BRB No. 11-0363 BLA

ALTA MAE JOHNSON (Widow of JOHNNY MARTIN JOHNSON)	)	
Claimant-Petitioner	)	
v.	)	
HUNTER MINING, INCORPORATED	)	DATE ISSUED: 01/18/2012
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 Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-5705) of Administrative Law Judge John P. Sellers, III (the administrative law judge) rendered on a survivor's claim filed on November 6, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *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). The administrative law judge accepted employer's stipulation to thirty-one years of coal mine employment. Decision and Order at 3. The administrative law judge also found that claimant was not entitled to the Section 411(c)(3) irrebuttable presumption that the miner's death was due to pneumoconiosis, 30 U.S.C. §921(c)(3), because claimant

failed to establish the existence of complicated pneumoconiosis.[1] *See* 20 C.F.R. §718.304. Likewise, the administrative law judge found that claimant was not entitled to the Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis, 30 U.S.C. §921(c)(4), because total disability was not established pursuant to 20 C.F.R. §718.204(b).[2] Considering entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge found that total disability was not established thereunder because, although autopsy evidence established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(2), and claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in not considering that the miner had at least forty years of coal mine employment and erred in according greater weight to the opinions of physicians who had neither treated nor seen the miner. Claimant also contends that the administrative law judge should have found the existence of complicated pneumoconiosis established pursuant to Section 718.304, and that claimant was, therefore, entitled to the Section 411(c)(3) presumption that the

[1] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides, in pertinent part, an irrebuttable presumption that a miner's death is due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c).

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. 30 U.S.C. §921(c)(4).

[3] To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

miner's death was due to pneumoconiosis. Alternatively, claimant argues that the administrative law judge should have found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.

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.[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).

After consideration of the arguments on appeal, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge's Decision and Order denying benefits is rational, supported by substantial evidence, and in accordance with law. It is, therefore, affirmed.

We decline to address claimant's argument that the administrative law judge should have credited the miner with "forty" years of coal mine employment instead of "thirty-one." A finding of forty years of coal mine employment would not avail claimant of the benefit of any additional presumptions in her favor. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983).

We reject claimant's argument that the administrative law judge erred in according greater weight to the opinions of physicians who had neither seen nor treated the miner, namely, the opinions of Dr. Broudy, a non-examining physician, and Dr. Alam, the miner's treating physician. The administrative law judge is not required to accord less weight to the opinion of a non-examining physician. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Cadwallader v. Director, OWCP*, 7 BLR 1-879 (1985). Further, a treating physician's opinion must be determined to be reasoned, *see* 20 C.F.R. §718.104(d)(5), and persuasive, *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), in order to be credited. In this case, the administrative law judge acknowledged that Dr. Broudy, a Board-certified pulmonologist, never examined the miner. Decision and Order at 22. Nevertheless, the administrative law judge found that Dr. Broudy's opinion was persuasive because Dr. Broudy reviewed the autopsy report, another physician's narrative opinion, and the miner's medical records. *See Clark v.*

[4] Because the miner's most recent coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Wetzel*, 8 BLR at 1-41. In addition, the administrative law judge properly found that Dr. Broudy's deposition testimony was credible and entitled to great weight because it was well-explained. *Clark*, 12 BLR at 1-155; Decision and Order at 22-23. The administrative law judge also acknowledged that Dr. Alam's opinion was entitled to "particular weight…as that of the treating physician[.]" Decision and Order at 23. The administrative law judge, however, properly accorded it less weight because it was not well-reasoned. *See* 20 C.F.R. §718.104(d); *Williams*, 338 F.3d at 513, 22 BLR at 2-640, 647.

Further, contrary to claimant's argument, the administrative law judge properly found that the existence of complicated pneumoconiosis was not established at Section 718.304. In evaluating the relevant evidence, the administrative law judge permissibly rejected Dr. DePonte's x-ray reading as "equivocal" on the issue of complicated pneumoconiosis pursuant to Section 718.304(a), because Dr. DePonte commented that the large opacities seen on the x-ray were "most likely" the result of the miner's lung cancer. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Further, the administrative law judge properly found that Dr. Dennis's autopsy finding of "progressive massive fibrosis" did not establish complicated pneumoconiosis pursuant to Section 718.304(b), when weighed with the other autopsy evidence. *See Clark*, 12 BLR at 1-155. Additionally, the administrative law judge properly found that complicated pneumoconiosis was not established pursuant to Section 718.304(c) because the CT scan evidence did not contain a diagnosis of complicated pneumoconiosis, and the medical opinion evidence did not contain a reasoned and documented opinion diagnosing complicated pneumoconiosis.[5] *See Clark*, 12 BLR at 1-155. Consequently, we affirm the administrative law judge's finding that the existence of complicated pneumoconiosis was not established pursuant to Section 718.304.

Likewise, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). In considering the relevant evidence, the administrative law judge weighed all the medical opinions and properly accorded greater weight to the opinions of Drs. Broudy and Caffrey, that the miner's death was not due to, or hastened by, pneumoconiosis, because they convincingly explained how the miner's death was due to his lung cancer. *See Clark*, 12 BLR at 1-155. The administrative law judge rejected the opinion of Dr. Alam, who opined that the miner's pneumoconiosis hastened his death by depressing his heart function, because Dr. Alam's opinion consisted only of a "one-

[5] The administrative law judge found that the evidence established both simple clinical pneumoconiosis and legal pneumoconiosis. *See* 20 C.F.R. §718.202(a). Claimant does not demonstrate how a finding of simple pneumoconiosis supports a finding of complicated pneumoconiosis. Claimant's Brief at 9.

sentence explanation of why the miner's emphysema contributed to his death[.]" Decision and Order at 23. The administrative law judge also noted that Dr. Alam's statement that the coal-dust induced emphysema weakened the miner's heart was not supported by any evidence in the record that the miner's death was caused by heart disease, rather than lung cancer. The administrative law judge, therefore, properly determined that Dr. Alam's opinion was not well-reasoned. *See Clark*, 12 BLR at 1-155. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish that the miner's death was caused by his pneumoconiosis pursuant to Section 718.205(c).[6]

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[6] Claimant asserts that the miner had both simple clinical pneumoconiosis and legal pneumoconiosis and that his pneumoconiosis arose out of coal mine employment. Claimant's Brief at 15-24. The administrative law judge found that the miner had both clinical and legal pneumoconiosis and that his pneumoconiosis arose out of coal mine employment. Decision and Order at 21. Contrary to claimant's assertion, however, these findings do not establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202(a), 718.203(b), 718.205(c); *Trumbo*, 17 BLR at 1-89-90.