

BRB No. 07-0644 BLA

K.R.N.)
(Widow of J.E.N.))
)
Claimant-Petitioner)
)
v.)
)
HARLAN KENTUCKY-VIRGINIA COAL,) DATE ISSUED: 03/25/2008
INCORPORATED)
)
and)
)
KENTUCKY COAL PRODUCERS' SELF-)
INSURANCE FUND)
)
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 – Denial of Benefits of Larry S. Merck,
Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for
employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denial of Benefits (2005-BLA-05586) of Administrative Law Judge Larry S. Merck 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 miner died on December 26, 2003, and claimant filed her application for survivor's benefits on February 24, 2004. Director's Exhibits 2, 12. In a decision dated February 20, 2007, the administrative law judge credited the miner with twenty years of coal mine employment based on the parties' stipulation, and found that the evidence was sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (2), 718.203, but 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.

On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.205(c), 718.104(d), arguing that the administrative law judge failed to assign proper weight to the opinion of Dr. Vaezy as one of the miner's treating physicians.² Employer's Brief at 10. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.³ 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).

¹ Claimant is the surviving divorced spouse of the miner, who died on December 26, 2003. Director's Exhibit 2, 12.

² We affirm, as unchallenged on appeal, the administrative law judge's determination that the evidence of record was sufficient to establish that the miner suffered from simple pneumoconiosis arising out of coal mine employment pursuant 20 C.F.R. §§718.202(a)(1), (2), 718.203(a), but insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was employed in the coal mining industry in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

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, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). 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); *see Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these 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 that Dr. Vaezy's opinion, that "coal workers' pneumoconiosis and associated COPD contributed to [the miner's] death," Claimant's Exhibit 1, was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Specifically, claimant argues that the administrative law judge erred in failing to consider Dr. Vaezy's opinion "in light of 20 C.F.R. §718.104(d) and case law giving controlling weight to the opinions of the miner's treating physician." Claimant's Brief at 10. Claimant asserts that Dr. Vaezy's opinion is reasoned, supported by its underlying documentation, and should have been credited in light of the physician's treatment of the miner, the fact that his biopsy of the miner's right lung established the miner's cancer, the miner's history of COPD and pneumoconiosis, the miner's twenty years of coal mine employment, and Dr. Vaezy's expertise in pulmonary medicine. Claimant's Brief at 10-12. Contrary to claimant's arguments, however, we can discern no error in the administrative law judge's consideration of Dr. Vaezy's opinion.

The mere fact that a physician is a miner's treating physician does not mandate assigning controlling weight to that medical opinion; rather, the administrative law judge must assess the credibility of a treating physician's opinion on its merits. 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002). In the present case, the administrative law judge accurately reviewed Dr. Vaezy's opinion, its underlying documentation, and the physician's credentials and status as one of the miner's treating physicians, and determined that Dr. Vaezy failed to provide any explanation for his conclusion as to the role of pneumoconiosis in the miner's death. Decision and Order at 17; Claimant's Exhibit 1. Thus, the administrative law judge permissibly found that the opinion was conclusory and inadequate to establish death due to pneumoconiosis because it was unreasoned. Decision and Order at 17; Claimant's

Exhibit 1; *see Williams*, 338 F.3d 501, 22 BLR 2-625. The administrative law judge also correctly determined that the death certificate attributed the miner's death solely to metastatic lung cancer, and gave no weight to the opinions of Drs. Fino and Dahhan that the miner's death was not caused or hastened by his pneumoconiosis. Accordingly, the administrative law judge properly found that claimant failed to meet her burden of establishing death due to pneumoconiosis under Section 718.205(c). Decision and Order at 16-17. The administrative law judge's findings pursuant to Section 718.205(c) are supported by substantial evidence and are affirmed. Consequently, we affirm the administrative law judge's denial of survivor's benefits. *Trumbo*, 17 BLR at 1-87.

Accordingly, we affirm the administrative law judge's Decision and Order – Denial of Benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge