

BRB No. 03-0858 BLA

MARGIE ALLEN)
(Widow of ARVIL L. ALLEN))
)
 Claimant-Petitioner)
)
 v.)
)
WELLMORE COAL CORPORATION) DATE ISSUED: 07/29/2004
)
 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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Margie Allen, Grundy, Virginia, *pro se*.

Ronald E. Gilbertson, (Bell, Boyd & Lloyd PLLC), Washington, D.C. for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Benefits (03-BLA-5351) of Administrative Law Judge Edward Terhune Miller

¹ Margie Allen is the surviving spouse of Arvil L. Allen, the miner, who died on

on 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).² Claimant filed her survivor's claim on June 4, 2001. Director's Exhibit 5. The district director initially awarded benefits on October 11, 2001. Director's Exhibit 27. At employer's request, the claim was forwarded to the Office of Administrative Law Judges for a formal hearing held on May 14, 2003. Director's Exhibits 26, 30. The administrative law judge initially found that the miner worked 28 years in coal mine employment and that he had an extensive smoking history.³ The administrative law judge determined that the medical evidence was insufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Further, the administrative law judge found that the evidence failed to establish that his death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

February 7, 2001. The miner filed a claim for benefits on June 30, 1973, which was initially denied by the Social Security Administration. Director's Exhibit 1. The miner elected review of his claim by the Department of Labor and a denial was issued on February 13, 1980 on the grounds that the evidence failed to establish the existence of pneumoconiosis. Director's Exhibit 1. On February 7, 1994, the miner filed a duplicate claim, which was denied by Judge George A. Fath on November 2, 1995, again on the basis that the miner did not have pneumoconiosis. The denial was affirmed by the Board on appeal. *Arvil L. Allen v. Wellmore Coal Corporation*, BRB No. 96-0446 BLA (Nov. 18, 1997)(unpub.). On January 27, 1998, the miner filed a request for modification. Judge Linda S. Chapman denied benefits on September 15, 1999, and the denial was upheld by the Board. Director's Exhibit 2; *Arvil L. Allen v. Wellmore Coal Corporation*, BRB No. 00-0118 BLA (Oct. 6, 2000)(unpub.). Upon further appeal, the denial was also affirmed by the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 2; *Margie Allen (widow of Arvil Allen) v. Wellmore Coal Co.*, No. 00-2459 (Sept. 11, 2001, 4th Cir.)(unpub.). While the appeal was pending before the Fourth Circuit Court, the miner died and his widow pursued the claim. A petition for rehearing was filed by claimant, which was denied on September 19, 2002. No further action was taken with respect to the miner's claim.

² The 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ We affirm the administrative law judge's finding on length of coal mine employment as unchallenged on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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 administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are in accordance with 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).

Claimant appeals, challenging the administrative law judge's finding that the miner's death was not due to pneumoconiosis. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers Compensation Programs, has declined to participate in this appeal.

To establish entitlement to survivors' benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). 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); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980, 16 BLR 2-90 (4th Cir. 1992).⁴

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish that pneumoconiosis hastened the miner's death under Section 718.205(c). The record only contains three medical opinions, prepared by Drs. Briggs, Naeye and Castle, addressing the cause of the miner's death.⁵ The administrative law judge properly found that the

⁴ The United States Court of Appeals for the Fourth Circuit Court of Appeal has jurisdiction over this claim based on the miner's most recent coal mine employment in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 7.

⁵ The administrative law judge properly noted that the autopsy report was prepared by Dr. Segen, who diagnosed pneumoconiosis and intimated that the miner's death was due to liver cancer. Decision and Order at 11; Director's Exhibit 12. The record contains

miner's death certificate, which was signed by Dr. Briggs, listed the immediate cause of the miner's death as hepatocellular carcinoma, with hepatic disease and coal worker's pneumoconiosis also listed as conditions leading to death. Director's Exhibit 11; Decision and Order at 3. The administrative law judge, however, correctly determined that the death certificate, in and of itself, did not constitute a reasoned medical opinion as to whether the miner's death was hastened by pneumoconiosis since "it was unaccompanied by an explanation for the inclusion of pneumoconiosis as the cause of death, and Dr. Briggs, did not testify regarding his opinion as expressed in the death certificate." See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 21 BLR 2-251 (4th Cir. 2000); Decision and Order at 7, 9-11. The administrative law judge also reasonably questioned why Dr. Briggs included pneumoconiosis as a contributing factor of death on the death certificate since the physician's office notes, dated from August 21, 2000 to February 8, 2001, made no mention of the disease. Decision and Order at 7.

Furthermore, although Dr. Briggs opined in a May 15, 2002 letter that pneumoconiosis precluded the miner from undergoing a comprehensive treatment for his liver cancer and thereby hastened his death, the administrative law judge had discretion to find that Dr. Briggs "short letter" was lacking any medical rationale and therefore was inconclusive as to the cause of the miner's death. Decision and Order at 11. In contrast, the administrative law judge considered that the opinion of Dr. Castle, that the miner's death was not hastened by pneumoconiosis, and Dr. Naeye's opinion that coal dust exposure did not play any role in the miner's death, to be better reasoned since each physician explained with medical rationale why they felt the miner's death was not due to pneumoconiosis and supported their conclusions with references to the medical record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 6-7; Employer's Exhibits 2, 3. Additionally, the administrative law judge reasonably assigned greater weight to the opinions of Drs. Castle and Naeye, finding that they were better qualified to address the cause of the miner's death given their board certification in internal medicine and the subspecialty of pulmonary disease, while Dr. Briggs expertise was limited to being a board-certified osteopath. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

reports from Drs. Jabour and Lapis, but these physicians did not offer an opinion on the cause of the miner's death. Director's Exhibit 13; Claimant's Exhibit 1. The administrative law judge had discretion to find Dr. Jabour's statement the miner "probably had complicated pneumoconiosis" to be uncorroborated and equivocal, see *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 9. Consequently, because the administrative law judge did not find credible evidence to establish that the miner had complicated pneumoconiosis, claimant was unable to avail herself of the presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.

Because the administrative law judge has discretion to resolve conflicts in the medical evidence, his findings will not be disturbed if supported by substantial evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). We affirm the administrative law judge's finding that claimant failed to establish that the miner's death was hastened by pneumoconiosis since he properly found the opinions of Drs. Castle and Naeye entitled to controlling weight on the cause of the miner's death. Therefore, we affirm the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c).⁶

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁶ Because claimant failed to establish death due to pneumoconiosis, we decline to address the administrative law judge's findings at 20 C.F.R. §§718.202(a) and 718.203(b).