

BRB No. 90-0961 BLA

GRETA G. PETTRY)
(Widow of CHARLES W. PETTRY))

Claimant-Petitioner)

v.)

PEABODY COAL COMPANY)

and)

OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:

Employer/Carrier-)
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Greta G. Pettry, Naoma, West Virginia, pro se.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Charleston, West Virginia, for employer.

Before: STAGE, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (88-BLA-2533) of Administrative Law Judge

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Jeffrey Tureck denying benefits on both a miner's claim and 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 filed a claim on October 7, 1986 and claimant filed a survivor's claim on May 12, 1987.¹ Based on the dates of filing, the administrative law judge considered the claims pursuant to 20 C.F.R. Part 718. After crediting the miner with 11 years of coal mine employment, the administrative law judge found that, upon applying the true doubt rule, the x-ray evidence established the existence of pneumoconiosis. The administrative law judge then determined that claimant did not establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and that the miner's death was not due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied in both claims. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has chosen not to respond in this case.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. Stark v. Director, OWCP, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Upon considering the evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly found that the x-ray evidence was equally probative and that, upon giving claimant the benefit of true doubt, the x-ray evidence is positive for the existence of pneumoconiosis. See Decision and Order at 3; Conley v. Roberts and Schaefer Co., 7 BLR 1-309 (1984). The administrative law judge then considered the survivor's claim pursuant to 20 C.F.R. §718.205 and stated that the report of Dr. Gant was the only evidence indicating that the miner's death was in any way related to pneumoconiosis. See Decision and Order at 3. In his report of July 24, 1987, Dr. Gant stated that the miner's death was "certainly a considerable if not a direct result of his co-worker's pneumoconiosis, considered COPD class III stage IV." See Director's Exhibit 41. Upon considering this report, the administrative law judge permissibly accorded it no weight as Dr. Gant failed to offer any explanation for his conclusions. See Decision and Order at 3; Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989). The administrative law judge also stated that Dr. Gant's opinion was further diminished by a physical examination

¹The miner died on April 29, 1987. See Director's Exhibit 62.

performed a year before the miner's death in which Dr. Gant cleared claimant for unlimited work, by the errors in Dr. Gant's report and by the doctor's statements about his own poor mental and physical condition. See Decision and Order at 3; Director's Exhibits 41, 63; Mabe v. Bishop Coal Co., 9 BLR 1-67 (1986). The administrative law judge then considered the remaining evidence relevant to the cause of the miner's death which includes the miner's death certificate and the report of the medical examiner, both of which list the immediate cause of death as arteriosclerotic cardiovascular disease. See Director's Exhibits 31, 62. Dr. Tuteur performed a record review on November 20, 1988, and stated that the miner's death was not a result of coal workers' pneumoconiosis or the inhalation of coal mine dust, but was due to hypertension and the miner's heart disease. See Employer's Exhibit 1. Dr. Zaldivar performed a record review on July 5, 1989 and stated that the cause of death was heart disease and that there was absolutely no contribution from the miner's occupation. See Employer's Exhibit 3. The administrative law judge permissibly stated that this evidence establishes that the miner's death was due solely to heart disease. See Decision and Order at 3; Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989). As a result, the administrative law judge's finding that claimant did not establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205 is affirmed as it is supported by substantial evidence.

The administrative law judge next considered the miner's claim pursuant to 20 C.F.R. §718.204(c) and properly determined that the qualifying blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(c)(2). See Decision and Order at 5; Director's Exhibits 10, 63. The administrative law judge then permissibly determined that claimant did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). See Kuchwara v. Director, OWCP, 7 BLR 1-167 (1984). In making this determination, the administrative law judge permissibly accorded the greatest weight to the opinion of Dr. Tuteur, who determined that the miner's disability was related to his hypertension and not coal workers' pneumoconiosis, on the basis of his qualifications. See Decision and Order at 5; Employer's Exhibit 1; Lafferty, supra. The administrative law judge also properly found Dr. Tuteur's report to be supported by the report of Dr. Zaldivar, who stated that the miner's impairment was the result of cardiac disease and obesity. See Employer's Exhibit 3. Further, the administrative law judge permissibly discredited the reports of Dr. Rasmussen, who stated that the miner had possible pulmonary disease and that "one cannot clearly distinguish between left heart failure and intrinsic interstitial lung disease", as his reports do not clearly state that the miner's total disability is related to pneumoconiosis or any other pulmonary condition. See Decision and Order at 4; Director's Exhibits 8, 9; Justice v. Island Creek Coal Co., 11 BLR 1-91 (1988). As a result, the administrative law judge's finding that the evidence of record was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), and his denial of benefits in the

miner's claim are supported by substantial evidence, and are affirmed.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge