

BRB No. 02-0572 BLA

RUTH B. HESS)
(Widow of WILLIAM E. HESS))
)
Claimant-Petitioner)
)
v.)
)
DOMINION COAL CORPORATION) DATE ISSUED:
)
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Ruth B. Hess, Richlands, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, the miner's widow,¹ appeals, without the assistance of counsel,² the

¹The miner's death certificate indicates that he died on April 30, 1999 due to cardiopulmonary arrest due to massive myocardial infarction. Director's Exhibit 4.

²Ron Carson, Black Lung Program Director, of Stone Mountain Health Services in Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's Decision and Order. The Board, in a letter dated May 17, 2002, indicated that it would consider claimant to be representing herself on appeal.

Decision and Order Denying Benefits (01-BLA-0617) of Administrative Law Judge Edward Terhune Miller on a survivor's claim³ filed pursuant to the provisions of Title IV of the

Shelton v. Claude V. Keen Trucking Co., 19 BLR 1-88 (1995)(Order.)

³Claimant filed the instant claim on July 28, 1999. Director's Exhibit 1. The district director denied the claim on October 27, 1999 based on claimant's failure to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 26. On September 11, 2000, claimant submitted additional evidence and requested modification of the district director's denial. Director's Exhibit 33. The district director issued a Proposed Decision and Order Denying Request for Modification on December 12, 2000, determining that claimant failed to establish modification under 20 C.F.R. §725.310 (2000). By letter dated December 15, 2000, Ron Carson advised the district director that claimant disagreed with the district director's determination and requested a formal hearing. Director's Exhibit 36. Subsequently, by letter dated August 6, 2001, Ron Carson advised the administrative law judge that claimant waived her right to testify and requested a decision on the record. By letter dated August 9, 2001, employer indicated that it had no objection to a decision on the record. The administrative law judge granted claimant's request by Order dated August 30, 2001. *See* 20 C.F.R. §725.461(a). The administrative

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).⁴ The administrative law judge credited the miner with at least twenty-four years of coal mine employment. Considering all the evidence of record on the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found that the autopsy evidence established the existence of simple coal workers' pneumoconiosis under 20 C.F.R. §718.202(a)(2), which arose out of the miner's coal mine employment under 20 C.F.R. §718.203(b). The administrative law judge further found that the medical evidence established that the miner's simple coal workers' pneumoconiosis neither caused, contributed to, nor hastened the miner's death, which was due to cardiopulmonary arrest and massive myocardial infarction. The administrative law judge thus found that claimant failed to establish a mistake in a determination of fact under 20 C.F.R. §725.310 (2000) in the district director's denial of the claim, and denied benefits.

In response to claimant's appeal, employer contends that the administrative law judge properly found that the miner's simple coal workers' pneumoconiosis "in no way hastened or contributed to the miner's death, consistent with the prior denial." Employer's Brief at 7. Employer urges the Board to affirm the administrative law judge's denial of benefits based on claimant's failure to establish that the miner's death was due to pneumoconiosis. In a footnote, employer argues that the administrative law judge should have determined whether reopening the record on modification would serve "the interest of justice" in this case. Employer's Brief at 6 n.3. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative

law judge issued a decision on the record in this case.

⁴The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Pursuant to the revised regulation at 20 C.F.R. §718.205(c)(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)(5).⁵

⁵The record contains no evidence of complicated pneumoconiosis and is, thus, insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304. Consequently, claimant cannot establish her entitlement to benefits pursuant to 20 C.F.R. §718.205(c)(3).

We affirm the administrative law judge's finding that the evidence of record fails to establish that the miner's simple coal workers' pneumoconiosis was a cause or factor in the miner's death as it is rational, supported by substantial evidence, and in accordance with law.⁶ In the instant case, the evidence relevant to the cause of the miner's death is as follows.⁷

Dr. Javed treated the miner during his final hospitalization from April 25, 1999 to April 29, 1999. In his ensuing report dated May 14, 1999, under "Final Discharge Diagnosis," Dr. Javed listed upper back pain secondary to arthritis of the dorsal spine; atherosclerotic coronary artery disease with stable angina pectoris and sever [sic] aortic stenosis; hypertension and pneumoconiosis. Director's Exhibit 15.

The miner's death certificate indicates that the miner died on April 30, 1999 due to cardiopulmonary arrest due to massive myocardial infarction. Director's Exhibit 4.

Dr. Larry Joyce conducted the autopsy, which was limited to the miner's lungs. In his autopsy report, Dr. Joyce diagnosed: coal workers' pneumoconiosis, coal macules, diffuse and rare silicotic nodules; diffuse emphysematous changes; multiple foci of interstitial fibrosis; fibrous pleural adhesions, extensive bilateral; pulmonary macrophages, multiple, within alveoli containing hemosiderin, consistent with congestive heart failure; pulmonary hypertension; chronic tracheobronchitis, mild; negative for malignancy. Director's Exhibit 5. Dr. Joyce opined, "Death is attributed to cardiopulmonary arrest." *Id.*

⁶Employer alleges no error in the administrative law judge's determination that claimant established the existence of pneumoconiosis which arose out of the miner's coal mine employment. *See* 20 C.F.R. §§718.202, 718.203.

⁷The administrative law judge properly determined that the medical reports rendered by Dr. Javed from November 30, 1995 through February 23, 1999, which claimant submitted to the district director in support of her request for modification, document the miner's treatment for, *inter alia*, pneumoconiosis, but do not pertain to the cause of the miner's death. *See* Director's Exhibit 33.

Dr. Naeye reviewed the pathological and medical evidence. In his report dated October 17, 1999, Dr. Naeye stated:

This man had only 2 micronodular lesions of possible silicotic origin in 17 pieces of lung tissue that may have qualified for the diagnosis of very mild simple coal workers' pneumoconiosis. They certainly were too small and far too few in number to have produced any abnormalities in lung function, caused any disability[,] contributed in any way to his death. He would have died at the same time and in the same way if he had never mined coal. Death was due to a combination of very serious cardiac disorders, any one of which could have led to death. These are severe aortic valvular stenosis, severe arteriosclerotic coronary artery disease, myocardial infarcts, and damage to the microcirculation of his heart by hypertension and cigarette smoking.

Director's Exhibit 6.

Dr. Tomashefski reviewed the miner's medical records, including the pathological evidence. Dr. Tomashefski did not identify coal macules or silicotic nodules and opined that the miner had neither coal workers' pneumoconiosis nor pulmonary silicosis. Director's Exhibit 39. He further opined that the miner's diffuse pulmonary fibrosis was not caused by coal dust or silica exposure. With regard to the cause of the miner's death, Dr. Tomashefski stated:

Since the autopsy is limited to his lungs, I cannot determine anatomically the cause of his death. Based upon my review of the medical records, and the secondary changes of chronic congestive heart failure in Mr. Hess'[s] lung tissue, however, it is reasonable to assume that his sudden death was cardiac in nature. Both aortic stenosis and atherosclerotic coronary artery disease are associated with sudden cardiac death. Since it is my opinion that Mr. Hess did not have coal workers' pneumoconiosis, it follows that coal workers' pneumoconiosis did not cause or contribute to his death, nor was it a cause of respiratory impairment or exercise limitation.

Neither coal mine employment nor coal dust exposure is a cause of atherosclerotic cardiovascular disease, aortic stenosis or cerebral stroke. It is therefore my opinion that Mr. Hess's death was unrelated to his coal mining occupation.

Director's Exhibit 39.

Dr. Castle reviewed the medical and pathological evidence. In his report dated July

12, 2001, Dr. Castle opined that the miner “probably did have pathologic evidence of very minimal simple coal workers’ pneumoconiosis.” Employer’s Exhibit 1. With regard to the cause of the miner’s death, Dr. Castle stated:

It is my opinion with a reasonable degree of medical certainty that Mr. Hess died as a result of a sudden, acute myocardial infarction due to coronary artery disease and possibly contributed to by aortic stenosis. It is my opinion that coal workers’ pneumoconiosis did not cause, contribute to, or hasten his death in any way. It is my opinion with a reasonable degree of medical certainty that he would have died as and he did regardless of his occupational history and regardless of the finding of simple coal workers’ pneumoconiosis pathologically.

Id.

The administrative law judge reviewed all the evidence relevant to the cause of the miner’s death and properly found that it does not establish that the miner’s simple coal workers’ pneumoconiosis was a cause or factor in the miner’s death. Specifically, substantial evidence supports the administrative law judge’s finding that “the preponderance of the evidence overwhelmingly establishes that the Miner had diffuse coal workers’ pneumoconiosis which neither caused, contributed to, or hastened the Miner’s death due to cardiopulmonary arrest and massive myocardial infarction.” Decision and Order at 7. The administrative law judge initially properly found that the death certificate does not mention pneumoconiosis “in any form” and that the autopsy prosector, Dr. Joyce, “attributed the miner’s death solely to cardiopulmonary arrest, and without reference to pneumoconiosis.” Decision and Order at 6; *see* Director’s Exhibits 4, 5. The administrative law judge further properly determined that the consulting opinions of Drs. Naeye, Tomaszefski and Castle do not support a finding that the miner’s death was due to pneumoconiosis because these physicians do not attribute the miner’s death to pneumoconiosis or coal mine dust exposure. 20 C.F.R. §718.205(c); Director’s Exhibits 6, 39, Employer’s Exhibit 1; Decision and Order at 4-7.

Based on the foregoing, we hold that substantial evidence supports the administrative law judge’s determination that the record evidence fails to establish that the miner’s simple coal workers’ pneumoconiosis was a cause or factor in the miner’s death. We hold, therefore, that claimant has not met her burden to establish that the miner’s death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, we affirm the administrative law judge’s denial of survivor’s benefits and the claim.⁸

⁸Inasmuch as a finding of entitlement is precluded in this case, we need not address the administrative law judge’s finding that claimant failed to establish modification of the

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

PETER A. GABAUER, Jr. Administrative
Appeals Judge

district director's denial of the claim. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). Further, employer's argument that the administrative law judge erred in not determining whether reopening the record on modification would serve "the interest of justice," *see* Employer's Brief at 6 n.3, is rendered moot by our decision to affirm the administrative law judge's denial of benefits on the merits of the claim.