

BRB No. 07-0422 BLA

P.L.D.)
(Widow of F.W.D.))
)
Claimant-Petitioner)
)
v.)
)
WESTMORLAND COAL COMPANY) DATE ISSUED: 03/14/2008
)
Employer-Respondent)
)
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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

P.L.D., Big Stone Gap, Virginia, *pro se*.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order – Denying Benefits (2005-BLA-6024) of Administrative Law Judge William S. Colwell 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 at least twenty 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 claimant established that the miner had pneumoconiosis at 20 C.F.R. §718.202(a)(2), based on autopsy evidence, and that claimant was entitled to the presumption that the miner’s pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b), based on the miner’s length of coal mine employment. The administrative law judge, however, found that claimant failed 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.

On appeal, claimant generally challenges the administrative law judge’s denial of benefits. Employer responds, urging affirmance. 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 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. 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, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner’s death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 718.205(a). In claims filed on or after January 1, 1982, death is considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner’s death, if pneumoconiosis was a substantially contributing cause or factor leading

¹ Claimant, the widow of the miner who died on April 3, 2004, filed a survivor’s claim for benefits on July 14, 2004. Director’s Exhibit 3.

² Jerry Murphee, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, filed an appeal on behalf of claimant, but is not representing her on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if the presumption at 20 C.F.R. §718.304 is available, based on a finding of complicated pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).³

A review of the administrative law judge's Decision and Order and the record shows that the administrative law judge rationally determined that claimant did not meet her burden of establishing that the miner's death was due to pneumoconiosis at Section 718.205(c). Decision and Order at 7-9; *Mays*, 176 F. 3d at 755, 21 BLR at 2-592; *Shuff*, 967 F.2d at 979, 16 BLR at 2-92. In considering the evidence, the administrative law judge noted that lung cancer was the only cause of death listed on the miner's death certificate. Director's Exhibit 9. The administrative law judge further noted that Dr. Colquitt performed an autopsy on April 4, 2004 and prepared a report noting the existence of simple coal workers' pneumoconiosis, but Dr. Colquitt did not address the issue of whether pneumoconiosis or coal dust exposure played a role in the miner's death. Decision and Order at 7; Director's Exhibit 10. The administrative law judge noted that, on reviewing the autopsy slides, Dr. Oesterling, a Board-certified pathologist, found that coal dust exposure played no role in the miner's death. Rather, Dr. Oesterling opined that the miner would have suffered from the same respiratory impairment and died due to lung cancer regardless of the presence of pneumoconiosis. Decision and Order at 7; Employer's Exhibit 2.

Turning to the miner's treatment records, the administrative law judge found that the records of Dr. Williams, the miner's treating physician, Dr. Miller, the miner's oncologist, Dr. Smiddy, a pulmonary consultant to which the miner was referred by Dr. Williams, and Dr. Boggan, the miner's surgeon, reflected a diagnosis of lung cancer, but never a specific diagnosis of pneumoconiosis or a pulmonary condition related to the miner's coal dust exposure. Director's Exhibits 11-14. The administrative law judge noted that while Dr. Smiddy's September 11, 2003 treatment notes mentioned a *history* of pneumoconiosis, they contained no specific diagnosis of pneumoconiosis or a causal relationship between the miner's respiratory condition and his coal mine employment. Director's Exhibit 11. Additionally, the administrative law judge noted that Dr. Boggan's assertion that pneumoconiosis added to the miner's risk of lung cancer was discredited by Drs. Castle, Rosenberg, and Oesterling, who cited medical literature that

³ The law of the United States Court of Appeals for the Fourth Circuit applies because the miner was employed in the coal mine industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3-5.

affirmatively established that Dr. Boggan's point was scientifically inaccurate. Director's Exhibit 13. The administrative law judge, therefore, correctly found that the miner's death certificate, autopsy evidence, and treatment records did not establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c).

Finally, turning to the medical reports prepared after the miner's death by Drs. Williams, Miller, Castle, and Rosenberg, the administrative law judge found that the deficiencies in the opinions of Dr. Williams⁴ and Dr. Miller⁵ significantly affected their credibility. The administrative law judge found that their opinions that pneumoconiosis contributed to and hastened the miner's death were, therefore, outweighed by the contrary opinions of Drs. Castle⁶ and Rosenberg,⁷ which the administrative law judge found to be

⁴ Dr. Williams filed a February 21, 2005 report which noted the miner's coal mine employment history and that a diagnosis of lung cancer was made in April 2002. Dr. Williams stated that the miner ultimately died with complications of his pulmonary disease on April 3, 2004, with the loss of functional status secondary to his underlying severe pneumoconiosis, poorly differentiated adenocarcinoma of the lung, and patchy bronchopneumonia. Dr. Williams also noted that there had been x-ray changes consistent with pneumoconiosis during the miner's pulmonary workup. Claimant's Exhibit 1.

⁵ Dr. Miller filed a report on March 1, 2005, concluding that the miner's pulmonary disease was the major illness which contributed to his inability to perform the activities of daily living effectively. Dr. Miller also noted that he began treating the miner in 2002 for non-small cell carcinoma of the lungs, but that the miner had pre-existing respiratory problems before the cancer diagnosis. Claimant's Exhibit 2.

⁶ Dr. Castle submitted a report dated September 20, 2005, and was deposed on October 3, 2005. Dr. Castle found that the evidence showed that the miner had chronic obstructive pulmonary disease due to smoking. Dr. Castle acknowledged that the autopsy evidence showed minimal pneumoconiosis, but noted that emphysema due to smoking was also found on autopsy. Dr. Castle opined that the miner died as a result of lung cancer due to cigarette smoking and that his death was not caused by, contributed to, or hastened in any way, by coal workers' pneumoconiosis or coal mine employment. Dr. Castle stated that the miner would have died at the same time and in the same manner even if he had not been a coal miner or had evidence of pneumoconiosis. As support for his opinion, the administrative law judge noted the miner's thirty-five year smoking history and the fact that objective testing did not support a finding of pneumoconiosis. Employer's Exhibits 4, 6.

⁷ Dr. Rosenberg submitted a report dated September 14, 2005, and was deposed on September 28, 2005. Dr. Rosenberg, like Dr. Castle, confirmed that chronic obstructive pulmonary disease (COPD) was present prior to the miner's lung cancer diagnosis.

more persuasive.

The administrative law judge found the opinion of Dr. Williams to be deficient because, even though Dr. Williams's treatment records from the last two years of the miner's life included a diagnosis of chronic obstructive lung disease, Dr. Williams did not mention pneumoconiosis or that the miner had a pulmonary disease related to coal mine employment. The administrative law judge further noted that although Dr. Williams referred to x-rays that were compatible with pneumoconiosis, his treatment records did not reveal any findings of pneumoconiosis by x-ray. The administrative law judge noted that while Dr. Williams stated that Dr. Smiddy, a pulmonary specialist he had consulted, found that the miner had pneumoconiosis, Dr. Smiddy's report did not elaborate on that statement or provide any documentation for his diagnosis. Additionally, the administrative law judge noted that Dr. Williams's treatment records and the reports submitted subsequent to the miner's death never mentioned the miner's lengthy smoking history.

Regarding the opinion of Dr. Miller, the administrative law judge found that it was deficient because the letter he wrote after the miner's death referred only generally to the miner's pre-existing chronic respiratory problems, without identifying a coal mine dust related disease. The administrative law judge, therefore, rationally concluded that the post-death opinions of Drs. Williams and Miller were not sufficient to establish that pneumoconiosis contributed to, or hastened, the miner's death. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988) (Ramsey, CJ., concurring); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Because the opinions of Drs. Williams and Miller were the only opinions of record linking claimant's death to pneumoconiosis, the administrative law judge rationally found that claimant failed to establish by affirmative evidence that the miner's pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to Section 718.205(c). 20 C.F.R. §718.205(c); *Mays*, 176 F.3d at 755, 21 BLR at 2-592; *Shuff*, 967 F.2d at 979, 16 BLR at 2-92.

Further, like Dr. Castle, he acknowledged pathological evidence of minimal pneumoconiosis, but also noted pathological evidence of smoking-related emphysema. He found that the miner's COPD was caused by his significant history of cigarette smoking, not coal dust exposure. Based on the evidence he reviewed, he concluded that the miner's pneumoconiosis played no role in his death. Employer's Exhibits 3, 5.

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