

BRB No. 08-0333 BLA

N.C.)
(Widow of E.C.))
)
Claimant-Petitioner)
)
v.)
)
B & G CONSTRUCTION COMPANY,)
INCORPORATED) DATE ISSUED: 01/29/2009
)
and)
)
STATE WORKERS' INSURANCE FUND)
(PA))
)
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 Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

N.C., Worthington, Pennsylvania, *pro se*.

Edward K. Dixon (Zimmer Kunz, P.L.L.C.), Pittsburgh, Pennsylvania, for
employer/carrier.

Emily Goldberg-Kraft (Carol A. DeDeo, Deputy Solicitor of Labor; Rae
Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge,
Counsel for Administrative Litigation and Legal Advice), Washington,
D.C., for the Director, Office of Workers' Compensation Programs, United
States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals
Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel,² the Decision and Order – Denying Benefits (2007-BLA-5499) of Administrative Law Judge Daniel L. Leland 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).³ The administrative law judge accepted the parties’ stipulation that the miner suffered from pneumoconiosis arising out of coal mine employment. The administrative law judge, however, found that the evidence was insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner’s death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to credit the opinion of the miner’s treating physician, Dr. Evanko, that the miner’s death was hastened by pneumoconiosis. Employer responds to claimant’s appeal, urging affirmance of the denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has also filed a letter brief, which asserts that the administrative law judge erred in crediting Dr. Fino’s opinion based solely on his qualifications, without first addressing whether Dr. Fino provided a reasoned and documented opinion as to whether the miner’s death was hastened by pneumoconiosis. Director’s Letter Brief at 3. In addition, the Director contends that the administrative law judge erred in failing to discuss the miner’s hospital treatment records and Dr. Evanko’s curriculum vitae. *Id.* The Director, therefore, requests that the Board vacate the administrative law judge’s

¹ Claimant is the widow of the miner, who died on April 4, 2005. Director’s Exhibit 10.

² Lynda Glagola, the Program Director of Lungs at Work, requested the Board’s review of the administrative law judge’s Decision and Order – Denying Benefits, and enclosed claimant’s letter contending that the administrative law judge erred in crediting Dr. Fino’s opinion over that of the miner’s treating physician.

³ The miner filed an application for benefits on August 11, 1995, which was denied by the administrative law judge in a Decision and Order issued on November 25, 1997. Director’s Exhibit 1. The miner subsequently filed a request for modification and was awarded benefits by the district director on April 19, 2000. *Id.* Following the miner’s death, claimant filed a survivor’s claim on February 16, 2006. Director’s Exhibit 2. The district director issued a Proposed Decision and Order awarding benefits on November 22, 2006. Director’s Exhibit 23. Employer requested a hearing, which was held on November 7, 2007. Thereafter, the administrative law judge issued his Decision and Order – Denying Benefits on January 16, 2008, which is the subject of this appeal.

findings pursuant to Section 718.205(c) and remand the case for further consideration. *Id.* at 4.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated 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 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* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors’ claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner’s death, or was a substantially contributing cause or factor leading to the miner’s death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In this case, there is no autopsy or biopsy evidence of record. The miner’s death certificate lists the immediate cause of the miner’s death as respiratory failure due to chronic obstructive pulmonary disease (COPD), myelodysplastic syndrome and coronary artery disease. Director’s Exhibit 10. In a letter dated September 21, 2005, Dr. Evanko indicated that the miner had been under his care for ten years for the treatment of pneumoconiosis. Director’s Exhibit 11. Dr. Evanko stated:

Despite our treatment, [the miner’s] pulmonary condition continued to progress with evidence of both progressive COPD and pulmonary fibrosis, which we feel is a direct result of the coal mine dust exposure. It is, therefore, my professional medical opinion that coal workers’ pneumoconiosis contributed to and hastened [the miner’s] death. Although his ultimate cause of death was myelodysplasia, it is my opinion that his coal workers’ pneumoconiosis was a contributing factor to his death.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner’s coal mine employment was in Pennsylvania. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 4.

[A]lthough the pneumoconiosis was not the direct cause of his death, I feel it was a significant contributory factor as it put an added stress on his heart aggravating the co-morbid heart disease. I feel it also decreased his ability to recovery [sic] from his other medical problems. It is also my medical opinion that if [the miner] had not suffered from coal workers' pneumoconiosis, his life expectancy may have been prolonged.

Id.

Dr. Fino reviewed medical records and prepared a report dated September 17, 2007. Employer's Exhibit 1. Dr. Fino noted that he had examined the miner three times during his lifetime and diagnosed the miner with simple coal workers' pneumoconiosis and a restrictive ventilatory defect due to phrenic nerve paralysis. *Id.* Dr. Fino disputed the finding on the death certificate that the miner died of respiratory failure, noting that only the miner's earlier pulmonary function tests showed evidence of moderate obstruction, while his more recent tests, performed in 2003 and 2005, showed no evidence of obstruction. *Id.* He stated that any restrictive defect was secondary to phrenic nerve paralysis. *Id.* Dr. Fino did not specifically address the cause of the miner's death, noting only that the miner "had numerous medical problems, all of which could have taken his life whether or not he had any respiratory problems." *Id.* Dr. Fino concluded that "despite the abnormalities in the lung function studies, a review of the information clearly showed that there was no evidence that respiratory disease due to coal mine dust inhalation was a significant or hastening cause of death." *Id.*

In a letter dated October 31, 2007, Dr. Evanko indicated that the miner had been treated from 1992 through April 2005 for several chronic medical problems including hypertension, coronary artery disease, and pneumoconiosis. Claimant's Exhibit 1. He indicated that claimant was diagnosed in February 2004 with myelodysplasia, a type of bone marrow disease resulting in decreased red blood cell production in the bone marrow, which is characterized by chronic anemia and must be treated with "frequent blood transfusions." *Id.* Dr. Evanko indicated that he disagreed with Dr. Fino's conclusion that the miner's more recent pulmonary function studies showed no obstruction. *Id.* Dr. Evanko also disagreed that phrenic nerve paralysis had any impact on the pulmonary function results, noting that "because the [miner] had minimal change in total lung capacity, phrenic nerve paralysis could not affect [his] ability to adequately breathe in and breathe out." *Id.* Dr. Evanko offered the following explanation in his opinion that the miner's death from myelodysplasia was hastened by pneumoconiosis:

The red blood cells are responsible for carrying oxygen to the vital organs. Any anemia decreases the body's capacity to [carry] this oxygen to the vital organs. This is and can be complicated by any underlying lung disease that causes low oxygen levels in the blood we call hypoxemia. This is demonstrated by the [miner's] documented desaturation at night requiring

nocturnal oxygen. Therefore, although the myelodysplasia was the final cause of death . . . the underlying lung disease hastened and aggravated the course of the myelodysplasia.

Id.

Dr. Fino prepared a supplemental report on November 6, 2007, in response to Dr. Evanko's October 31, 2007 report. Employer's Exhibit 4. Dr. Fino reiterated that the miner's death was not related to respiratory failure, since there was only one episode of respiratory failure during the miner's final hospitalization:

What is being described is fluid overload to the lungs due to blood transfusions. A diuretic was administered to get rid of fluid, and the [miner] improved. It is certainly not consistent with a coal mine dust related pulmonary condition.

Id. Dr. Fino opined that the miner "would have died as and when he did due to his terminal conditions of subdural hematoma and myelodysplastic disease had he never stepped foot in the mines." *Id.*

In weighing the conflicting medical opinions at Section 718.205(c), the administrative law judge initially considered whether Dr. Evanko's opinion was entitled to controlling weight based on his status as the miner's treating physician. Decision and Order at 4. Taking into consideration the factors set forth at 20 C.F.R. §718.104(d), the administrative law judge noted that Dr. Evanko "never indicated the frequency of treatment or the type of testing and examinations he administered to the miner." *Id.* The administrative law judge, however, also noted that "[e]ven if [Dr. Evanko] had treated the miner frequently, primarily treated his respiratory impairment, and administered respiratory tests to the miner, I would nevertheless give his opinion less weight than the opinion of Dr. Fino." *Id.* The administrative law judge explained:

Dr. Fino is a board certified pulmonary specialist who has vast experience in treating patients for pulmonary impairments. [See Employer's Exhibit] 2. He has submitted reports and testified many times in black lung cases and his experience with pulmonary conditions, including coal workers' pneumoconiosis, can not be denied. The curriculum vitae of Dr. Evanko is not in the record, but he is apparently a family physician who has no board certification in pulmonary diseases and little experience in treating patients for pulmonary problems. He did not refer to any expertise he might have in treating patients for respiratory disease in general or pneumoconiosis in particular. His status as the miner's treating physician for over ten years, therefore[,] does not give his opinion controlling weight or more weight than the expert opinion of Dr. Fino. I therefore credit the expert and well reasoned opinion of Dr. Fino over the inexpert opinion of Dr. Evanko.

Id. at 4-5. The administrative law judge thus found that claimant failed to establish that the miner's death was caused, contributed to, or hastened by pneumoconiosis pursuant to Section 718.205(c).⁵ *Id.* at 5.

The Director asserts in this appeal that the administrative law judge erred in resolving the conflict in the medical opinions based solely on Dr. Fino's credentials. Director's Letter Brief at 3. The Director maintains that simply because Dr. Fino "advances a list of medical suspects that may have caused death [,] . . . the fact that the miner may have had other serious conditions[,] does not prove that he died only due to those conditions." *Id.*

The Director's argument has merit. Regardless of Dr. Fino's qualifications, his opinion may not be given controlling weight if it is not credible. *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). We agree with the Director that the administrative law judge erred in failing to specifically address whether Dr. Fino provided a reasoned and documented opinion on the issue of whether pneumoconiosis hastened the miner's death. *Id.*

Furthermore, we conclude that the administrative law judge erred in stating that Dr. Evanko's curriculum vitae was not part of the record, as it is located at Director's Exhibit 12. He also erred in failing to discuss the miner's medical treatment records from Allegheny Hospital and Butler Memorial Hospital, which indicate that the miner received treatment for COPD and episodes of acute respiratory distress. Director's Exhibits 12, 13. Thus, because the administrative law judge has failed to properly explain the bases for his credibility determinations, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), and he has failed to discuss relevant evidence in the record, we vacate the administrative law judge's finding that the evidence was insufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

On remand, the administrative law judge should specifically determine whether the physicians' opinions are reasoned and documented in light of the objective evidence and the miner's hospitalization records. The administrative law judge should address the

⁵ The administrative law judge correctly noted that the death certificate did not identify pneumoconiosis as a factor in the miner's death, and that standing alone, the death certificate is not a reasoned assessment of the cause of the miner's death. Decision and Order at 5; *see generally Lango v. Director, OWCP*, 104 F.3d 573, 577; 21 BLR 2-12, 2-21 (3d Cir. 1997); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Lango v. Director, OWCP*, 104 F.3d 573, 577; 21 BLR 2-12, 2-21 (3d Cir. 1997); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark*, 12 BLR at 1-155. The administrative law judge must resolve the conflict in the medical opinions and determine whether the evidence is sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c). In so doing, the administrative law judge must explain the basis for his credibility findings in accordance with the APA.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is vacated and the case is remanded to the administrative law judge to reconsider the evidence consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge