

BRB No. 06-0662 BLA

JOYCE WARREN, Survivor of and o/b/o)
RAYMOND WARREN)
)
Claimant-Petitioner)
)
v.)
)
EASTERN ASSOCIATED COAL) DATE ISSUED: 03/22/2007
CORPORATION)
)
and)
)
PEABODY 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Joyce Warren, Beckley, West Virginia, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (04-BLA-05262 and 04-BLA-05263) of Administrative Law Judge Michael P. Lesniak on claims filed by the miner and the survivor 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 found that employer was the responsible operator and that the parties stipulated to at least twenty years of qualifying coal mine employment. Decision and Order at 2-3. Based on the dates of filing, the administrative law judge considered entitlement in both the miner's and the survivor's claims pursuant to 20 C.F.R. Part 718.¹ Decision and Order at 3, 8. After noting that the miner's claim was a subsequent claim, and noting the proper standard for considering subsequent claims, the administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and was therefore sufficient to establish one of the applicable conditions of entitlement previously adjudicated against the miner pursuant to 20 C.F.R. §725.309. Decision and Order at 2-4, 6-7. The administrative law judge further concluded that, on consideration of all the evidence of record,² the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and the administrative law judge noted that employer agreed that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). Decision and Order at 7. The administrative law judge found, however, that the miner was not totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 7-8. Regarding the survivor's claim, the administrative law judge found that, although the evidence established the existence of pneumoconiosis arising out of coal mine employment, it failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 8-9. Accordingly, benefits were denied on both the miner's and the survivor's claims.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits on both claims. Employer responds, urging affirmance of the

¹ The miner filed his first claim for benefits on June 8, 1994. That claim was denied by the district director on November 29, 1994, as the miner failed to prove any element of entitlement. Director's Exhibit 1. The miner took no further action until he filed the instant, second claim on August 21, 2001. The miner died on May 23, 2002, and, on December 10, 2002, claimant filed a survivor's claim. That claim was denied on September 5, 2003. Widow's Director's Exhibits 2, 19. Hearings were requested on both claims, Director's Exhibit 25; Widow's Director's Exhibit 21, and the claims were consolidated and referred to the Office of Administrative Law Judges on October 31, 2003. Director's Exhibit 29; Widow's Director's Exhibit 24.

² The administrative law judge found the existence of pneumoconiosis established based on positive x-ray reports, a positive biopsy report, and the positive autopsy report. 20 C.F.R. §718.202(a)(1), (2).

administrative law judge's denial of benefits as supported by substantial evidence. Employer also challenges its designation as the responsible operator, contending that the Black Lung Disability Trust Fund is responsible for this claim. Employer's Brief at 2-3, n.1. Employer further contends that the administrative law judge's finding of pneumoconiosis is not without error. Employer's Brief at 13, n.5. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to prove any one of these elements, compels a denial of benefits. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Additionally, in order to establish entitlement to benefits, pursuant to 20 C.F.R. Part 718, in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *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). Pneumoconiosis was a "substantially contributing cause" of a miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).³

³ The record indicates that the miner was last employed in the coal mine industry in West Virginia. Director's Exhibits 1, 2, 4. 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 (1989)(*en banc*).

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 contains no reversible error. In considering the evidence at 20 C.F.R. §718.204(c), the administrative law judge permissibly noted that, although Dr. Mullins concluded that the miner's pneumoconiosis was totally disabling, the doctor's opinion was entitled to less weight as the doctor did not have the benefit of the autopsy findings or the autopsy review findings, which established that the miner had only minimal simple coal workers' pneumoconiosis, but had widespread and fatal adenocarcinoma. Decision and Order at 7; *see* Director's Exhibit 14; Widow's Director's Exhibit 12.

Instead, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Fino and Naeye, that the miner's pneumoconiosis was too mild to have caused any pulmonary impairment. The administrative law judge noted the superior qualifications of Drs. Fino and Naeye and also noted that their opinions were better documented as they had reviewed all the medical evidence, including the autopsy and biopsy evidence, showing extensive and serious lung cancer.⁴ This was permissible. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Collins v. J&L Steel*, 21 BLR 1-181 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 7-8; Employer's Exhibits 2, 3, 6. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c) as it is supported by substantial evidence and is in accordance with law. 20 C.F.R. §718.204(c).

Regarding the survivor's claim, the administrative law judge considered and discussed all of the relevant evidence as it related to the cause of the miner's death and rationally determined that the evidence of record was insufficient to carry claimant's burden of proof pursuant to Section 718.205. *See Shuff*, 967 F.2d at 980, 16 BLR at 2-94; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201, 1-203; *Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984); Decision and Order at 8-9; Director's Exhibit 10; Widow's Director's Exhibits 9, 12; Employer's Exhibits 1-3, 5, 6. The administrative law judge permissibly found that the opinion of Dr. Sahadevan, that the miner's death due to adenocarcinoma of the lung was complicated by superimposed pneumoconiosis, was not as persuasive as the better-

⁴ The record shows that Dr. Fino is Board-certified in internal medicine and pulmonary disease, Employer's Exhibits 2, 6 while Dr. Naeye is Board-certified in anatomical and clinical pathology, Employer's Exhibit 3. The credentials of Dr. Mullins are not in the record. Director's Exhibit 14.

reasoned opinions of Drs. Naeye and Fino, as Dr. Sahadevan offered only summary statements and did not articulate the basis for his conclusions, *Lafferty*, 12 BLR at 1-192; *Clark*, 12 BLR at 1-155; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Lucostic*, 8 BLR at 1-47; *Kuchwara*, 7 BLR at 1-170; Decision and Order at 9; Widow's Director's Exhibit 12. Instead, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Naeye because, while Dr. Naeye found the existence of pneumoconiosis, he also determined, on examination of the actual lung tissue, that the pneumoconiosis was too mild to have caused the miner's death. The administrative law judge also permissibly accorded greater weight to the opinion of Dr. Fino, that the miner's death was due to adenocarcinoma, not coal workers' pneumoconiosis, because Dr. Fino had considered, more completely, the entire medical evidence. *See Hicks*, 138 F.3d at 532-33 n.9, 21 BLR at 2-335 n.9; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order at 9; Employer's Exhibits 2, 3, 6. We, therefore, affirm the administrative law judge's determination that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis.⁵

Accordingly, the administrative law judge's Decision and Order - Denying Benefits on the miner's and the survivor's claims is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵ We need not address the arguments made by employer as to whether it was the properly designated responsible operator or whether the administrative law judge properly found the existence of pneumoconiosis established, as we affirm the denial of benefits on both claims. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).