 BLR 2-514, 2-528 (7th Cir. 2002); *Peabody Coal Co. v. Shonk*, 906 F.2d 264, 277 (7th Cir. 1990); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). In contrast, the administrative law judge permissibly relied on Dr. Houser's well-reasoned opinion that the miner's "emphysema, chronic bronchitis, coal workers' pneumoconiosis, and terminal pneumonia were the major factors contributing to his death."⁹ Claimant's Exhibit 5 at 4; *see Stalcup*, 477 F.3d at 484, 22 BLR at 2-37; *Clark*, 12 BLR at 1-155. As substantial evidence supports the administrative law judge's finding that pneumoconiosis hastened the miner's death, pursuant to 20 C.F.R. §718.205(c), the finding is affirmed. We therefore affirm the award of survivor's benefits.

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in the prior appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of \$1,771.00 for 8.05 hours of legal services at an hourly rate of \$220.00. No objections to the fee petition have been received. The Board finds the requested fee to be reasonable in light of the services performed and approves a fee of \$1,771.00, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

⁹ Dr. Houser explained that the miner's coal workers' pneumoconiosis and COPD caused severe airway obstruction and hypoxemia that were totally disabling. Claimant's Exhibit 5 at 4. In opining that COPD and coal workers' pneumoconiosis were "major factors" contributing to the miner's death, Dr. Houser stated that:

Individuals who have coal workers' pneumoconiosis and/or [COPD] (chronic bronchitis and/or emphysema) have an increased morbidity and mortality associated with acute respiratory events such as acute bronchitis and pneumonia. Mr. Hill had at least two prior episodes of respiratory failure, one of which required endotracheal intubation and ventilatory assistance.

Id.

Accordingly, the administrative law judge's Decision and Order on Remand Award of Benefits is affirmed, and claimant's counsel is awarded a fee of \$1,771.00.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge