

BRB No. 06-0781 BLA

JEANNE M. KOCH)
(o/b/o ELIZABETH E. MILLER (Deceased))
Widow of WILLIAM J. MILLER))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 06/28/2007
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Christina E. Hale and Lloyd R. Hampton (Hampton and Hampton),
Ashland, Pennsylvania, for claimant.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H.
Feldman, 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, McGRANERY
and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant¹ appeals the Decision and Order on Remand (2002-BLA-5369) of
Administrative Law Judge Janice K. Bullard denying benefits on a survivor's claim filed

¹ Claimant is pursuing the instant survivor's claim on behalf of the miner's widow,
who died on April 8, 2006, as the executrix of the widow's estate. Decision and Order on
Remand at 2 n.7. The miner was receiving benefits at the time of his death on October 8,
2001. Director's Exhibits 2, 4; Hearing Transcript at 10.

on October 15, 2001 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). This case is before the Board for the second time. In the original Decision and Order, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge accepted the concessions of the Director, Office of Workers' Compensation Programs (the Director), that the miner suffered from pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment. However, the administrative law judge found the evidence insufficient to establish 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.

In disposing of claimant's appeal, the Board affirmed the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *Miller v. Director, OWCP*, BRB No. 03-0819 BLA (July 14, 2004)(unpub). The Board subsequently denied claimant's request for reconsideration. *Miller v. Director, OWCP*, BRB No. 03-0819 BLA (Sept. 2, 2004)(unpub).

Following claimant's appeal of the Board's July 14, 2004 and September 2, 2004 Decisions and Orders, the United States Court of Appeals for the Third Circuit² vacated the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and remanded the case for further consideration of the evidence. *Miller v. Director, OWCP*, No. 04-4177 (3d Cir. Jan. 12, 2006)(unpub.).

By Order dated April 7, 2006, the Board remanded the case to the Office of Administrative Law Judges for further consideration consistent with the Third Circuit court's opinion. *Miller v. Director, OWCP*, BRB No. 03-0819 BLA (Apr. 7, 2006)(unpub).

On remand, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

² The record indicates that the miner's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). Claimant also contends that the evidence is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, based on x-ray evidence demonstrating the presence of complicated pneumoconiosis. The Director responds, urging affirmance of the administrative law judge's denial of benefits.

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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.³ See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *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); *Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989). Failure to

³ 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 establishes that pneumoconiosis was the cause of the miner's death, 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, or...

- (5) 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).

establish any one of these requisite 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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). The administrative law judge considered the reports of Dr. Michael Sherman and Dr. Todd Banning. Dr. Sherman opined that pneumoconiosis did not contribute to the miner's death. Director's Exhibit 7. In contrast, Dr. Banning opined that pneumoconiosis contributed to the miner's death. Director's Exhibit 9. Dr. Banning specifically stated:

While I did not immediately care for him, I strongly feel that his Cor Pulmonale secondary to his Coal Workers Pneumoconiosis directly contributed to his demise by way of right-sided heart failure, with subsequent Hypotension and Shock. Clearly his underlying pulmonary disease with long-standing Cor Pulmonale secondary to such at the very least, expedited his demise.

In my medical opinion after reviewing the records his number one cause of death I would not argue should be acute non-transmural Myocardial Infarction, number two cause of death should read acute on-chronic right heart failure; secondary to Cor Pulmonale, number three Coal Worker's Pneumoconiosis, #4 acute on-chronic Renal failure.

Director's Exhibit 9.

The administrative law judge found that Dr. Sherman's opinion outweighed Dr. Banning's contrary opinion, on the grounds that Dr. Sherman's opinion is better reasoned and documented. Decision and Order at 7-9.

Claimant asserts that the administrative law judge erred in failing to accord greater weight to Dr. Banning's opinion based upon his status as the miner's treating physician. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the

credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

In *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004), the United States Court of Appeals for the Third Circuit held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician. *Soubik*, 366 F.3d at 235; 23 BLR at 2-101. However, the court has also indicated that automatic preferences are disfavored. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). In the instant case, the administrative law judge stated that "[a]lthough the Third Circuit has held as a matter of law that Dr. Banning is [the miner's] 'treating physician,' I decline to give his opinion controlling weight under 20 C.F.R. §718.104(d)." Decision and Order at 8. The administrative law judge permissibly discounted Dr. Banning's opinion because it was not reasoned. *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). The administrative law judge stated that "[a] major flaw in Dr. Todd Banning's report is that it is conclusory in nature and does not fully explain his ultimate opinion that pneumoconiosis contributed to the [m]iner's death." Decision and Order at 7. The administrative law judge also stated that "Dr. Banning offers no genuine rationale for concluding that cor pulmonale secondary to coal workers' pneumoconiosis hastened [the miner's] death." *Id.* at 7-8. In addition, the administrative law judge stated that "Dr. Banning fails to correlate his ultimate opinion regarding the relationship between cor pulmonale and pneumoconiosis with objective findings from [the miner's] final hospital admission." *Id.* at 8. We hold, based on the rationale provided, that the administrative law judge reasonably declined to accord greater weight to Dr. Banning's opinion based upon his status as the miner's treating physician. *Mancia*, 130 F.3d at 590-1, 21 BLR at 2-238; *Lango*, 104 F.3d at 577, 21 BLR at 2-20-1. Furthermore, because the administrative law judge permissibly discounted the only medical opinion of record that could support a finding that pneumoconiosis hastened the miner's death, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at Section 718.205(c)(2), (c)(5). *Lango*, 104 F.3d at 576, 21 BLR at 2-18; *Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-108.

Claimant also asserts that the administrative law judge committed the same errors on remand that the Third Circuit court addressed in its decision. Contrary to claimant's assertion, the administrative law judge properly considered the conflicting opinions of Drs. Sherman and Banning in accordance with the opinion of the Third Circuit court. In its decision, the Third Circuit held that the administrative law judge was either incorrect or mistaken on the following aspects of Dr. Banning's opinion: (1) that the opinion was

written by Dr. Richard Banning, as opposed to Dr. Todd Banning;⁴ (2) that Dr. Banning was not the miner's treating physician at the time of the miner's death; (3) that Dr. Banning's treatment records were not in evidence; (4) that Dr. Banning agreed with Dr. Sherman on the miner's primary and secondary causes of death.⁵ *Miller*, No. 04-4177, slip. op at 5-6. In addition, the court instructed the administrative law judge to consider the bases for the opinions of Drs. Sherman and Banning and the proper weight to be given the opinion of Dr. Banning as the miner's treating physician. *Id.* at 7.

In her Decision and Order on Remand, the administrative law judge acted within her discretion in reaffirming her original finding that Dr. Sherman's opinion is well reasoned and documented.⁶ *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22-22; *Fuller*, 6 BLR at 1-1294. The administrative law judge stated:

Dr. Sherman reviewed a number of [the miner's] medical treatment records, including the hospital records from [the miner's] final hospital admission. He thoroughly discussed the medical records he reviewed and explained their observations, findings, and conclusions. He then came to a reasoned opinion based upon those records he reviewed.

Decision and Order on Remand at 7. Moreover, the administrative law judge permissibly discounted Dr. Banning's opinion because it is not reasoned. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22-22; *Fuller*, 6 BLR at 1-1294. Thus, we reject claimant's

⁴ The United States Court of Appeals for the Third Circuit noted that although Dr. Richard Banning, the father of Dr. Todd Banning, treated the miner for some time during the 1970's, Dr. Todd Banning treated the miner in the last five years of the miner's life. *Miller v. Director, OWCP*, No. 04-4177 (3d Cir. Jan. 12, 2006) (unpub.).

⁵ The Third Circuit court noted the causes of death listed by Drs. Sherman and Banning. Specifically, the court noted that Dr. Banning listed the causes of death as (1) acute non-transmural myocardial infarction, (2) acute on-chronic right heart failure secondary to cor pulmonale, (3) pneumoconiosis, and (4) acute on-chronic renal failure whereas Dr. Sherman listed the causes of death as (1) myocardial infarction and (2) underlying coronary artery disease. The court then noted that cor pulmonale and coronary artery disease are two different conditions. *Id.* at 6.

⁶ The administrative law judge stated that "the Third Circuit found no error of law *per se* in giving weight to Dr. Sherman's opinion, 'as it was supported by medical evidence...' TCO at 5." Decision and Order on Remand at 7.

assertion that the administrative law judge's weighing of the evidence at Section 718.205(c) does not comply with the decision of the Third Circuit court.

Finally, we reject claimant's assertion that the evidence is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304,⁷ based on x-ray evidence demonstrating the presence of complicated pneumoconiosis. Contrary to claimant's assertion, there is no x-ray evidence demonstrating the presence of complicated pneumoconiosis. Furthermore, as argued by the Director, claimant waived this argument by failing to raise it previously. *Taylor v. 3D Coal Co.*, 3 BLR 1-350 (1981).

Because claimant did not establish that the miner's death was caused, contributed to, or hastened by pneumoconiosis pursuant to Section 718.205(c), *Lango*, 104 F.3d at 576, 21 BLR at 2-18; *Lukosevich*, 888 F.2d at 1006, 13 BLR at 2-108, an essential element of entitlement in a survivor's claim, we affirm the denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's decision denying benefits. I would remand the case for the administrative

⁷ Claimant mistakenly refers to 20 C.F.R. §410.418.

law judge to discuss the specific arguments raised by claimant concerning the opinions of Drs. Sherman and Banning.

Claimant argues that the administrative law judge erred in crediting Dr. Sherman's opinion that pneumoconiosis was not a substantially contributing cause of the miner's death. Dr. Sherman's only reasoning proffered for his opinion is that "the PO2 on admission was 77.5, suggesting that hypoxemia did not contribute to the etiology of the myocardial infarction." Director's Exhibit 7. As claimant points out, the doctor's exclusion of pneumoconiosis as a cause of the heart attack, *i.e.*, the etiology of the myocardial infarction, does not exclude it as a contributing cause of the miner's death, *i.e.*, a separate condition which hastened death.

Furthermore, as claimant argues, Dr. Sherman does not explain his determination that the miner's death was totally unrelated to pneumoconiosis, in light of his statement that the miner "had significant impairment from his pneumoconiosis with exacerbations of his COPD and was receiving oxygen therapy for his pneumoconiosis [at the time of his death]." *See* Director's Exhibit 7. The doctor's conclusion is particularly puzzling since he quotes medical notes stating that six and one-half months before the miner's death, and again, three months before the miner's death, he was suffering from "end stage lung disease. . . ." *i.e.*, he was in the last stage of a terminal condition.⁸ Hence, it is Dr. Sherman's conclusion that notwithstanding the fact that the miner's death occurred more than six and a half months after the miner had entered the final stages of terminal lung disease, that terminal illness did not hasten or contribute to the miner's death. I agree with claimant that the administrative law judge should explain her determination that Dr. Sherman has provided a reasoned medical opinion.

Claimant also argues that the administrative law judge erred in her evaluation of Dr. Banning's opinion. It is clear that the administrative law judge misread the doctor's opinion.⁹ She states:

⁸ End-stage "refers to being or occurring in the final stages of a terminal disease or condition." *Merriam Webster Online Dictionary*, Retrieved June 6, 2007, from <http://www.merriam-webster.com/dictionary>.

⁹ When the United States Court of Appeals for the Third Circuit considered the administrative law judge's original decision in this case, the court discussed the administrative law judge's misreading of both doctors' opinions as being in agreement on the primary and secondary causes of death. *Miller v. Director, OWCP*, No. 04-4177, slip op. at 6 (3d Cir. Jan. 12, 2006)(unpub.).

In paragraph 2, Dr. Banning agrees with Dr. Sherman that “there is little argument that [Claimant] suffered from an acute non-transmural Myocardial Infarction.” Dx-9 at 2. Dr. Banning then proceeds to state:

Without left-sided congestive findings on the X-ray and the lack of demonstrable significant Hypoxemia on Blood gas (as noted by examiner Dr. Michael Sherman) *it is difficult to argue* that his acute Myocardial Infarction [with] subsequent left-sided heart failure was the only factor contributing to [Claimant’s] death.

Dx-9 at 2, ¶2 (emphasis added). This statement does not explain how pneumoconiosis contributed in any way to or hastened Claimant’s death. In addition, it credits Dr. Sherman’s opinion (i.e. that death was caused solely by Claimant’s underlying coronary artery disease) by stating that it is “difficult to argue.” Dr. Banning’s conclusion that cor pulmonale was a contributing factor is contradicted by this statement, because the doctor fails to reconcile that conclusion.

Decision and Order on Remand at 8.

First, Dr. Banning did not purport to explain in this paragraph how pneumoconiosis contributed to death. He explains how he determined that the myocardial infarction was not the sole cause of death. He concluded that it was not the sole cause because the x-ray did not show left-sided congestive findings and the blood gas study did not show significant hypoxemia.

Second, the administrative law judge completely misunderstands Dr. Banning’s reference to Dr. Sherman. Dr. Banning stated that claimant’s blood gas study had not shown significant hypoxemia and that Dr. Sherman had noted this fact.

Third, the administrative law judge misreads the sentence with “it is difficult to argue . . .”. Dr. Banning states it is difficult to argue that myocardial infarction was the only factor contributing to claimant’s death. This contradicts Dr. Sherman’s opinion that myocardial infarction was the only factor contributing to death.

Dr. Banning’s opinion reflects that he considered not only the blood gas study, but also an x-ray. He opined that the absence of left-sided congestive findings on the x-ray indicated that the miner’s acute myocardial infarction was not the sole cause of the miner’s death. Based upon his consideration of this evidence, he stated, as a consultant cardiologist, that if the myocardial infarction had been the sole cause of death, claimant’s

x-ray would have shown left-sided congestive findings. Since these findings were absent, the doctor concluded that claimant's cor pulmonale secondary to coal workers' pneumoconiosis caused right-sided heart failure, thereby contributing directly to his demise. The doctor added that "at the very least, [the cor pulmonale] expedited his demise." Director's Exhibit 9. Dr. Banning therefore explained how his analysis of the medical evidence led him to conclude that a myocardial infarction was not the sole cause of death, that death was also brought on by right-sided heart failure due to cor pulmonale secondary to pneumoconiosis. In her brief on appeal, claimant discusses at length the reasonableness of this opinion with references to relevant medical literature. Claimant's Brief at 8-11.

In sum, I believe that claimant has made valid arguments that the administrative law judge erred in her consideration of both Dr. Sherman's opinion and Dr. Banning's opinion. I would, accordingly, remand the case for the administrative law judge to address claimant's arguments.

REGINA C. McGRANERY
Administrative Appeals Judge