

BRB No. 11-0309 BLA

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| FANNIE M. MACHESKY |) | |
| (Widow of RICHARD C. MACHESKY) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 01/18/2012 |
| |) | |
| CYPRUS EMERALD RESOURCES |) | |
| CORPORATION |) | |
| |) | |
| 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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach (Kovach & Kovach), Uniontown, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (10-BLA-5506) of Administrative Law Judge Daniel L. Leland (the administrative law judge) denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006),

¹ Claimant is the surviving spouse of the miner, who died on March 20, 2008. Director's Exhibit 16.

amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case involves a survivor's claim filed on August 11, 2009. After crediting the miner with forty years and six months of qualifying coal mine employment,² the administrative law judge noted employer's concession that the miner suffered from pneumoconiosis arising out of his coal mine employment. Decision and Order at 2; Hearing Transcript at 5. First considering whether claimant could establish invocation of the rebuttable presumption of death due to pneumoconiosis at 30 U.S.C. §921(c)(4),³ the administrative law judge found that claimant did not establish that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant did not invoke the presumption of death due to pneumoconiosis at amended Section 411(c)(4). Further, the administrative law judge found that claimant 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 argues that the administrative law judge erred in finding that she did not establish invocation of the rebuttable presumption at Section 411(c)(4). Claimant further asserts that the administrative law judge erred in finding that the evidence did not establish the miner died due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 3; Claimant's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

³ On March 23, 2010, amendments to the Act affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revived Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, if a miner was employed for at least fifteen years in qualifying coal mine employment, and he or she had a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she died due to pneumoconiosis. 30 U.S.C. §921(c)(4).

The Section 411(c)(4) Presumption

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Claimant contends that the administrative law judge erred in finding that claimant did not invoke the Section 411(c)(4) presumption that the miner died due to pneumoconiosis. Specifically, claimant argues that the administrative law judge improperly considered the evidence in determining whether the miner suffered from cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii).⁴

In considering whether the evidence established the existence of cor pulmonale, the administrative law judge considered the medical opinions of Drs. Caffrey, Oesterling, Tuteur, Lee, and Wecht. Neither Dr. Caffrey nor Dr. Oesterling diagnosed cor pulmonale, Employer's Exhibit 8 and 14, and Dr. Tuteur testified that the miner's cardiac disease "was dominantly left-sided," and that the miner also suffered from "tricuspid regurgitation, which could be secondary to the left-ventricular-failure-caused pulmonary pressure elevation" Employer's Exhibit 13 at 15. Dr. Lee, the autopsy prosector, reported that both ventricles "were abnormally thickened," an occurrence he referred to as "biventricular hypertrophy," and testified that the thickening of the left ventricle of the miner's heart was due to coronary artery disease. Claimant's Exhibit 10 at 57, 62. Dr. Lee further opined that, depending on its severity,⁵ the miner's emphysema could have caused back pressure in his right ventricle that led to right ventricle hypertrophy. *Id.* at 62. In contrast, Dr. Wecht diagnosed cor pulmonale, testifying that the miner suffered from "an advanced or severe degree of cor pulmonale, right ventricular hypertrophy, which is specific for lung disease." Claimant's Exhibit 3 at 22. Dr. Wecht explained that he did not diagnose biventricular hypertrophy because the thickness of the left ventricular wall was "just minimally increased." *Id.* at 23.

⁴ The administrative law judge's findings that claimant did not establish total disability based upon pulmonary function studies, arterial blood gas studies, or reasoned medical judgment, pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), are affirmed, as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ In his deposition, Dr. Lee testified that the severity of the miner's pulmonary emphysema "was probably at least moderate," although he could not recall whether he graded the severity of the emphysema in his autopsy report. Claimant's Exhibit 10 at 49. Dr. Lee later testified that, other than the miner's chart, he had no clinical records at the time of the autopsy to assess the severity of the miner's emphysema. *Id.* at 62-63.

In evaluating the evidence relevant to the issue of total disability, the administrative law judge found that Dr. Wecht was the only doctor to specifically diagnose cor pulmonale. Decision and Order at 8. However, the administrative law judge did not credit Dr. Wecht's opinion, as he found that the opinion was not well-reasoned or well-documented. *Id.* at 9. In contrast, the administrative law judge found that Dr. Oesterling's opinion diagnosing "biventricular heart disease," and not cor pulmonale, was well-reasoned and well-documented. *Id.* The administrative law judge further found that the opinions of Drs. Lee, Caffrey, and Tuteur supported Dr. Oesterling's opinion diagnosing "biventricular heart disease." *Id.* Accordingly, the administrative law judge found that claimant failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Claimant contends that the administrative law judge erred in finding "that Dr. Lee agreed that the miner suffered from biventricular hypertrophy and not from cor pulmonale." Claimant's Brief at 4. We disagree.

In finding that claimant failed to establish the existence of cor pulmonale, the administrative law judge properly determined that Drs. Lee, Caffrey, Oesterling, and Tuteur diagnosed biventricular heart disease. Dr. Lee specifically diagnosed biventricular hypertrophy, further stating that there was no way to assess the severity of the miner's emphysema, and that the emphysema could cause cor pulmonale only if the emphysema were severe enough. In addition, Drs. Caffrey, Oesterling, and Tuteur refrained from diagnosing cor pulmonale. Employer's Exhibits 8, 13, 14. The administrative law judge further acknowledged that Dr. Wecht diagnosed cor pulmonale. Director's Exhibit 18, Claimant's Exhibit 3. However, the administrative law judge permissibly found that Dr. Wecht did not address how his opinion diagnosing cor pulmonale was affected by the existence of an enlarged left ventricle in the miner's heart, or sufficiently explain his basis for ruling out the miner's heart problems as the cause of the enlargement of both sides of the miner's heart. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The administrative law judge, therefore, appropriately found that Dr. Wecht's opinion was not well-reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). Accordingly, we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii), as it is supported by substantial evidence. *See Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Clark*, 12 BLR at 1-155. We therefore affirm the administrative law judge's finding that claimant did not establish invocation of the Section 411(c)(4) presumption of death due to pneumoconiosis.

Death Due to Pneumoconiosis Pursuant to Section 718.205(c)

A miner's death will be considered to be 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 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 1006 (3d Cir. 1989). Claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner died due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

In considering whether the evidence established that the miner died due to pneumoconiosis, the administrative law judge evaluated the medical opinions of Drs. Wecht, Oesterling, Tuteur, Caffrey, and Lee.⁶ Dr. Wecht, in opining that coal workers' pneumoconiosis was "a significant contributing factor in leading to [the miner's] death," stated the following:

[The miner] at some point would have gone on to die from his heart problems and other difficulties, but at the time that he needed good respiratory function to help him withstand these demands being placed on his body by the infectious process, by the compromised cardiovascular system, et cetera, his lungs were not there to provide that kind of assistance.

Claimant's Exhibit 3 at 26-27. In contrast, Drs. Oesterling, Tuteur, and Caffrey each opined that the inhalation of coal mine dust did not cause, contribute to, or hasten the miner's death. Employer's Exhibits 4, 5, 8. Further, each of these doctors determined that the miner's severe, long-standing heart disease was the contributing factor in causing his death. Employer's Exhibits 4-7, 5-6, 8-4. Dr. Lee opined that anything that stresses a weakened heart, depending on the severity of that stress, would be a part of the death process. Claimant's Exhibit 10 at 60-61. However, Dr. Lee also testified that the miner died from sepsis, that his lungs did not play a significant role in his death, and that, due to

⁶ All of the doctors agreed that septic shock, as a result of necrotizing fasciitis of the right leg, was the immediate cause of the miner's death. Director's Exhibit 18; Claimant's Exhibit 10; Employer's Exhibits 4, 5, 8.

the severity of the miner's sepsis, the health of his lungs "would have made no difference" in whether he would have lived any longer. *Id.* at 63-64.⁷

In evaluating the evidence relevant to the cause of the miner's death, the administrative law judge found that Dr. Wecht determined that pneumoconiosis contributed to the miner's death. Decision and Order at 9. The administrative law judge was not persuaded by Dr. Wecht's opinion, however, finding that, "[a]t best, Dr. Wecht appears to be suggesting that improved lung function *could* have assisted the miner in fighting the infection that led to his death" Decision and Order at 10. The administrative law judge further found that, although Dr. Lee testified that any stress placed on the miner's heart could have played a role in his death, Dr. Wecht did not adequately describe the level of severity of the stress on the miner's heart caused by pneumoconiosis. *Id.* Finally, the administrative law judge found that no other doctor concluded that pneumoconiosis hastened the miner's death and that, therefore, the remaining doctors' opinions did not support Dr. Wecht's conclusion. *Id.* Accordingly, the administrative law judge found that the evidence did not establish that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c).

Claimant argues that the administrative law judge did not "take into consideration the effects of the pulmonary emphysema caused by [the miner's] forty-plus (40+) years of exposure to the hazards of coal dust." Claimant's Brief at 1. We disagree.

The administrative law judge acknowledged Dr. Wecht's opinion that pneumoconiosis was a substantial contributing factor in causing the miner's death. However, the administrative law judge permissibly found that Dr. Wecht did not adequately explain how pneumoconiosis affected the miner's condition compared to "his significant and long-standing heart disease." See *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155; Decision and Order at 10. The administrative law judge acted within his discretion as factfinder when he determined that Dr. Wecht's opinion was not well-reasoned. See *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002). The administrative law judge also accurately found that, other than Dr. Wecht, no other physician determined that pneumoconiosis placed enough stress on the miner's heart to hasten his death. Accordingly, the administrative law judge permissibly found that claimant did not establish that pneumoconiosis hastened the miner's death. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994); Decision and Order at 10.

⁷ Dr. Lee testified that, while the miner's pulmonary emphysema could have placed a burden on his system if the emphysema was sufficiently severe, any resulting aggravation would have been minimal. Claimant's Exhibit 10 at 64-65.

Therefore, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis, pursuant to either 30 U.S.C. §921(c)(4) or 20 C.F.R. §718.205(c), as this finding is in accordance with applicable law and supported by substantial evidence. Because the administrative law judge properly found that the evidence did not establish death due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-114 (1989).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge