

BRB No. 08-0722 BLA

S.B.)
(Widow of E.B.))
)
Claimant-Petitioner)
)
v.)
)
PEN COAL CORPORATION)
) DATE ISSUED: 07/20/2009
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 Richard A. Morgan,
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for
employer.

Before: DOLDER, Chief Administrative Appeals judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-6050) of
Administrative Law Judge Richard A. Morgan rendered 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).¹ In a decision dated June 25, 2008,

¹ The miner died on August 9, 2005. Director's Exhibit 3. He had filed a claim
for benefits on May 17, 2002. In a Proposed Decision and Order finding the miner
entitled to benefits, the district director determined that the miner had "contracted
pneumoconiosis" and that "such disease has caused a breathing impairment of sufficient

the administrative law judge credited the miner with twenty-four years of coal mine employment,² and initially found that employer was collaterally estopped from relitigating the existence of clinical pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b), based on the prior findings in the miner's successful claim for benefits. The administrative law judge further found, however, that the evidence did not establish that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304, or that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.³

degree to establish total disability.” District Director's Proposed Decision and Order at 1; Director's Exhibit 1; Claimant's Exhibit 1.

Employer contested the district director's finding of entitlement and requested a hearing before an administrative law judge. Director's Exhibit 1. Prior to the scheduled hearing, however, by letter dated November 4, 2003, employer withdrew its controversion, stating that “after a review of all of the medical evidence in this claim, we agree with the award of benefits to [the miner] and wish to withdraw our request for hearing.” Claimant's Exhibit 2. Accordingly, at employer's request, the hearing was canceled, and the miner's claim was remanded to the district director for payment of benefits. Director's Exhibit 1.

Following the miner's death, claimant filed her application for survivor's benefits on September 8, 2005. Director's Exhibit 3.

² The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 1, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-four years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis, or where the presumption set forth at 20 C.F.R. §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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Turning first to the issue of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, the regulations provide that there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if (a) an x-ray of the miner's lungs shows a large opacity greater than one centimeter in diameter, that would be classified as Category A, B, or C; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). 20 C.F.R. §718.304(a)-(c); 30 U.S.C. §921(c)(3); see *Director, OWCP v. Eastern Coal Corp. [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). The administrative law judge must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption has been established. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Melnick*, 16 BLR at 1-33.

Claimant initially asserts that in evaluating the biopsy evidence relevant to 20 C.F.R. §718.304(b), the administrative law judge erred in according less weight to the opinion of Dr. Kahn, that the miner suffered from progressive massive fibrosis with a lesion measuring 1.7 centimeters, than to the opinion of Dr. Bush, that the biopsy evidence revealed only simple pneumoconiosis. Claimant's Brief at 9-11; Claimant's Exhibit 7; Employer's Exhibits 10, 12. We disagree.

Reviewing the evidence relevant to the existence of complicated pneumoconiosis, the administrative law judge found, correctly, that the record contains no x-ray interpretations of large opacities pursuant to 20 C.F.R. §718.304(a), and no computerized tomography (CT) scan interpretations diagnosing the existence of the disease pursuant to 20 C.F.R. §718.304(c). Decision and Order at 23. Considering the biopsy and medical opinion evidence pursuant to 20 C.F.R. §718.304(b), (c), the administrative law judge noted that only Dr. Kahn concluded that tissue sections from a needle biopsy of the lung, performed on January 4, 2005, represented "massive pulmonary fibrosis (PMF)." Decision and Order at 23; Claimant's Exhibit 7. The administrative law judge further noted, correctly, that Dr. Kahn explained his diagnosis by stating that "[w]hen the [tissue] fragments are considered end-to-end, they measure 1.7 [centimeters], and, since the lesion involves both ends of the needle biopsy, it represents only a portion of a larger lesion." Decision and Order at 23; Claimant's Exhibit 7. Subsequently, Dr. Kahn opined that the lesion "would appear larger than one centimeter in diameter if seen on x-ray examination."⁴ Decision and Order at 23; Claimant's Exhibit 7.

By contrast, Drs. Gaziano and Zaldivar, who examined the miner during his lifetime and reviewed additional medical evidence, and Drs. Naeye and Bush, who examined the biopsy tissue slides, did not diagnose complicated pneumoconiosis. In addition, Dr. Bush specifically criticized Dr. Kahn's conclusion that the lesion measured 1.7 centimeters, as based on the unsupported assumption that the biopsy specimen had been collected in a single needle pass. Employer's Exhibit 12 at 34. Dr. Bush explained that the size of the lesion could not be determined from the individual fragments on the histologic slides, as multiple passes may have been made to retrieve the multiple fragments identified pathologically. Employer's Exhibit 10. Dr. Bush stated that the

⁴ The Fourth Circuit has held that 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, requires that an equivalency determination be made. The statute requires, if diagnosis is by biopsy or autopsy, that a miner have "massive lesions," which are lesions that would show on an x-ray as opacities greater than one centimeter. *Director, OWCP v. Eastern Coal Corp. [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999).

variable appearance of the tissue fragments strongly supported a conclusion that the tissue specimens had not come from a single needle pass. Employer's Exhibit 12 at 33.

Considering these conflicting opinions, the administrative law judge permissibly discounted Dr. Kahn's opinion as not well-reasoned, because the physician had "not provided a basis for his determination that the tissue fragments derived from one needle pass through the mass," and, consequently, had inadequately supported his opinion that the lesion measured greater than 1.7 centimeters. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 23. The administrative law judge further permissibly found that, by contrast, Dr. Bush's conclusion, that the miner did not suffer from complicated pneumoconiosis, was persuasive, well-reasoned, and better supported by the objective evidence of record, including the x-ray and CT scans that were negative for the existence of complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 23-4. Moreover, contrary to claimant's argument, having discredited Dr. Kahn's conclusion as to the existence of a 1.7 centimeter lesion, the administrative law judge was not required to consider Dr. Kahn's additional opinion that the lesion would appear on x-ray as an opacity greater than one centimeter. Claimant's Brief at 10-11. Accordingly, the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304 is affirmed, as it is supported by substantial evidence. *See Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-311 (2003); *Braenovich v. Cannelton Indus.*, 22 BLR 1-236, 1-239 (2003); Decision and Order at 24.

Claimant next asserts that, in determining whether pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c), the administrative law judge erred in failing to credit the opinion of Dr. Kahn. Claimant's argument lacks merit.

The administrative law judge noted, correctly, that the evidence relevant to the cause of the miner's death includes the miner's death certificate, and the opinions of Drs. Bush, Zaldivar, and Kahn. Decision and Order at 25-6. The miner's death certificate, completed by Dr. Zeid, the miner's treating physician, listed the immediate cause of death as acute respiratory failure, due to massive hemoptysis, due in turn to non-small cell lung cancer, with chronic obstructive pulmonary disease (COPD) and pneumoconiosis listed as significant conditions contributing to death, but not resulting in the underlying cause of death. Decision and Order at 8; Director's Exhibit 9. The administrative law judge accorded the death certificate little weight, as was within his discretion, because although Dr. Zeid had personal knowledge of the miner, he failed to provide sufficient explanation for his diagnoses listed on the death certificate to constitute

a reasoned medical opinion. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-263; *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order at 25.

Turning to the biopsy and medical opinion evidence, the administrative law judge accurately found that Drs. Bush and Zaldivar opined that the miner died of a massive pulmonary hemorrhage resulting from lung cancer, and unrelated to pneumoconiosis or coal dust exposure. Decision and Order at 25-6; Employer's Exhibits 2, 5, 10-12. By contrast, the administrative law judge found that only Dr. Kahn opined that pneumoconiosis contributed to and hastened the miner's death. Decision and Order at 25; Claimant's Exhibit 7. Specifically, Dr. Kahn opined, in pertinent part:

From a pathophysiologic standpoint, multiple disease processes act synergistically when they are present, so that the effect of any one abnormal process is multiplied by the presence of the others. It is only reasonable to conclude that each disease process that was present did significantly contribute to [the miner's] pulmonary disability and to his death. I believe that Coal Workers' Pneumoconiosis was present in [the miner's] case and therefore did contribute to his death."

Claimant's Exhibit 7 at 2.

The administrative law judge accorded little weight to Dr. Kahn's opinion because it was based on generalities and lacked explanation. Decision and Order at 26. Specifically, the administrative law judge found that Dr. Kahn failed to explain both how he determined that the miner's disease processes would affect each other and how the disease processes were actually affecting each other in the miner's case. Decision and Order at 26. The administrative law judge further found that Dr. Kahn failed to explain, with sufficient detail, how the miner's pneumoconiosis either contributed directly to the miner's death or how the miner's pneumoconiosis interacted with the medical implications arising from the miner's lung cancer and other pulmonary diseases to contribute to the miner's death. Finally, the administrative law judge found that Dr. Kahn failed to explain how the underlying medical documentation and data supported his conclusions that pneumoconiosis contributed to the miner's death.

Contrary to claimant's contention, the administrative law judge permissibly considered the quality of Dr. Kahn's opinion. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Hutchens v. Director, OWCP*, 8 BLR 1- 16 (1985); Decision and Order at 26; Claimant's Exhibit 7. Thus, the administrative law judge acted within his discretion in determining that Dr. Kahn's opinion was not a reasoned opinion sufficient to meet claimant's burden of proof to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Hicks*, 138 at 533, 21 BLR at 2-336.

Claimant next contends that the administrative law judge erred in crediting the opinions of Drs. Bush and Zaldivar. Specifically, claimant asserts that both Drs. Bush and Zaldivar opined that pneumoconiosis did not contribute to the miner's death because the degree of pneumoconiosis demonstrated by the objective evidence was too mild to have caused any lung dysfunction or impairment.⁵ Claimant's Brief at 12. Thus, claimant asserts, the opinions of Drs. Bush and Zaldivar are contrary to the determination in the miner's lifetime claim that the miner was totally disabled due to pneumoconiosis. Claimant contends that the finding that the miner was totally disabled due to pneumoconiosis should have been afforded collateral estoppel effect when the administrative law judge weighed the medical opinions of Drs. Bush and Zaldivar. Claimant's Brief at 8-9, 12-13. We need not resolve these issues. As discussed above, the administrative law judge properly analyzed, and explained his reasons for discrediting, the miner's death certificate, and the opinion of Dr. Kahn, which constituted the only evidence supportive of a finding that pneumoconiosis played any role in the miner's death. We, therefore, affirm the administrative law judge's conclusion that a finding of entitlement is precluded in this case. *See* 20 C.F.R. §718.205(c); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Trent*, 11 BLR at 1-27; *Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-124-25 (1999); Decision and Order at 26.

⁵ Dr. Bush opined that the miner suffered from simple pneumoconiosis that did not play any role in the miner's death, or in the disability suffered by the miner prior to his death. Employer's Exhibits 10, 12. Dr. Zaldivar opined that the miner did not suffer from pneumoconiosis or any coal dust related disease, but alternatively opined that, assuming the presence of the degree of pneumoconiosis suggested by the x-ray evidence of record, the pneumoconiosis was too mild to have caused any lung dysfunction, or to have contributed to the miner's death. Employer's Exhibit 5 at 24-5.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge