

BRB No. 04-0114 BLA

DORA L. COOK)
(Widow of MILFORD R. COOK))
)
Claimant-Respondent)
)
v.)
)
ARMCO, INCORPORATED) DATE ISSUED: 06/07/2004
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes) Bluefield, West Virginia, for claimant.

Bernard Cochran (Schaffer & Schaffer, PLLC) Charleston, West Virginia, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (02-BLA-5335) of Administrative Law Judge Gerald M. Tierney awarding 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).¹ The miner died on March 6, 2001 and claimant filed her application for survivor's benefits on March 27, 2001.² Director's Exhibit 1.

Initially, the administrative law judge credited the miner with thirty years of coal mine employment,³ and accepted employer's concession that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge additionally found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to support an award of benefits pursuant to Section 718.205(c). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not participate in this appeal.⁴

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

¹ 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.

² At the time of the miner's death, he was receiving benefits for total disability due to pneumoconiosis pursuant to a final award on his claim filed in 1984. Director's Exhibit 1.

³ The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibit 2. 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*).

⁴ The administrative law judge's crediting of the miner with thirty years of coal mine employment, and his acceptance of the employer's concession that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a), 718.203(b) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor’s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(2), (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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). 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, 1-27 (1987).

The record reflects that on February 26, 2001, the miner reported to the emergency room of Raleigh General Hospital complaining of syncopal episodes. He was evaluated and found to have third-degree atrioventricular block and congestive heart failure. Director’s Exhibit 17. He was admitted and underwent emergency placement of a pacemaker because of his congestive heart failure and need for atrial coordination. In her treatment notes, dated February 26, 2001, Dr. Maria R. Boustani, who had treated the miner for his pulmonary conditions since 1998, noted that the miner had been previously hospitalized on multiple occasions for chronic obstructive pulmonary disease (COPD) exacerbation, and that he also suffered from coronary artery disease and had undergone coronary artery bypass surgery in 1991. Director’s Exhibit 17. Dr. Boustani stated that the miner had been chronically hypoxemic on oxygen replacement and had been having chronic respiratory acidosis. She stated that while the miner’s complete heart block had been corrected with a pacemaker, he remained in severe respiratory distress. She explained that intubation had been discussed but rejected because, considering the miner’s poor lung function, she could not guarantee that the miner could be weaned off the ventilator. Director’s Exhibit 17. The miner chose non-invasive support and further chose not to be resuscitated. Director’s Exhibit 17. The miner progressively worsened in his oxygenation, developed some metabolic acidosis on top of his respiratory acidosis from renal failure, and expired on March 6, 2001. Dr. Boustani listed her final discharge diagnoses as: pneumoconiosis, complete heart block, coronary artery disease, acute renal failure and chronic obstructive pulmonary disease. Director’s Exhibit 17. No autopsy was performed. Dr. Boustani completed the miner’s death certificate and listed the immediate causes of death as “pneumoconiosis,” due to “complete heart block,” due to “acute renal failure.” Director’s Exhibit 14.

In support of her claim, claimant submitted treatment records from Dr. Boustani, beginning in 1998.⁵ Director's Exhibits 16, 17. The administrative law judge noted that in her initial office record, dated August 14, 1998, Dr. Boustani documented the miner's thirty year history of coal mine employment, his smoking history of two to three packs a day for fifty years, and his history of coronary artery disease with bypass surgery. Director's Exhibit 16. Following her review of the medical records and her physical examination of the miner, her assessment included: very severe COPD, most probably a combination of emphysema and pneumoconiosis, and further noted that his chest x-ray showed some evidence of mild cor pulmonale. Director's Exhibit 16. In her follow-up report dated October 8, 1998, Dr. Boustani again noted the miner's very severe COPD and coronary artery disease, and further stated that the chest x-ray confirmed the presence of pneumoconiosis. Director's Exhibit 16. In her final report of record, dated November 5, 2001, Dr. Boustani stated:

On reviewing the records on the date of Mr. Cook's death, the patient had a combination of a cardiac and a pulmonary problem.... He also had cardiac disease for which aggressive treatment could not be offered because the patient had end-stage lung problems.... Again, the cardiac notes could be followed as well as previous evaluation and the patient's treatment was limited because of his poor pulmonary performance.... The patient also had severe pulmonary hypertension which is most probably secondary to his lung problem with pulmonary disease with chronic obstructive pulmonary disease and pneumoconiosis.

Claimant's Exhibit 2.

Claimant also offered a June 26, 2002 letter from Dr. Dominic Gaziano, who stated that he had previously provided an opinion for the Department of Labor regarding the miner's death, circumstances and causes. Claimant's Exhibit 1. Dr. Gaziano stated that even though he did not have the entire record before him at that time, he had only the medical consultant case review form he completed on June 23, 2001, it had been his opinion since his earlier review of the medical records that the miner had pneumoconiosis and that he was totally disabled prior to his death. With respect to the cause of the miner's death, Dr. Gaziano stated:

⁵ Claimant also submitted treatment notes and medical reports from Dr. Jebran Karam, the miner's treating coronary specialist, and Dr. Charles Porterfield, who treated the miner's pulmonary conditions until 1998. Director's Exhibits 16, 17. Neither Dr. Karam nor Dr. Porterfield offered any opinion as to the cause of the miner's death. In addition, employer deposed Dr. Porterfield on December 3, 2002, but again, Dr. Porterfield did not address the issue of the miner's death. Claimant's Exhibit 3.

The medical records indicate that the [miner] had a respiratory death. In most patients with chronic respiratory disease such as black lung, emphysema, chronic bronchitis or a combination of these chronic lung diseases, death is very often a respiratory death due to acute exacerbations due to infections or pneumonia. As a matter of fact, most such deaths of individuals with chronic lung disease are due to acute infection on top of chronic lung disease, such as pneumoconiosis. In this instance, I believe that is what happened to [the miner] and that the pneumoconiosis was a very significant cause of his death. I do not believe that any other conclusion could or should be made.

Claimant's Exhibit 1. On the accompanying June 23, 2001 medical consultant case review form, Dr. Gaziano indicated that the miner's death was not due to pneumoconiosis, but that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Claimant's Exhibit 1.

After thoroughly discussing the medical reports in light of the physicians' qualifications and reasoning, Decision and Order at 2-3, the administrative law judge noted that Dr. Boustani's treatment records document that she had treated the miner's pulmonary disease for many years, that she had consulted with other physicians about his many other medical problems, and that, contrary to the employer's arguments, she was fully aware of the miner's coal mine employment history, his smoking history, and his cardiac history. Decision and Order at 2; Director's Exhibit 16. The administrative law judge further found that Dr. Boustani's records also documented that pneumoconiosis was included as part of her diagnosis of pulmonary disease. Decision and Order at 2; Director's Exhibit 16. The administrative law judge concluded that Dr. Boustani's records support her assertion on the death certificate that pneumoconiosis played a role in the miner's death. Because Dr. Gaziano also opined that pneumoconiosis contributed to the miner's death, and because there was no contradictory evidence in the record, the administrative law judge found that claimant met her burden to establish that the miner's death was due to pneumoconiosis. Decision and Order at 3.

Employer initially asserts that because there was no autopsy in this case, the administrative law judge erred in relying on the death certificate to establish the cause of the miner's death. Employer's Brief at 5. While the employer is correct that a death certificate stating that pneumoconiosis contributed to the miner's death, without some further explanation, is insufficient, *see Bill Branch Coal Co. v. Sparks*, 213 F.3d 186 (4th Cir. 2000), that is not the case here. In this case, the administrative law judge properly found that Dr. Boustani's extensive medical reports and treatment records supported her conclusion on the death certificate that pneumoconiosis contributed to the miner's death. Decision and Order at 2.

Employer further asserts that in weighing the medical opinion evidence, the administrative law judge improperly discredited the opinion of Dr. Porterfield because he did not comment on the cause of the miner's death. We disagree. A review of the administrative law judge's decision reveals that he simply noted that Dr. Porterfield did not offer an opinion as to the cause of the miner's death when finding that the opinions of Drs. Boustani and Gaziano were uncontradicted. Decision and Order at 3.

Employer's primary argument is that the administrative law judge erred in finding the opinions of Drs. Boustani and Gaziano sufficiently reasoned to establish that pneumoconiosis contributed to the miner's death. In support of this argument employer asserts: Dr. Boustani did not explain how the miner's pneumoconiosis, rather than his other pulmonary problems, contributed to the miner's death; Dr. Gaziano did not sufficiently explain his conclusions; and neither Dr. Boustani nor Dr. Gaziano indicated that they were even aware of the miner's smoking history. Employer's Brief at 7-8. We disagree.

With respect to Dr. Boustani's opinion, in her initial treatment note of record, referenced by the administrative law judge in his decision, Dr. Boustani specifically states that the miner's COPD is due to a combination of his emphysema and his pneumoconiosis. Director's Exhibit 16. Further, the administrative law judge specifically acknowledged this fact in finding that Dr. Boustani's records document that pneumoconiosis was included as part of her diagnosis of pulmonary disease, and also specifically found that Dr. Boustani's records indicated that she was fully aware of the miner's smoking history. Decision and Order at 2. Thus, the administrative law judge permissibly concluded that in stating that the miner's pulmonary disease contributed to his death, Dr. Boustani was also stating that pneumoconiosis contributed to the miner's death. With respect to the opinion of Dr. Gaziano, although he stated that he had not recently reviewed the entire record, he noted that he had reviewed the relevant medical records in connection with his initial June 23, 2001 consultation as to the cause of the miner's death. Claimant's Exhibit 1. In addition, Dr. Gaziano explained what he believed to be the role of the miner's diagnosed pneumoconiosis in his respiratory death. Claimant's Exhibit 1. Furthermore, the administrative law judge considered employer's arguments and found the opinion of Dr. Boustani, which is uncontradicted and is further supported by the opinion of Dr. Gaziano, to be sufficiently reasoned and documented to support her conclusion that pneumoconiosis contributed to the miner's death. Decision and Order at 2-3.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999)(the Board will not substitute its inferences for those of the administrative law judge), and the Board may not reweigh the evidence or substitute its own inferences on appeal, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155

(1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Therefore, we reject employer's contentions and conclude that substantial evidence supports the administrative law judge's findings pursuant to Section 718.205(c), that the evidence of record was sufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death, which we affirm. *See Shuff v. Cedar Coal Co.*, 967 F.2d at 977, 16 BLR at 2-90; *Trumbo v. Reading Anthracite Co.*, 17 BLR at 1-85, 1-87-88.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge