

BRB No. 08-0493 BLA

P.S.)
)
 Claimant-Respondent)
)
 v.)
)
 DIAMOND MAY COAL COMPANY) DATE ISSUED: 03/13/2009
)
 and)
)
 PROGRESS FUELS CORPORATION)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Incorporated), Whitesburg, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2007-BLA-05462) of Administrative Law Judge Ralph A. Romano on a survivor's claim filed on April 5, 2006, 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). Director's Exhibit 2.

The administrative law judge accepted the parties' stipulation to twenty years of coal mine employment, found the existence of pneumoconiosis arising out of coal mine employment established at 20 C.F.R. §§718.202(a)(2), (4) and 718.203(b), and found that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).¹ Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge erred in finding that the medical evidence established that the miner's death was hastened by pneumoconiosis. Specifically, employer contends, *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-655 (6th Cir. 2003), that claimant failed to carry his burden by showing that pneumoconiosis hastened the miner's death since pneumoconiosis only hastens death if it does so "through a specifically defined process that reduced the miner's life by an estimable time." *Williams*, 338 F.3d at 509, 22 BLR at 2-655. Employer also contends that the administrative law judge failed to discuss how he concluded that the physicians' opinions he relied on to find death causation were reasoned and documented, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Additionally, employer contends that the administrative law judge did not consider the physicians' qualifications in weighing the evidence relevant to death causation. Lastly, employer contends that the administrative law judge shifted the burden of proof to employer to disprove death due to pneumoconiosis and that the administrative law judge selectively analyzed the evidence. Claimant responds that the administrative law judge's decision awarding benefits should be affirmed, and that employer is merely requesting a reweighing of the evidence. Claimant contends that the administrative law judge properly relied upon the treating physicians' opinions of Drs. Chaney and Ratliff, and the findings on autopsy of Dr. Anderson, the autopsy prosector. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this case.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

¹ The administrative law judge found that claimant established that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), based on autopsy evidence of coal workers' pneumoconiosis and doctors' opinions finding the existence of coal workers' pneumoconiosis, and that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). These findings are affirmed, as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.² 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 survivor’s benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis. Death will be considered to be due to pneumoconiosis if pneumoconiosis caused the miner’s death, pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, the miner’s death was caused by complications of pneumoconiosis, or the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Pneumoconiosis is a “substantially contributing cause” of death if it hastened the miner’s death. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (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).

The administrative law judge found that the following evidence was relevant to the issue of death causation: Dr. Anderson, the autopsy prosector, found massive squamous cell carcinoma of the left lung and bullous emphysema of the right lung with clubbing of the nail beds and extensive pneumoconiosis, as well as bronchopneumonia on autopsy. Director’s Exhibit 13. Dr. Ratliff opined that the miner had clinical pneumoconiosis and chronic obstructive pulmonary disease (copd) that was due to smoking and aggravated by coal dust exposure. Dr. Ratliff opined that the miner’s pneumoconiosis hastened his death because it decreased his lung reserve and increased his susceptibility to infection. Director’s Exhibit 16. Dr. Chaney diagnosed clinical pneumoconiosis and copd. He found that fifty percent of the miner’s copd was due to coal mine employment. He opined that pneumoconiosis hastened the miner’s death. Director’s Exhibit 17. Dr. Oesterling diagnosed mild coal workers’ pneumoconiosis and extensive squamous cell carcinoma that had destroyed a significant portion of the miner’s lung. Dr. Oesterling opined that the miner’s death was not hastened by his “low level of coal workers’ pneumoconiosis.” Employer’s Exhibits 3, 4. Dr. Rosenberg opined that the miner died due to lung cancer and that he would have died when he did, irrespective of his coal mine

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mining industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 3.

dust exposure and any mild coal workers' pneumoconiosis that he had. Employer's Exhibits 1, 2.³

In finding that the miner's death was hastened by pneumoconiosis at Section 718.205(c), the administrative law judge noted that all of the doctors agreed that the miner had pneumoconiosis. The administrative law judge credited the opinions of Drs. Ratliff and Chaney that pneumoconiosis hastened the miner's death, over the opinions of Drs. Oesterling and Rosenberg that it did not.

We agree with employer that claimant has failed to carry his burden of showing that pneumoconiosis hastened the miner's death based on the opinions of Drs. Ratliff and Chaney, as their opinions do not, as a matter of law, meet the standard set forth in *Williams*. In *Williams*, the Sixth Circuit held that the doctors must explain the process by which pneumoconiosis hastened the miner's death. *Williams*, 338 F.3d at 509, 22 BLR at 2-655. Dr. Ratliff opined that pneumoconiosis hastened the miner's death because it "decreased his lung reserve and susceptibility to infection." Director's Exhibit 16. Dr. Chaney opined that pneumoconiosis hastened the miner's death because it "contributed to his chronic shortness of breath." Director's Exhibit 17. The doctors failed, however, to provide any explanation as to how the processes they identified hastened death. Consequently, their opinions are insufficient, as a matter of law, to carry claimant's burden of showing that pneumoconiosis hastened the miner's death. *Williams*, 338 F.3d at 509, 22 BLR at 2-655. As claimant has offered no other evidence establishing that pneumoconiosis hastened the miner's death, we must reverse the award of benefits. Because claimant's evidence is insufficient to carry his burden, we need not address employer's additional arguments concerning the administrative law judge's weighing of the medical opinion evidence. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

³ The miner's death certificate states that the miner died primarily due to multiple cancers. It does not indicate the existence of pneumoconiosis. Director's Exhibit 10.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is reversed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge