

BRB No. 08-0336 BLA

V.E.)
(Widow of H.E.))
)
Claimant-Petitioner)
)
v.)
)
SEWELL COAL COMPANY) DATE ISSUED: 01/16/2009
)
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Francesca Tan (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (07-BLA-5380) of Administrative Law Judge Janice K. Bullard denying benefits 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.

¹ Claimant is the surviving spouse of the miner, who died on February 12, 2006. Director's Exhibit 8. Claimant filed her application for survivor's benefits on April 7, 2006. Director's Exhibit 2.

Part 718, the administrative law judge found that the miner worked in qualifying coal mine employment for 35.14 years. Next, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4) and 718.203(b), but failed to establish that the miner's death was 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 credit the opinions of Drs. Trenbath and Kahn, that pneumoconiosis caused the miner's death pursuant to Section 718.205(c), over the opinions of Drs. Rosenberg and Castle, that the miner's death was caused by cardiac disease, not pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in claimant's appeal.²

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, 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, claimant must establish that the miner suffered from pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's

² We affirm the administrative law judge's findings that the miner worked in qualifying coal mine employment for 35.14 years and that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 6-13.

death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).³

Challenging the administrative law judge's weighing of the conflicting medical opinions of record at Section 718.205(c), claimant argues that the administrative law judge erred in discrediting the opinions of Drs. Trenbath and Kahn that pneumoconiosis contributed to death and erred in assigning greater weight to the contrary opinion of Drs. Rosenberg and Castle. Specifically, claimant argues that the administrative law judge erred in discounting Dr. Trenbath's death causation opinion as speculative and equivocal, because the doctor only found that the miner's pulmonary problems were "probably" due to coal workers' pneumoconiosis. Further, claimant argues that the administrative law judge erred in according diminished weight to Dr. Trenbath's opinion because he failed to discuss the effect of the miner's cigarette smoking history on his pulmonary condition, since the record shows that Dr. Trenbath was aware of the miner's significant smoking history. Claimant also contends that the administrative law judge erred in discounting Dr. Trenbath's opinion on the basis that the miner's treatment records did not contain a diagnosis of pneumoconiosis, *i.e.*, chronic obstructive pulmonary disease and interstitial fibrosis, when they did.

Contrary to claimant's argument, the administrative law judge permissibly discounted Dr. Trenbath's opinion as speculative and equivocal because Dr. Trenbath found that the miner's pulmonary problems were "probably" related to coal workers' pneumoconiosis. The administrative law judge noted that, given the extent of the evidence of the miner's other debilitating conditions and the fact that Dr. Trenbath was the miner's treating physician, he should have been able to render a more definitive opinion as to the cause of the miner's respiratory problems. The administrative law judge, therefore, permissibly discounted Dr. Trenbath's opinion regarding the cause of death as speculative and equivocal. *See* 20 C.F.R. §718.104(d)(5); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 15; Director's Exhibit 12. Likewise, contrary to claimant's contention, even if Dr. Trenbath was aware of the miner's lengthy smoking history, the administrative law judge could permissibly accord the opinion less weight because she found that the doctor did not adequately discuss the effect of smoking on the miner's pulmonary condition. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Further, contrary to claimant's contention, the administrative law judge was aware of the findings of chronic obstructive pulmonary disease and interstitial fibrosis in the miner's treatment record, but permissibly found that such evidence did not support

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

Dr. Trenbath's opinion because Dr. Trenbath did not sufficiently discuss the relationship that these conditions had on the miner's cardiac condition, which caused his ultimate demise. Moreover, contrary to claimant's contention, a diagnosis of interstitial fibrosis is not, standing alone, a diagnosis of pneumoconiosis under the Act. *See* 20 C.F.R. §718.201.⁴ We, therefore, affirm the administrative law judge's discounting of Dr. Trenbath's opinion for the reasons given. *Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 15.

Turning to the opinion of Dr. Kahn, claimant contends that even though the administrative law judge found it to be well-reasoned and well-documented, she failed to adequately explain why Dr. Kahn's opinion was worthy of less weight than the opinions of Drs. Rosenberg and Castle. Claimant contends that Dr. Kahn's opinion is entitled to greater weight than the opinions of Drs. Rosenberg and Castle because Dr. Kahn is a Board-certified pathologist, while Drs. Rosenberg and Castle are only pulmonologists.

The administrative law judge found Dr. Kahn's opinion entitled to "some weight" because Dr. Kahn is a Board-certified pathologist and his opinion was well-reasoned and well-documented, as it was based on consideration of the multiple conditions from which the miner suffered, including coronary artery disease, emphysema, pulmonary congestion, bronchopneumonia, and coal workers' pneumoconiosis. The administrative law judge was, however, persuaded by the contrary opinions of Drs. Rosenberg and Castle that the miner's cardiac condition was the cause of his death. Employer's Exhibits 2, 3. The administrative law judge credited the opinions of Drs. Rosenberg and Castle because the miner's treatment records, hospitalization records, x-ray interpretations, and CT scan reports did not show the presence of pneumoconiosis and the record did not show that the miner was being treated for pneumoconiosis. The administrative law judge also credited the opinions of Drs. Rosenberg and Castle because the record did not show that pneumoconiosis was a complicating factor in the cardiac condition that ultimately resulted in the miner's demise. Decision and Order at 16. Hence, the administrative law judge permissibly found the opinions of Drs. Rosenberg and Castle, Board-certified internists and pulmonologists, better reasoned than the opinion of Dr. Kahn, a Board-certified pathologist. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trumbo*, 17 BLR at 1-88-89; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Contrary to claimant's contention, the administrative law judge was not required to accord greater weight to the opinion of Dr. Kahn based on his credentials as a Board-

⁴ The miner's death certificate, signed by Dr. Trenbath, his treating physician, listed respiratory arrest related to cardiac conditions as the immediate cause of death. Chronic obstructive pulmonary disease and interstitial fibrosis were listed as other significant conditions contributing to death but not resulting in the underlying cause of death. Director's Exhibit 8.

certified pathologist, rather than to the opinions of Drs. Rosenberg and Castle, Board-certified pulmonologists. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

In conclusion, the administrative law judge's finding that the preponderance of the credible evidence failed to establish that pneumoconiosis caused the miner's death at Section 718.205(c) was rational, supported by substantial evidence, and in accord with law. We, therefore, affirm the administrative law judge's finding that claimant failed to establish that pneumoconiosis caused the miner's death pursuant to Section 718.205(c), and her finding that claimant was not entitled to benefits on her survivor's claim. *See* 20 C.F.R. §718.205(c); *Shuff*, 967 F.2d at 980, 16 BLR at 2-93; *Trumbo*, 17 BLR at 1-87; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge