

BRB No. 96-0380 BLA

THORBE McKINNEY)
(Widow of ALBERT McKINNEY))

)
Claimant-Petitioner)

)
v.)

) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Dorothy J. Amis (Legal Services of Eastern, Oklahoma, Inc.), Hugo, Oklahoma, for claimant.

Jeffery S. Goldberg (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (94-BLA-1455) of Administrative Law Judge Donald W. Mosser denying benefits on a claim filed pursuant to the

¹Claimant is Thorbe McKinney, the miner's widow, who filed a survivor's claim for benefits on December 27, 1993. Director's Exhibit 1. The miner, Albert McKinney, filed a claim for benefits on February 18, 1993, was awarded benefits on July 21,

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 found that the miner had 2.38 years of qualifying coal mine employment and that claimant did not establish that the miner's death was due to

1993, and died on December 5, 1993. Director's Exhibits 3, 11.

pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing Dr. Helton's opinion and the death certificate, and in not considering all of the evidence of record. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.²

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a survivor's claim filed after January 1, 1982, the evidence must establish that the decedent miner's death was due to pneumoconiosis, and not due to a medical condition unrelated to pneumoconiosis. See *Willis v. Birchfield Mining Co.*, 15 BLR 1-59 (1991); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Under Section 718.205(c), death is considered to be due to pneumoconiosis where the cause of death was significantly related to or significantly aggravated by pneumoconiosis. *Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985).

Claimant first contends that the administrative law judge substituted his expertise for, and disregarded the opinion of Dr. Helton. Claimant's Brief at 9-10. In the death certificate dated December 6, 1993, Dr. Helton listed the immediate cause of death as chronic myelocytic leukemia. Director's Exhibit 3. In an amended death certificate dated May 2, 1994, Dr. Helton stated that the immediate cause of death was chronic obstructive pulmonary disease due to chronic myelocytic leukemia. Director's Exhibit 8. In a report dated May 22, 1995, Dr. Helton stated:

It is my opinion that Mr. McKinney's death was caused by Chronic Obstructive Pulmonary Disease, amended copy of death certificate. Mr. McKinney had already received six checks for this also.

²We affirm the administrative law judge's finding regarding the length of coal mine employment as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Patient, prior to his death, was on oxygen at home and was under Home Health treatment.

The latter part of his life, Mr. McKinney suffered chronic myelocytic leukemia. Patient's x-ray dated December 1993 showed bilateral lobe infiltrate with pleural effusion. X-ray also showed bronchioectasis with scarring of lungs. Patient suffered with shortness of breath, labored breathing on exertion, and chronic cough with production along with COPD which all helped contribute to a shortened life and then death.

In summary, Black Lung Disease did substantially contribute to his death. Who is to say that the Black Lung Disease did not cause his leukemia.

Claimant's Exhibit 1.

The administrative law judge found Dr. Helton's opinion problematic because, "in the original death certificate, he did not list chronic obstructive pulmonary disease as a cause of death. . . . has not given any explanation for how the miner's remote coal mine employment is related to his chronic obstructive pulmonary disease and leukemia,. . . [and] has not explained the possible effects that the miner's lengthy smoking history may have had on his disease processes." Decision and Order at 6. The administrative law judge then found Dr. Helton's opinion insufficiently documented and reasoned and gave it "little credit." Decision and Order at 6. The administrative law judge also stated that Dr. Helton's status as the miner's treating physician does not "rehabilitate his weak medical opinion." Decision and Order at 6.

It is within the administrative law judge's discretion to weigh the evidence and draw his own conclusions and inferences, *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), and to determine whether a physician's opinion is sufficiently reasoned and documented, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Further, the administrative law judge may find two opinions submitted by one physician to be inconsistent if the physician does not explain the significantly different conclusions reached, *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984), and may reject an opinion if the physician fails to explain his diagnosis, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Finally, the treating physician's status is just one of the factors to be considered by the administrative law judge in rendering a decision. *Tedesco v. Director, OWCP*, 18

BLR 1-103 (1994). Inasmuch as, based on these factors, the administrative law judge permissibly accorded little probative value to Dr. Helton's conclusion, we affirm the administrative law judge's weighing of Dr. Helton's opinion.

Claimant next contends that the administrative law judge "gave too much weight to the fact that pneumoconiosis was not listed in the death certificate." Claimant's Brief at 10. We reject this contention because the administrative law judge considered the entirety of the opinion rendered by Dr. Helton and permissibly found his opinion to be entitled to little weight. See *Lafferty, supra*.

Finally, claimant contends that the administrative law judge failed to consider the hand-written supplemental opinion submitted by Dr. Boyer on the bottom of a letter dated June 21, 1993. Claimant's Brief at 16-17; Director's Exhibit 11. While the administrative law judge noted Dr. Boyer's report of March 22, 1993, which was submitted with the miner's claim, Decision and Order at 4; Director's Exhibit 11, he did not mention the physician's response to the Department of Labor's request for clarification of his findings. Dr. Boyer states:

The disability findings are unchanged. Statistically reduced exposure to coal reduces likelihood of cause. Smoking is contributory. Little other noted exposure. Findings clarified as follows: Coal Mine exposure 3 yrs less significant than 10 yrs. Still had exposure.

Director's Exhibit 11.

Although he did not discuss Dr. Boyer's supplemental opinion, the administrative law judge properly found that Dr. Helton is the "only physician who rendered an opinion regarding the cause of the miner's death." Decision and Order at 6. Thus, Dr. Boyer's response is not relevant to the issue of death due to pneumoconiosis. Further, claimant does not indicate how this report aids her in meeting her burden of establishing that pneumoconiosis was a contributing cause of the miner's death.³ See *Willis, supra*; see also *Lukosevicz v. Director, OWCP*, 888

³The administrative law judge stated that he would apply the "hastening death" standard, which eases claimant's burden of proof, even though it has not been adopted by the United States Court of Appeals for the Tenth Circuit, within whose appellate jurisdiction this claim arises, because it is the position of the Director. Decision and Order at 5-6; see *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989); see also *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). Even under this easier standard, claimant failed to establish death due to pneumoconiosis.

F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 135 (6th Cir. 1993), and *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992). Thus, we reject claimant's contention and affirm the administrative law judge's findings pursuant to Section 718.205(c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge