

BRB No. 95-1643 BLA

ELIZABETH AIELLO)
(Widow of ARTHUR AIELLO))
)
Claimant-Respondent)
)
v.)
)
NEMACOLIN MINES CORPORATION)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:
)
Employer/Carrier-)
Petitioners)
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-In-Interest) DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James T. Davis (Davis & Davis), Uniontown, Pennsylvania, for claimant.

Anne M. Coholan (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (94-BLA-1353) of Administrative Law Judge Michael P. Lesniak awarding benefits on a 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 administrative law judge accepted the parties' stipulations that claimant¹ established twenty-one years

¹Claimant is Elizabeth Aiello, widow of Arthur Aiello, the miner, whose claims for benefits filed on June 5, 1973 and August 10, 1978 were finally denied when the Board dismissed the miner's appeal as abandoned. Director's Exhibit 42. The miner died on December 24, 1992. Director's Exhibit 19. Claimant filed a survivor's claim on May 27, 1993. Director's Exhibit 1.

and four months of qualifying coal mine employment, that employer is the responsible operator, and that the miner had pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge then found that pneumoconiosis was a substantial contributor to the miner's death pursuant to 20 C.F.R. §718.205(c) and, accordingly, awarded benefits.

On appeal, employer contends that the administrative law judge prejudiced employer in weighing the evidence, failed to discuss all of the relevant evidence of record, and erred in relying on Dr. Wecht's opinions to find death due to pneumoconiosis pursuant to Section 718.205(c).² Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate 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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends that the administrative law judge removed part of claimant's burden of proof and prejudiced employer by relying on the parties' stipulation that the miner had a totally disabling respiratory condition. Employer's Brief at 4-5. Employer argues that there was no such stipulation and that the administrative law judge's "belief" predisposed him to find death due to pneumoconiosis established. Employer's Brief at 5-6.

In his discussion of the evidence, the administrative law judge first noted that claimant must establish that the miner's death was due to pneumoconiosis. Decision and Order at 10. The administrative law judge then stated: "Initially, I note that no one disputes that the miner had a totally disabling respiratory condition."

²We affirm the administrative law judge's findings regarding the length of coal mine employment, responsible operator status, Dr. Naeye's opinion, and pursuant to Sections 718.202(a) and 718.203(b) as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order at 11. The administrative law judge further noted that, in the miner's claim, Administrative Law Judge Theodor P. Von Brand found the miner's respiratory disability to be due to cigarette smoking. Decision and Order at 10.

Contrary to employer's contention, the administrative law judge's observation does not diminish claimant's burden of proof. Pursuant to Section 718.205(c), claimant must show that pneumoconiosis was a substantially contributing cause of death, which the United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, has defined as any condition which actually hastens the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); see *Tackett v. Armco, Inc.*, 17 BLR 1-103 (1993). This burden is not lessened by the administrative law judge's statement that the miner had a totally disabling respiratory condition, presumably due to cigarette smoking, prior to his death. Further, employer does not demonstrate how the administrative law judge's weighing of the evidence pursuant to Section 718.205 was influenced by his statement that the miner had a totally disabling respiratory condition. Thus, we reject this contention.

Employer contends that the administrative law judge failed to consider information contained in the hospital records and claimant's testimony which "bolster" the medical opinions that the miner died from renal problems and complications. Employer's Brief at 6-8. The administrative law judge summarized claimant's testimony and the hospital discharge diagnoses, Decision and Order at 3-4, and stated that his decision is based upon his "analysis of the record, the arguments of the parties, and the applicable law," Decision and Order at 2.

Further, in determining whether pneumoconiosis hastened the miner's death, the administrative law judge noted that the death certificate listed the immediate cause of death as cardio-pulmonary arrest with renal failure, emphysema, and chronic obstructive pulmonary disease as other significant conditions. Decision and Order at 4. Thus, pursuant to Section 718.205, the administrative law judge did not exclude renal problems as a cause of the miner's death, but instead found that pneumoconiosis was also a substantial contributing cause of the miner's death. Decision and Order at 12; see 20 C.F.R. §718.205(c)(4); see also *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990). Thus, we reject employer's argument.

Employer next contends that the administrative law judge erred in assigning more weight to some opinions and less to others based solely upon whether the physician had diagnosed cor pulmonale. Employer's Brief at 12-13. The administrative law judge stated that Drs. Sinnenberg and Oesterling "did not find cor pulmonale, making their opinions somewhat less reliable as to the role of the miner's

chronic obstructive pulmonary disease (emphysema, pneumoconiosis) in his death." Decision and Order at 12; Director's Exhibit 38; Employer's Exhibits 3, 5.

The administrative law judge permissibly credited Dr. Wecht's diagnosis of cor pulmonale, which he found to be supported by hospital records indicating that the miner was being treated for cor pulmonale, over the contrary opinions of Drs. Sinnenberg and Oesterling, based on Dr. Wecht's status as prosector.³ Decision and Order at 11; Director's Exhibits 20, 23, 39; see *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992); *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991).

Inasmuch as the weighing of the evidence is for the administrative law judge, see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987), and the administrative law judge may consider factors which tend to undermine the reliability of a physician's opinion, see *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985), we hold that the administrative law judge permissibly questioned the reliability of the opinions of Drs. Sinnenberg and Oesterling. Therefore, we reject employer's argument.

Finally, employer contends that the administrative law judge erred in crediting Dr. Wecht's opinion over those of Drs. Oesterling, Sinneberg, and Tuteur that the miner's minimal pneumoconiosis did not compromise his pulmonary function or contribute to his demise. Employer argues that the administrative law judge erred in "lumping" these three opinions together and should have counted them as separate opinions which outweigh Dr. Wecht's sole opinion. Employer's Brief at 15-16.

The administrative law judge found Dr. Wecht's opinion that pneumoconiosis hastened the miner's death to be more thorough and reasonable than the other opinions of record. Decision and Order at 12. He further found that Dr. Wecht fully considered all of the miner's lung conditions⁴ and their impact on the miner's death

³The autopsy report indicates that Dr. Rozin is the prosector and that Dr. Wecht reviewed the autopsy materials and the protocol. Director's Exhibit 20. In his deposition, Dr. Wecht stated that Dr. Rozin did the gross examination and, several days later, he [Dr. Wecht] examined large portions of tissue, made the slides, and put together the final autopsy report. He also stated that he performed the microscopic studies and made the final diagnoses. Claimant's Exhibit 4 at p.6. The administrative law judge found this deposition testimony to be credible. Decision and Order at 12; see *Lafferty, supra*.

⁴The administrative law judge noted that Dr. Wecht "reviewed more than the one one-hundredth of a percent of lung tissue" to which the other physicians were limited. Decision and Order at 12.

and persuasively explained his finding that pneumoconiosis played a significant role in the miner's death. *Id.* As discussed previously, the administrative law judge also permissibly

questioned the reliability of the opinions of Drs. Sinnenberg and Oesterling. Finally, the administrative law judge concluded that while Drs. Tuteur, Oesterling, and Sinneberg were "highly qualified," their opinions were "cumulative" in that they all adopted the same reasoning and the question thus became "their reasoning versus Dr. Wecht's." Decision and Order at 12.

The Board has held that the administrative law judge's function is to consider the conflicting evidence on an issue and determine the relative credibility of that evidence; the Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Thus, the administrative law judge may consider factors which tend to undermine the reliability of a physician's opinion, *Hutchens, supra*, assign determinative weight to the opinion which he determines is better reasoned. *Lafferty, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and to the opinion of the physician who performed the autopsy, *Urgolites, supra*, *Gruller, supra*; *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); and consider the cumulative nature of evidence, especially consulting physicians' reports, in evaluating the weight of the evidence, *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136, 1-139 (1989). We therefore reject employer's argument as a request to reweigh the evidence and affirm the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.205 and the award of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge