

BRB No. 07-0796 BLA

M.W.)
(Widow of A.W.))
)
Claimant-Petitioner)
)
v.)
)
HARMAR COAL COMPANY)
)
and)
) DATE ISSUED: 06/26/2008
ROCKWOOD INSURANCE COMPANY)
)
Employer/Carrier-)
Respondents)
)
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 Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

M.W., Natrona Heights, Pennsylvania, *pro se*.

Gregory J. Fisher (Pietragallo Bosick & Gordon, LLP), Pittsburgh,
Pennsylvania, for employer.

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 (2006-BLA-6013) of Administrative Law Judge Daniel L. Leland (the administrative law judge) 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). The administrative law judge credited the miner with twenty-nine years of qualifying coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence failed to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).² Additionally, despite Dr. Perper’s finding of complicated pneumoconiosis, the administrative law judge found that the preponderance of the evidence did not invoke the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge’s denial of benefits. Employer has responded, urging affirmance. The Director, Office of Workers’ Compensation Programs, declines to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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, supported by substantial evidence, and in accordance with law.³ 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).

In order to establish entitlement to survivor’s benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that the miner’s death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The miner’s death will be considered due to

¹ Claimant, widow of the miner who died on October 11, 2003, filed her claim for survivor’s benefits on February 10, 2005. Director’s Exhibits 2, 9.

² This was the only contested issue, as employer conceded that the miner had histological evidence of simple coal workers’ pneumoconiosis. Hearing Transcript at 5.

³ The law of the United States Court of Appeals for the Third Circuit is applicable, as the miner was employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 3-6.

pneumoconiosis if pneumoconiosis was the cause of the miner's death, if it was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed.

In his consideration of the evidence relevant to the cause of the miner's death pursuant to Section 718.205(c), the administrative law judge first assessed Dr. Schroeder's opinion as the miner's treating physician pursuant to 20 C.F.R. §718.104(d)(1)-(5). The administrative law judge found that her opinion was not entitled to controlling weight. The administrative law judge noted that Dr. Schroeder testified that she treated the miner for his breathing problems, but the administrative law judge found that the record did not substantiate her testimony. Rather, the administrative law judge found that Dr. Schroeder treated the miner for hypertension, degenerative joint disease, hypothyroidism, and coronary artery disease. Decision and Order at 5; *see* 20 C.F.R. §718.104(d)(1). Additionally, the administrative law judge found that although Dr. Schroeder testified to over a decade of treatment, the record reflected only one notation issued by the physician on April 29, 2003, and no further evidence of the frequency or extent of Dr. Schroeder's treatment, or any evidence of medical testing conducted by the physician in the course of her treatment of the miner, was contained in the record. Decision and Order at 5; *see* 20 C.F.R. §718.104(d)(2)-(4). Thus, the administrative law judge properly found that Dr. Schroeder's opinion was not entitled to controlling weight as the miner's treating physician pursuant to 20 C.F.R. §718.104(d).

Further, the administrative law judge found that Dr. Schroeder's opinion was neither well-reasoned nor well-documented. Decision and Order at 5. In so finding, the administrative law judge stated that Dr. Schroeder failed to relate her diagnosis of "increasingly debilitating cardiac problems, including pulmonary hypertension, which is a known complication of coal workers' pneumoconiosis," to the miner's death. Decision and Order at 5; Director's Exhibits 16, 17. Additionally, the administrative law judge found that Dr. Schroeder failed to provide any analysis of how the miner's coal workers' pneumoconiosis contributed to the miner's death. Decision and Order at 5; Director's Exhibits 16, 17; *Kertesz v. Director, OWCP*, 788 F.2d. 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, the administrative law judge properly found that Dr. Schroeder's opinion was not entitled to deference on

the issue of whether pneumoconiosis contributed to the miner's death at Section 718.205(c). *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Likewise, the administrative law judge found that Dr. Perper's opinion was poorly reasoned,⁴ as the physician failed to specify how the miner's pneumoconiosis and centrilobular emphysema contributed to his death. Decision and Order at 5; *see Lango*, 104 F.3d at 575, 21 BLR at 2-20. Additionally, the administrative law judge found that Dr. Perper failed to explain how he determined that the miner's emphysema was caused by coal dust exposure rather than cigarette smoking. *Id.* Thus, the administrative law judge concluded that Dr. Perper's opinion was too vague and unsupported to establish a finding of death due to pneumoconiosis at Section 718.205(c). *Id.*

Next, the administrative law judge acknowledged that Dr. Perper found that the miner suffered from complicated pneumoconiosis, and therefore addressed the applicability of the irrebuttable presumption at Section 718.304.⁵ The administrative law judge accurately found that the record contained no chest x-rays showing large opacities or other diagnostic tests that produced comparable results. Decision and Order at 6; *see* 20 C.F.R. §718.304(a)-(c); *Director, OWCP v. North American Coal Corp. [Truitt]*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). Noting that the initial biopsy report itself did not reveal any opacities as large as those observed by Dr. Perper, and that the remainder of the record did not support Dr. Perper's findings of lesions greater than two centimeters,⁶

⁴ Dr. Perper opined that pneumoconiosis substantially contributed to the miner's death "both directly and through its complications of adenocarcinoma in scar, eventually metastatic and associated centrilobular emphysema." Claimant's Exhibit 1 at 48.

⁵ 20 C.F.R. §718.304 of the regulations provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a)-(c).

⁶ In the initial biopsy report, conducted by Dr. Baker on November 26, 2001, the largest mass observed was in the upper left lobe. Dr. Baker noted a "3 x 2.5 cm. well-demarcated, firm, granular, gray black mass," which he attributed to cancer. Director's Exhibit 12. Dr. Baker also found multiple silicotic nodules present and generally stated in his overview of the biopsy that "the histologic appearance is compatible with coal workers' pneumoconiosis," but he did not find complicated pneumoconiosis. Director's Exhibit 12.

the administrative law judge permissibly found that Dr. Perper's diagnosis of complicated pneumoconiosis was insufficient to establish invocation at Section 718.304, and we affirm his finding thereunder as supported by substantial evidence. *Id.*; see also *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Consequently, we affirm the administrative law judge's finding that claimant is precluded from entitlement to survivor's benefits. See *Lukosevicz*, 888 F.2d at 1004, 13 BLR at 2-105.

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