

BRB No. 08-0476 BLA

A.H.A.)
(Widow of H.R.A.))
)
Claimant-Petitioner)
)
v.)
)
EASTERN COAL CORPORATION)
) DATE ISSUED: 01/30/2009
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 – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIUM:

Claimant appeals the Decision and Order –Denial of Benefits (06-BLA-5546) of Administrative Law Judge Richard T. Stansell-Gamm 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). The miner died on April 24, 2005, and claimant filed her application for survivor’s benefits on May 12, 2005. Director’s Exhibit 2. In a decision dated February 28, 2008, the administrative law judge

credited the miner with at least thirty years of coal mine employment¹ and determined that, based upon the finding of pneumoconiosis set forth in the award of benefits in the miner's claim,² collateral estoppel³ precluded employer from contesting the issue in the survivor's claim. The administrative law judge further found, however, that the evidence did not establish that the miner's death was due to pneumoconiosis 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 his analysis of the medical opinion evidence relevant to the cause of the miner's death at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.⁴

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

¹ The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 1, 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² In a Decision and Order issued by Administrative Law Judge Thomas M. Burke, the miner was awarded benefits on a claim filed on August 8, 1994. Claimant's Exhibit 1. Judge Burke determined that although the x-ray evidence did not establish the existence of clinical pneumoconiosis, the medical opinion evidence established that the miner's respiratory impairment was caused, in part, by coal dust exposure. *See* 20 C.F.R. §718.201; Claimant's Exhibit 1 at 9, 10-11. In a decision dated October 7, 1997, the Board affirmed the award of benefits. [*H.R.A.*] *v. Eastern Coal Corp.*, BRB No. 97-0168 BLA (Oct. 7, 1997)(unpub.)

³ Under certain circumstances, the doctrine of collateral estoppel protects parties from the burden of relitigating an issue when the identical issue was previously decided in a prior proceeding involving the same parties. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*).

⁴ The administrative law judge's finding that the miner had at least thirty years of coal mine employment is affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 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 (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. 20 C.F.R. §718.205(c)(2), (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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Relevant to the cause of the miner’s death, pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the medical opinions of Drs. Johnson, Kahn, Jarboe, and Rosenberg. Dr. Johnson, the miner’s treating physician, diagnosed both clinical pneumoconiosis, and legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due in part to coal dust exposure, and concluded that “significant dust changes in [the miner’s] lungs added to other health problems surely played a role in [the miner’s] death but did not solely cause death.” Director’s Exhibit 18; Decision and Order at 15. Dr. Kahn, who is Board-certified in Anatomic and Clinical Pathology, opined that the miner’s coal workers’ pneumoconiosis “coexisted with the effects of COPD and congestive heart failure,” and he explained that with multiple diseases present, the “pathophysiologic effects” of each disease process are “synergistic” with the effects of the others, such that the “combined effects are not just additive, but rather are multiplicative.” Dr. Kahn concluded:

If [the miner] only had the degree of [coal workers’ pneumoconiosis] that his x-rays and pulmonary function tests suggest, and did not have any other lung problems, he may not have had any significant clinical respiratory problem. However, he had several pulmonary disease processes that were ongoing and interactive. The only reasonable conclusion I can make is that his coal workers’ pneumoconiosis did indeed contribute to his pulmonary disability and to his death.

Claimant’s Exhibit 3. By contrast, Dr. Jarboe, who is Board-certified in Internal Medicine and Pulmonary Disease, opined that the miner did not have coal worker’s

pneumoconiosis or any pulmonary impairment due to coal dust exposure, and that, therefore, pneumoconiosis did not contribute to the miner's death. Employer's Exhibits 3, 4; Decision and Order at 11-12. Finally, Dr. Rosenberg, who is Board-certified in Internal Medicine, Pulmonary Disease, and Occupational Medicine, opined that the miner suffered from clinical pneumoconiosis only, that the miner's COPD was due solely to smoking, and that the miner had no pulmonary impairment causally related to coal dust exposure. Employer's Exhibits 5, 6 at 11-15; Decision and Order at 13. Dr. Rosenberg concluded that in the absence of any clinical evidence of pulmonary impairment due to coal dust exposure, coal dust exposure did not contribute to the miner's death. Employer's Exhibits 5, 6 at 11-15; Decision and Order at 13.

The administrative law judge initially accorded "diminished weight" to Dr. Jarboe's opinion, that pneumoconiosis did not contribute to the miner's death, because Dr. Jarboe did not diagnose pneumoconiosis, contrary to the determination in the miner's claim that the existence of pneumoconiosis was established. Decision and Order at 14. The administrative law judge further accorded "diminished weight" to the opinions of Drs. Johnson and Kahn, because he found that the physicians failed to explain, with specificity, how pneumoconiosis contributed to the miner's death. Decision and Order at 15. By contrast, the administrative law judge found that the remaining opinion of Dr. Rosenberg was "well documented, well reasoned, probative, and establishes that coal workers' pneumoconiosis was not a contributing cause of, and did not hasten, [the miner's] death." Decision and Order at 15.

Claimant asserts that the administrative law judge erred in crediting the medical opinion of Dr. Rosenberg without considering that his opinion, that the miner had no pulmonary impairment causally related to coal dust exposure, is contrary to the determination in the miner's claim that the miner's respiratory impairment was due in part to coal dust exposure. Claimant's Brief at 8-9. Thus, claimant contends that the opinion of Dr. Rosenberg cannot constitute substantial evidence in support of the administrative law judge's findings. Claimant also asserts that the administrative law judge erred in discounting the opinions of Drs. Johnson and Kahn. Claimant's Brief at 9. However, claimant concludes, even assuming *arguendo*, that the administrative law judge permissibly accorded diminished weight to the opinions of Drs. Johnson and Kahn, they are sufficient to meet claimant's burden of proof in the absence of contrary probative evidence. Claimant's Brief at 11. Claimant's primary contention has merit.

As discussed above, in the miner's claim, Administrative Law Judge Thomas M. Burke determined that although the x-ray evidence did not establish the existence of clinical pneumoconiosis, the medical opinion evidence established that the miner suffered from legal pneumoconiosis, in the form of a respiratory impairment caused, in part, by coal dust exposure. 20 C.F.R. §718.201(a)(2); Claimant's Exhibit 1 at 9, 10-11. In reviewing the administrative law judge's decision in the instant case, it is clear that the

administrative law judge did not recognize that it was a finding of legal pneumoconiosis to which he was to give collateral estoppel effect.⁵ The administrative law judge affirmatively credited Dr. Rosenberg's opinion that, because no part of claimant's pulmonary impairment was due to coal dust exposure, coal dust exposure did not contribute to, or hasten, the miner's death. Decision and Order at 13, 15. Instead, the administrative law judge should have considered Dr. Rosenberg's opinion in light of the finding of legal pneumoconiosis in the miner's claim. Moreover, this issue may have affected the administrative law judge's credibility determinations regarding the remaining physicians' opinions, as the administrative law judge did not consider that both Drs. Johnson and Kahn opined that clinical *and* legal pneumoconiosis combined to hasten the miner's death. Thus, because the administrative law judge did not evaluate the medical opinions of record in light of the finding of legal pneumoconiosis in the miner's claim, we vacate his finding pursuant to 20 C.F.R. §718.205(c), and remand the case for further consideration of all of the physicians' opinions.⁶ See *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

⁵ In his decision, the administrative law judge stated that due to the legal application of collateral estoppel, the miner had "coal workers' pneumoconiosis," which is a form of clinical pneumoconiosis. 20 C.F.R. §718.201(a)(1); Decision and Order at 14. The administrative law judge also credited the opinion of Dr. Rosenberg, in part, because he addressed the role of "coal workers' pneumoconiosis" in the miner's death. Decision and Order at 15. In addition, the administrative law judge characterized the opinions of Drs. Johnson and Kahn as concluding that "coal workers' pneumoconiosis" contributed to the miner's death, without discussing their additional opinions that the miner's chronic obstructive pulmonary disease was also a factor contributing to death. Decision and Order at 15.

⁶ In light of our determination to vacate the administrative law judge's weighing of the medical opinion evidence, we decline to address, as premature, claimant's arguments regarding the administrative law judge's evaluation of the opinions of Drs. Johnson and Kahn.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge