BRB No. 00-0934 BLA

ROSE ZIEMBA)
(Widow of STANLEY ZIEMBA))
)
Claimant-Petitioner)
)
v.)
)
CONSOLIDATION COAL COMPANY) DATE ISSUED:
)
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Thomas McK. Hazlett (Harper and Hazlett), St. Clairsville, Ohio, for claimant.

Kathy L. Snyder (Jackson and Kelly), Morgantown, West Virginia, for employer.

Mary Forrest-Doyle (Judith E. Kramer, 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 McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (00-BLA-0052) of Administrative

[1]Claimant is the widow of the miner, Stanley Ziemba, who died on June 27, 1996. Director's Exhibits 2A, 6A. The miner filed his first claim with the Social Security Administration on June 29, 1973. Director's Exhibit 1. After two denials by the Social Security Administration on August 21, 1973 and September 26, 1979, this claim was denied by the Department of Labor on April 23, 1980. *Id*. Inasmuch as the miner did not pursue this claim any further, the denial became final. The miner filed a second claim on October 28, 1986. Director's Exhibit 2. This claim was denied by the Department of Labor on January 23, 1987, March 6, 1987 and May 13, 1987. *Id*. Because the miner did not pursue this claim any further, the denial became final. The miner filed a third claim on January 30, 1990. Director's Exhibit 3. On April 10, 1991, Administrative Law Judge George P. Morin issued a Decision and Order denying benefits. Director's Exhibit 21. The denial became final because the miner did not pursue this claim any further. The miner filed a fourth claim on August 2, 1994. Director's Exhibit 22. On August 7, 1996, Administrative Law Judge Michael P. Lesniak issued a Decision and Order denying benefits. Director's Exhibit 1A. Inasmuch as the miner did not pursue this claim any further, the denial became final. Claimant filed a survivor's claim on February 19, 1998. Director's Exhibit 2A.

Law Judge Daniel L. Leland denying benefits 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] The administrative law judge credited the miner with forty years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). The administrative law judge also found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(4) (2000). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), notes his disagreement with claimant's suggestion that Section 413(b) of the Act, 30 U.S.C. §923(b), requires all parties and fact-finders to accept a report of an autopsy which includes a diagnosis of pneumoconiosis if not fraudulently presented.

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 March 16, 2001, to which employer and the Director

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[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 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.

have responded.

In a brief dated April 9, 2001, employer indicated that the revisions to the regulations at 20 C.F.R. §§718.104(d), 718.201(c), 718.204(a) and 718.205(d) would affect the outcome of the case.[3] In a brief dated April 9, 2001, the Director indicated that it is his position that the instant case would not be affected by application of the litigated regulations. The Director, therefore, indicated that the Board could decide the instant case. Claimant has not filed a brief in response to the Board's order.[4]

The revisions to the regulation at 20 C.F.R. §718.104(d) apply to claims filed after January 19, 2001. Consequently, the provision requiring that special consideration be accorded to the report of a treating physician does not apply to the instant claim. Application of the revised definition of pneumoconiosis would not alter the outcome of the instant case inasmuch as there is no evidence which pertains to the revisions at 20 C.F.R. §718.201(a)(1) and (c). Inasmuch as there is no evidence which pertains to the revisions at 20 C.F.R. §718.204(a), the revisions related to this provision do not alter the outcome in the instant case. Further, inasmuch as 20 C.F.R. §718.205(d) was not implicated in the disposition of this case, the revisions to the regulations at 20 C.F.R. §718.205(d) do not alter the outcome of the instant case.

In addition, no substantive revisions have been made to the regulations which are relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (a)(3) and (a)(4). Moreover, inasmuch as there is no biopsy evidence of record, the revisions to the regulations at 20 C.F.R. §718.202(a)(2) would not alter the outcome of the instant case. Lastly, inasmuch as the Sixth Circuit, in *Brown*, adopted the hastening death standard, the revisions to the regulations at 20 C.F.R. §718.205(c) would not alter the outcome of the instant case. Based on the briefs submitted by employer and the Director, and our

[3]Employer noted that it contests the retroactive application of the revised regulations to pending claims.

[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.[5] *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203; *Boyd*, *supra*.

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000).[6] The United States Court of Appeals for the Sixth Circuit,

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[5]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

[6]Inasmuch as there is no medical evidence that pneumoconiosis caused the miner's death, we hold as a matter of law that the evidence is insufficient to establish that the miners death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1). Further, inasmuch as there is no evidence of complicated pneumoconiosis, we hold as a matter of law that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R.

within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) (2000) in a case in which the disease actually hastens his death. *See Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *see also* 20 C.F.R. §718.205(c)(2).

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§718.205(c)(3).

The administrative law judge considered the death certificate signed by Dr. Cholak, the autopsy report of Dr. Parmar and the relevant medical reports of Drs. Altmeyer, Cholak, Fino, Kleinerman, Lenkey, Naeye, Parmar and Tomashefski. In the death certificate, Dr. Cholak indicated that hypertensive cardiovascular disease caused the miner's death. Director's Exhibit 6A. In the autopsy report, Dr. Parmar opined that arteriosclerotic heart disease and congestive heart failure were the causes of the miner's death. Director's Exhibit 7A. Whereas, in medical reports, Drs. Cholak and Lenkey opined that pneumoconiosis contributed to the miner's death, Director's Exhibits 12A, 15A, Drs. Fino, Kleinerman, Naeye, Parmar and Tomashefski opined that pneumoconiosis did not contribute to the miner's death, Director's Exhibits 27A, 32A; Employer's Exhibits 2, 4, 6-8. Dr. Altmeyer opined that simple coal workers' pneumoconiosis did not have any effect on the miner's course prior to his death. Employer's Exhibit 8. The administrative law judge stated that "[t]he only physicians to find a connection between the miner's death and any possible pneumoconiosis he might have had are Dr. Cholak and Dr. Lenkey, neither of whom is a pathologist." Decision and Order at 6. The administrative law judge permissibly discredited the opinions of Drs. Cholak and Lenkey because he found them not to be well reasoned.[7] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge permissibly discredited the opinion of Dr. Lenkey because he found it to be equivocal.[8] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting the opinions of Drs. Cholak and Lenkey.

Claimant further asserts that the administrative law judge should have accorded determinative weight to Dr. Cholak's opinion due to his status as the

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[7]Administrative Law Judge Daniel L. Leland (the administrative law judge) stated that the reports of Drs. Cholak and Lenkey "are conclusory and contain...little or [no] reasoning as to how pneumoconiosis contributed to the miner's death." Decision and Order at 6. The administrative law judge further stated, "I believe that it is also noteworthy that Dr. Cholak made no mention of pneumoconiosis in the death certificate." *Id.*

[8]The administrative law judge stated that "Dr. Lenkey's deposition testimony is too speculative and vague to support a finding that the miner's pneumoconiosis caused, contributed to, or hastened his death." Decision and Order at 6. The administrative law judge observed that "Dr. Lenkey testified that the miner's impaired lung function <u>may</u> have hastened his death from a myocardial infarction." *Id.* The administrative law judge additionally observed that "[Dr. Lenkey] went on to state that the miner's lung condition was a risk factor in his death but that it did not necessarily have any effect on his death." *Id.*

miner's treating physician. Although the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of nontreating physicians, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the Sixth Circuit has also indicated that this principle does not alter the administrative law judge's duty, as trier of fact, to evaluate the credibility of the treating physician's opinion, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Here, as previously noted, the administrative law judge permissibly discredited the opinions of Drs. Cholak and Lenkey because he found them not to be well reasoned. *See Clark, supra*; *Fields, supra*; *Fuller, supra*. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Since the administrative law judge permissibly discredited the only medical evidence of record that could support a finding that pneumoconiosis hastened the miner's death, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(c)(2); *Brown, supra*; *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *see Trumbo, supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of survivor's benefits.[9]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

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[9]In view of our disposition of the case at 20 C.F.R. §718.205(c), we decline to address claimant's contentions with regard to 20 C.F.R. §718.202(a)(2) and (a)(4) (2000).

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge