

BRB No. 09-0376 BLA

BONNIE HUFF)
(Widow of BLEVINS HUFF))
)
 Claimant-Petitioner)
)
 v.)
)
 PEABODY COAL COMPANY)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 01/19/2010
)
 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 on Remand – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Harold M. Streets, Greenville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (04-BLA-5614) of Administrative Law Judge Joseph E. Kane (the administrative law judge)

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). This case is before the Board for the second time. In his initial decision, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited the miner² with thirty years of qualifying coal mine employment. The administrative law judge further found that claimant established that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) 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). The administrative law judge, therefore, denied benefits.

Claimant appealed. The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the miner worked in qualifying coal mine employment for thirty years and that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b). The Board, however, vacated the administrative law judge's determination that claimant failed to establish death due to pneumoconiosis by a preponderance of the evidence because the administrative law judge failed to resolve the conflicts in the evidence and provide an explanation for the relative weight he accorded to the relevant medical opinion evidence in accordance with the requirements of 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). The Board, therefore, instructed the administrative law judge to evaluate, on remand, the probative value of the opinion of Dr. Simpao, the miner's treating physician, in light of the factors set forth in 20 C.F.R. §718.104(d), and to then weigh the opinion with the other relevant evidence. Accordingly, the Board affirmed in part, and vacated in part, the administrative law judge's Decision and Order denying benefits and remanded the case for further consideration. *B.H. [Huff] v. Peabody Coal Co.*, BRB No. 07-0209 BLA (Oct. 24, 2007) (unpub.).

On remand, the administrative law judge considered the opinion of Dr. Simpao in light of the factors set forth in Section 718.104(d). The administrative law judge found that Dr. Simpao clearly had a "significant relationship with the [m]iner that included

¹ Claimant is the surviving spouse of the miner, who died on April 5, 2001. Director's Exhibit 10. The death certificate lists respiratory failure and pneumonia as the causes of death. Director's Exhibit 10. Claimant filed her application for survivor's benefits on August 19, 2002. Director's Exhibit 3.

² The miner filed an application for benefits on April 24, 1984. The miner's claim was finally denied by the district director on December 18, 1984, and administratively closed. Director's Exhibit 1.

frequent contact and treatment for various medical problems.” Decision and Order on Remand at 7. However, the administrative law judge found that Dr. Simpao’s opinion was entitled to little weight, even though he was the miner’s treating physician, because Dr. Simpao did not articulate “a reasoned basis for his conclusion that pneumoconiosis hastened the [m]iner’s death.”³ Decision and Order on Remand at 7. Specifically, the administrative law judge found that Dr. Simpao’s opinion, that “the [m]iner’s underlying medical problems aggravated and contributed to his cardiopulmonary death by weakening his lungs and leaving him more vulnerable to infection and respiratory failure,” Decision and Order on Remand at 3, was “little more than a statement that the [m]iner had pneumoconiosis and that it must have exacerbated his health problems and contributed to his death in some manner.”⁴ Decision and Order on Remand at 7. The administrative law judge noted that this was precisely the type of reasoning that was criticized by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The administrative law judge concluded, therefore, that Dr. Simpao’s opinion that pneumoconiosis hastened the miner’s death was not entitled to great weight.

Instead, the administrative law judge gave greater weight to the opinions of Drs. Renn and Rosenberg, non-treating physicians, because they rendered more thorough, detailed and coherent opinions “in which they reviewed and summarized all of the [m]iner’s medical records and specifically explained the process by which [the miner] died and why pneumoconiosis played no role in causing or hastening his death.”⁵

³ In a report dated June 6, 2003, Dr. Simpao noted that he treated the miner from January 24, 1974 until the miner’s death on April 5, 2001. Dr. Simpao diagnosed the miner with pneumoconiosis, chronic pulmonary fibrosis, klebsiella, pneumonia, cor pulmonale with decompensation and acute respiratory failure. Dr. Simpao opined that pneumoconiosis, along with the miner’s other conditions, played a role in the miner’s death. Dr. Simpao reiterated this opinion in his deposition on July 12, 2005. Director’s Exhibit 25; Claimant’s Exhibit 1.

⁴ Dr. Simpao noted that the miner’s lung diseases, including coal workers’ pneumoconiosis, aggravated his whole problem, that the miner’s heart and lungs were all one system and what affects one would affect the other, and that the miner’s pneumoconiosis made him susceptible to pneumonia, as his immune system was suppressed. *See* Claimant’s Exhibit 1.

⁵ In a report dated April 25, 2004, and in his deposition on May 25, 2006, Dr. Renn opined that pneumoconiosis was neither a cause of, nor a substantially contributing factor in, the miner’s death. Employer’s Exhibits 1, 12. In a report dated May 13, 2003, and in a deposition on April 4, 2006, Dr. Rosenberg opined that the primary causes of the

Decision and Order on Remand at 7. The administrative law judge further accorded greater weight to the opinions of Drs. Renn and Rosenberg because they were both pulmonary experts, while Dr. Simpao “ha[d] no special qualifications other than his experience treating miners.”⁶ Decision and Order on Remand at 7. Consequently, the administrative law judge found that the medical opinion evidence was insufficient to establish that pneumoconiosis caused or hastened the miner’s death pursuant to Section 718.205(c), and denied benefits.

On appeal, claimant contends that the administrative law judge should have found that the opinion of Dr. Simpao established that pneumoconiosis caused the miner’s death at Section 718.205(c), and should have accorded Dr. Simpao’s opinion determinative weight as a treating physician pursuant to Section 718.104(d). Employer responds, urging affirmance of the administrative law judge’s decision denying benefits. The Director, Office of Workers’ Compensation Programs, is not participating in this appeal.

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 applicable law, they are binding upon this Board and may not be disturbed. 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, 363 (1965).

To establish entitlement to survivor’s benefits, claimant must establish 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. *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, was applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner’s

miner’s death were influenza pneumonia and adult respiratory dysfunction syndrome (ARDS), with superimposed bacterial pneumonia, and that the miner would have suffered from these conditions, whether or not he worked in the coal mines. Director’s Exhibit 24; Employer’s Exhibit 9.

⁶ The administrative law judge noted: Dr. Renn is Board-certified in internal medicine, with a subspecialty in pulmonary disease; Dr. Rosenberg is Board-certified in occupational and internal medicine, with a subspecialty in pulmonary disease; and Dr. Simpao holds no board certifications. *See* Decision and Order on Remand at 3-4.

death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).⁷

After consideration of the arguments on appeal, the administrative law judge's decision, and the evidence of record, we conclude that the administrative law judge's decision denying benefits is supported by substantial evidence, rational and consistent with applicable law. The administrative law judge's decision denying benefits is, accordingly, affirmed.

Contrary to claimant's argument, in assessing the probative value of Dr. Simpao's opinion, the administrative law judge noted that Dr. Simpao treated the miner "from 1974 to 2001 for respiratory problems and general medical conditions," which clearly demonstrated "a significant relationship with the [m]iner that included frequent contact and treatment for various medical problems." Decision and Order on Remand at 7; *see* 20 C.F.R. §718.104(d)(1)-(4). The administrative law judge properly found, however, that Dr. Simpao's opinion was "not entitled to great weight when properly considered in light of its reasoning and documentation." Decision and Order on Remand at 7. The administrative law judge found that it lacked "a reasoned basis" or underlying documentation for the conclusion that pneumoconiosis hastened the miner's death and, that it was "little more than a statement that the [m]iner had pneumoconiosis and that it must have exacerbated his health problems and contributed to his death in some manner." Decision and Order on Remand at 7; *see* Claimant's Exhibit 1. The administrative law judge correctly noted, this is "precisely the type of reasoning that was criticized" by the court in *Williams*, 338 F.3d at 518, 22 BLR at 2-655. In *Williams*, the court held that the opinion of a physician who merely asserts that because the miner had pneumoconiosis, the pneumoconiosis must have hastened his death, is insufficient to establish death causation. Rather, the court held that in order to establish that pneumoconiosis hastened the miner's death, the physician must explain how pneumoconiosis hastened death "through a specific defined process that reduces the miner's life by an estimable time." *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Thus, because Dr. Simpao's opinion did not meet the standard set forth in *Williams*, the administrative law judge properly found that it did not constitute a reasoned opinion on the issue of death due to pneumoconiosis at Section 718.205(c). *See* 20 C.F.R. §718.104(d)(1)-(5); *Williams*, 338 F.3d at 518, 22 BLR at 2-655; *see generally Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003)(administrative law judge as fact-finder should decide whether physician's report is sufficiently reasoned and documented). Further, because, as the administrative law judge found, "the opinions of

⁷ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

treating physicians get the deference they deserve based on their power to persuade,” *Williams*, 338 F.3d at 513, 22 BLR at 2-647, the administrative law judge permissibly found that the opinion of Dr. Simpao as to the cause of the miner’s death was entitled to little weight, despite the fact that Dr. Simpao was the miner’s treating physician. *See* 20 C.F.R. §718.104(d)(1)-(5). Hence, we affirm the administrative law judge’s determination to accord less weight to the opinion of Dr. Simpao.⁸

Instead, the administrative law judge properly accorded greater weight to the contrary opinions of Drs. Renn and Rosenberg, as better reasoned and documented on the issue of death due to pneumoconiosis at Section 718.205(c). The administrative law judge noted that both Drs. Renn and Rosenberg rendered detailed opinions based on their review of all the medical records; explained why pneumoconiosis played no role in causing or hastening the miner’s death; thoroughly explained the conditions that caused the miner’s deterioration, and ultimately resulted in his death; and provided an adequate rationale to support their conclusions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88-89; *Clark*, 12 BLR at 1-155; *Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 7; Director’s Exhibit 24; Employer’s Exhibits 1, 9, 12. Additionally, the administrative law judge permissibly found that the opinions of Drs. Renn and Rosenberg were entitled to greater weight because they were both Board-certified in internal medicine and pulmonary disease, while Dr. Simpao possessed no board certifications. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Decision and Order on Remand at 7-8. We affirm the administrative law judge’s determination that these physicians’ opinions as to cause of the miner’s death, were entitled to greater weight than the opinion of Dr. Simpao, a treating physician. *See* 20 C.F.R. §718.104(d)(5). We affirm, therefore, the administrative law judge’s weighing of the medical evidence on the issue of death causation, and his resultant finding that claimant failed to establish that pneumoconiosis caused the miner’s death pursuant to Section 718.205(c). *See Williams*, 338 F.3d at 513, 22 BLR at 2-647.⁹

⁸ Further, contrary to claimant’s argument, the fact that there is evidence in the record establishing that the miner had pneumoconiosis and conditions that correlate to a finding of pneumoconiosis, *i.e.*, cor pulmonale and pulmonary hypertension, Claimant’s Brief at 5, does not establish that the miner’s death must then be due to pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

⁹ Claimant also argues that the Act is remedial in nature and should be liberally construed by resolving all doubts in claimant’s favor. We reject claimant’s argument, however, as claimant bears the burden of persuasion in proving entitlement to benefits by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff’g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to satisfy her burden to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). *See* 20 C.F.R. §718.205(c); *Brown*, 996 F.2d at 816, 17 BLR at 2-140; *Dillon*, 11 BLR at 1-114; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Because claimant has failed to satisfy her burden to establish that the miner's death was due to pneumoconiosis, we affirm the administrative law judge's determination that entitlement to benefits is precluded in this survivor's claim.

Accordingly, the Decision and Order on Remand – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge