

BRB No. 03-0558 BLA

ELLA F. NICKLER)
(Widow of LOUIS E. NICKLER))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 03/25/2004
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge United States Department of Labor.

Gregory C. Hook (Hook & Hook), Waynesburg, Pennsylvania, for claimant.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (02-BLA-5344) of Administrative Law Judge Michael P. Lesniak rendered on a 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). Based on the filing date of March 14, 2001, the administrative law judge adjudicated this survivor's claim pursuant to 20 C.F.R Part 718. Director's Exhibit 1. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), but insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence failed to establish death due to pneumoconiosis. Specifically, claimant contends that the administrative law judge erred in accepting the opinion of Dr. Perper that the miner had pneumoconiosis then rejected it on the issue of death due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, (the Director), responds, urging affirmance of the administrative law judge's decision denying benefits.

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 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, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Contrary to the arguments of claimant and the Director, the administrative law judge properly found that Dr. Perper's opinion diagnosing the existence of anthracosis established the existence of clinical pneumoconiosis, 20 C.F.R. §718.201(a)(2); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001)(*en banc*)(Smith and Dolder, Administrative Appeals Judges, dissenting in part and concurring in part); *see Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). The administrative law judge, however, also properly found that it did not establish that the miner's death was due to pneumoconiosis because even though Dr. Perper noted that emphysema, which was known to be associated with smoking and coal mine employment, could not be ruled out as a contributing factor in the miner's death, Dr. Perper never opined that the miner's emphysema was due to coal mine employment.

Dr. Perper further opined that the miner's anthracosis was too mild to be related to the miner's emphysema or to be a factor in the miner's death. *See* 20 C.F.R. §718.201(a)(2). Director's Exhibit 8 at 16-17. The administrative law judge, therefore, properly found that Dr. Perper's opinion did not establish death due to pneumoconiosis. 20 C.F.R. §718.205(c); *Lukosevicz*, 888 F.2d 1001, 13 BLR 2-101.

Additionally, the administrative law judge rejected the only items of evidence that could establish death due to pneumoconiosis. The administrative law judge observed that Dr. Wecht, the autopsy prosector, opined that the miner's coal workers' pneumoconiosis was a substantially contributing factor in the miner's death, but the administrative law judge found this opinion was neither well-reasoned nor well documented: Dr. Wecht did not explain how coal workers' pneumoconiosis contributed to the miner's death; he did not point to any diagnostic tests that would support his conclusion; he did not indicate that he had considered the miner's significant smoking history; and he did not provide a description of the extent and severity of the pneumoconiosis he found in the miner's lungs. Decision and Order at 13-14; Director's Exhibit 7. This was rational. *Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12 (3d Cir. 1997)(administrative law judge may disregard medical opinion that does not adequately explain the basis for its conclusion); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986) (noting that an administrative law judge is not bound to accept the opinion or theory of any medical expert, but may weigh the medical evidence and draw his own inferences); *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002)(administrative law judge must assess quality of a physician's reasoning); *see also Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Decision and Order at 13-14. Likewise, contrary to claimant's contention, the administrative law judge acted properly in refusing to credit the death certificate on which Dr. Barclay had listed black lung as a significant contributing cause of death, as there was no evidence that Dr. Barclay possessed any relevant qualifications or had any personal knowledge of the miner.¹ Decision and Order at 11; Director's Exhibit 5; *Lango*, 104 F.3d at 578, 21 BLR at 2-21 (mere fact that death certificate refers to pneumoconiosis cannot be viewed as a reasoned medical finding); *see Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), 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 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, the administrative law judge permissibly found that the medical opinion evidence failed to

¹ The death certificate reflected that metastatic lung cancer was the immediate cause of the miner's death. Director's Exhibit 5.

establish that the miner's death was caused, contributed to, or hastened by pneumoconiosis.

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

REGINA C. McGRANERY
Administrative Appeals Judge