

BRB No. 00-1001 BLA

HELEN HENDRICK)
(Widow of PAUL HENDRICK))
)
Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,))
UNITED STATES DEPARTMENT)
OF LABOR)
)
Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John C. Holmes, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Helen H. Cox (Howard M. Radzely, 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 and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (00-BLA-0023) of Administrative Law Judge John C. Holmes (the administrative law judge) on a survivor's claim¹ filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

¹Claimant is the surviving spouse of the miner, Paul Hendrick. The miner's death certificate indicates that he died on January 21, 1999 due to respiratory failure, severe hypoxemia, chronic obstructive pulmonary disease and pneumoconiosis. Septicemia, cerebrovascular accident and hypertension are listed as conditions leading to the

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² Initially the administrative law judge noted that the miner had been awarded benefits under the Act during his lifetime pursuant to claims he filed. On the merits of the instant survivor's claim, the administrative law judge found that the position taken by the Director, Office of Workers' Compensation Programs (the Director), challenging the issue of the existence of pneumoconiosis, contradicted findings made by the district director in connection with claims filed by the miner. *See* Director's Exhibits 11, 13. The administrative law judge concluded, "There is no basis in this case for excepting the determination of pneumoconiosis from the principles of collateral estoppel." Decision and Order at 6. The administrative law judge further found that even if he were to "fully revisit the issue, I would find that the evidence overwhelmingly supports a finding that Mr. Hendrick did indeed suffer from pneumoconiosis." *Id.* In this regard, the administrative law judge found that the weight of the x-ray evidence showed the presence of the disease and that every physician who expressed an opinion diagnosed pneumoconiosis arising out of the miner's coal mine employment. However, the administrative law judge, in considering the survivor's claim, found that claimant failed to meet her burden to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. Part 718 pursuant to *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in according less weight to the opinions expressed by the miner's treating physician, Dr. Farid, that the miner had a moderate impairment and that pneumoconiosis was the major cause of the miner's death. The Director responds in support of the decision below.

immediate cause of death. Director's Exhibit 3. Claimant filed the instant claim on February 18, 1999. Director's Exhibit 1.

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045 - 80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by Order issued on April 20, 2001. The Order gave the parties an opportunity to submit additional briefing on the issue of whether application of the amended regulations challenged in the lawsuit would affect the outcome of this case. Claimant and the Director have responded to the Board's Order. Both claimant and the Director state that application of the revised regulations at issue in the lawsuit will not affect the outcome of the case. Based on the briefs submitted by the parties, and our review of the case, we hold that the disposition of this case is not impacted by the challenged regulations. The issue in this case is whether claimant has met her burden to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). The revised regulations add explicitly that 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). Application of the regulation at 20 C.F.R. §718.205(c)(5) will not affect the outcome of this case because the regulation codifies the existing standard approved by the United States Court of Appeals for the Fourth Circuit³ in *Shuff*. We thus proceed to adjudicate the merits of the 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

³This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis.⁴ See 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 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).

Claimant contends that the administrative law judge impermissibly speculated that the miner's pneumoconiosis was mild, and then used that speculation to discredit the opinions rendered by Dr. Farid regarding the severity of the miner's impairment,⁵ the miner's pneumoconiosis, and the role pneumoconiosis played in the miner's death.⁶

⁴We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established the existence of occupational pneumoconiosis. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because the administrative law judge based his finding of pneumoconiosis on both types of relevant evidence present in this record, namely, the x-ray evidence and the medical opinion evidence, we hold that a remand of the case is not necessitated by the recent decision of the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000)(all types of relevant evidence must be considered together in determining whether the existence of pneumoconiosis is established at 20 C.F.R. §718.202(a)).

⁵In pertinent part, Dr. Farid opined, on September 9, 1990, that the miner had a moderately severe chronic obstructive and restrictive lung disease. Director's Exhibit 4.

⁶By letter dated November 1, 1999, Dr. Farid provided details concerning the miner's hospitalization which terminated in his death on January 21, 1999. Dr. Farid stated therein:

Because he was not able to eat[,] a feeding tube was placed for him on January 12, 1999, and during the endoscopy for placement of the feeding tube he was found to have a mass eroding into the esophagus in the upper part which was felt to be originating from the suspected carcinoma in the left upper lobe of the lung. While in the hospital, the patient continued to deteriorate because of respiratory failure and hypoxemia, pneumonia and sepsis and eventually passed away on January 21, 1999.

In my opinion, the cause of the death was respiratory failure and pneumonia

We agree with claimant that the administrative law judge impermissibly speculated about medical matters in weighing Dr. Farid's opinion. Specifically, the administrative law judge found that the treatment notes of Dr. Farid and his colleagues indicate that the miner's

shortness of breath waxed and waned with other respiratory infections, and was not a consistent symptom. This indicates that the [coal workers' pneumoconiosis] was not of a great degree. Mr. Hendrick in fact expressly denied dyspnea a number of times over the decade of treatment with Dr. Farid, including as recently as a month before his death. (D-4). I therefore find that the [coal workers' pneumoconiosis] suffered by Mr. Hendrick was mild in degree.

Decision and Order at 7. The administrative law judge thus interpreted symptoms reported by the miner to his treating physicians and determined their medical significance in concluding that the miner's pneumoconiosis "was not of a severe degree" and "was mild in degree." *Id.* The interpretation of medical data is a medical determination and the administrative law judge impermissibly substituted his opinion for that of the medical experts in this case. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

The additional reasons provided by the administrative law judge in discrediting Dr. Farid's opinion, which the administrative law judge found to be "reasoned," Decision and Order at 7, are not valid. Specifically, the administrative law judge noted that the pulmonary function study underlying Dr. Farid's September 1990 opinion that the miner had a moderately severe chronic obstructive and restrictive lung disease, Director's Exhibit 4, had been invalidated by Dr. Zaldivar. Decision and Order at 7; *see* Director's Exhibit 12. The administrative law judge thus determined that Dr. Farid's finding that the miner had a moderately severe impairment was incorrect, and he discredited Dr. Farid's 1999 opinion regarding the cause of the miner's death because he found that Dr. Farid had based his

in the background of pneumoconiosis and associated carcinoma of the left upper lung. Pneumoconiosis was the major cause of Mr. Paul Hendrick's death.

Claimant's Exhibit 1.

opinion on his “erroneous conclusion that Mr. Hendrick suffered from a severe degree of coal workers’ pneumoconiosis.” *Id.* The severity of the respiratory or pulmonary *impairment* suffered by the miner is not germane to the issue of the cause of the miner’s death. 20 C.F.R. §718.205(c). Therefore, the administrative law judge’s discrediting of Dr. Farid’s opinion on this basis cannot be upheld.

The administrative law judge also accorded less weight to Dr. Farid’s opinion regarding the cause of the miner’s death based on his finding that it was not clear whether Dr. Farid independently arrived at a diagnosis of coal workers’ pneumoconiosis or relied on Dr. Rasmussen’s prior diagnosis of the disease. The administrative law judge stated:

In reviewing the records from Dr. Farid’s practice, it becomes evident that his inclusion of CWP as a diagnosis is reflective of Dr. Rasmussen’s finding; it is not clear if he independently arrived at such a conclusion. This, combined with the lack of a significant impairment, leads me to assign his opinion less weight on this issue. An ALJ has a duty, pursuant to *U.S. Steel Mining Co., Inc. v. Director, OWCP (Jarrell)*, 187 F.3d 384, [21 BLR 2-639] (4th Cir. 1999), to perform a gatekeeping function with respect to evidence, screening it for reliability, probativeness, and substantiality. Dr. Farid’s opinion on the cause of death is less reliable for the reasons detailed above.

Decision and Order at 8. The record shows, however, that when Dr. Farid first treated the miner, on August 29, 1990, he referenced a May 1990 diagnosis of “pneumoconiosis and black lung.” Director’s Exhibit 4.⁷ The diagnoses rendered by Dr. Farid and his colleagues in the Medical Surgery Group from August 1990 through December 1998 include diagnoses of “pneumoconiosis” and “chronic obstructive pulmonary disease” which Dr. Farid related to the miner’s coal mine employment. *Id.*; Claimant’s Exhibit 1.

It is within the discretion of the administrative law judge to determine the credibility of the medical evidence. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). However, assuming that the administrative law judge correctly found that it is not clear whether Dr. Farid rendered a diagnosis of pneumoconiosis independent from Dr. Rasmussen’s diagnosis, the critical fact

⁷The record contains Dr. Rasmussen’s opinion dated May 11, 1990 in which he diagnosed pneumoconiosis arising out of the miner’s coal mine employment. Director’s Exhibit 5.

remains that the administrative law judge found that claimant established that the miner had pneumoconiosis arising out of his coal mine employment, yet the administrative law judge failed to accord claimant the benefit of having established this element of entitlement. *See* Decision and Order at 8.

Further, we note that the administrative law judge mischaracterized Dr. Farid's opinion when he stated that Dr. Farid "concluded that [the miner's coal workers' pneumoconiosis] *must have* complicated the final hospital course and therefore hastened the death." Decision and Order at 7 (emphasis added). Dr. Farid did not actually offer this opinion in his letter dated November 1, 1999 detailing the miner's final hospitalization and identifying pneumoconiosis as the major cause of his death. *See* Claimant's Exhibit 1. Moreover, Dr. Farid, whom the record shows was the miner's attending physician at the time of his death and who has provided details exhibiting his familiarity with the circumstances of the miner's demise, Director's Exhibit 3; Claimant's Exhibit 1, did not speculate or equivocate in finding that the miner's pneumoconiosis was the major cause of his death. *Id.* Claimant correctly argues that the case in *Jarrell*⁸ is, therefore, inapposite, and to the extent the administrative law judge relied on *Jarrell* in finding that Dr. Farid's opinion was less reliable, he erred. In this regard, we note that the administrative law judge permissibly found an internal contradiction in Dr. Farid's November 1, 1999 letter because the physician referred to both "suspected carcinoma" and "carcinoma of the left upper lung." Claimant's Exhibit 1; *see Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984). The administrative law judge did not, however, explain what effect, if any, this inconsistency had on Dr. Farid's critical conclusion that "[p]neumoconiosis was the major cause of Mr. Paul Hendricks's (sic) death." Claimant's Exhibit 1.

Based on the foregoing, we hold that the administrative law judge failed to provide a valid reason for discrediting Dr. Farid's opinion. We, therefore, vacate the administrative

⁸In *U.S. Steel Mining Co., Inc. v. Director, OWCP (Jarrell)*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), the United States Court of Appeals for the Fourth Circuit held that Dr. Rasmussen's consultative opinion, indicating that although he had no knowledge concerning the circumstances of the miner's death it was possible that death could have occurred as a consequence of his pneumonia superimposed upon his pneumoconiosis, was entirely speculative and therefore insufficient to comport with the requirement of 5 U.S.C. §556(d) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), that the evidence relied upon by the administrative law judge be reliable, probative, and substantial. The court held that by accepting Dr. Rasmussen's opinion, the administrative law judge failed to perform his gate keeping function of qualifying the evidence under the APA before relying upon it.

law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis.⁹ 20 C.F.R. §718.205(c). We remand the case for further consideration consistent with this opinion and for reconsideration of the issue of death due to pneumoconiosis. On remand, the administrative law judge must reassess the credibility and sufficiency of Dr. Farid's opinion and determine whether claimant has met her burden to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

⁹The administrative law judge accorded less weight to the miner's death certificate, which was certified by Dr. Farid, based, in part, on his weighing of Dr. Farid's opinion. Decision and Order at 8; *see* Director's Exhibit 3. Because the administrative law judge's weighing of the death certificate was affected by his credibility determinations regarding Dr. Farid's medical opinion, we instruct the administrative law judge to reconsider the credibility of the death certificate on remand.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge