

BRB No. 05-0766 BLA

LOUISE B. GAMMON)
(Widow of WILLIAM T. GAMMON))
)
Claimant-Petitioner)
)
v.)
)
EASTERN ASSOCIATED COAL)
CORPORATION)
)
and) DATE ISSUED: 05/26/2006
)
OLD REPUBLIC 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 Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

Gloria M. Stephens, Welch, West Virginia, for claimant.

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, appeals the Decision and Order Denying Benefits (04-
BLA-5810) of Administrative Law Judge Jeffrey Tureck rendered 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).¹ The administrative law judge found that the existence of pneumoconiosis arising out of coal mine employment had been established pursuant to 20 C.F.R. §§718.202 and 718.203 in this survivor's claim, based on the doctrine of collateral estoppel, because these issues had been found in the miner's claim. Assuming, *arguendo*, that collateral estoppel did not apply to the issue of the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203, the administrative law judge found no record evidence to rebut the presumption at 20 C.F.R. §718.203(b), where the miner had twenty-nine years of coal mine employment. The administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Thus, the administrative law judge denied death benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. 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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Dr. Hatahet, the miner's treating physician, Dr. Branscomb, and Dr. Zaldivar rendered opinions on the cause of the miner's death. Dr. Hatahet stated,

Even though several diagnostic impressions were formed during his final hospital stay, what ended Mr. Gammon's life was his lung disease, which was severe coal worker's pneumoconiosis/COPD. There was never any question in my mind, being the treating physician, of that fact.

I believe it's very unfair to deprive the widow (Ms. Gammon), of benefits allowed when the cause of death was clearly respiratory failure, and clearly the result of pre-existing lung disease.

¹ The miner died on December 27, 2001, and had been awarded disability benefits during his lifetime. Transcript at 4-5. Claimant filed her survivor's claim on March 19, 2002. Director's Exhibits 3, 32; Transcript at 5.

Director's Exhibit 11 at 1. Dr. Hatahet also completed the death certificate, and listed the immediate causes of death as coal workers' pneumoconiosis and end stage emphysema, and listed sepsis pneumonia, likely pulmonary emboli, renal failure, and malnutrition as other significant conditions contributing to death. Director's Exhibit 9. In contrast, Drs. Branscomb and Zaldivar attributed the miner's death to multiple organ failures, but not to coal workers' pneumoconiosis. Employer's Exhibits 1 at 7; 2 at 47-48; 3 at 25-28; Exhibit 3 at 6 of Employer's Exhibit 2. The administrative law judge gave no weight to Dr. Hatahet's opinion because he found that Dr. Hatahet did not explain his conclusion and found that his opinion was ambiguous. Thus, the administrative law judge found that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

We affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The administrative law judge rationally gave no weight to Dr. Hatahet's opinion that the miner died due to lung disease, which was severe coal workers' pneumoconiosis/COPD, because Dr. Hatahet did not explain his conclusion, and because his opinion was ambiguous.² *U. S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 5-6; Director's Exhibit 11 at 1. Moreover, the administrative law judge rationally gave no weight to the death certificate, completed by Dr. Hatahet, because it contained no explanation as to how coal workers' pneumoconiosis was responsible for the miner's death. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); Decision and Order at 5; Director's Exhibit 9. Contrary to claimant's argument, the administrative law judge was not required, nonetheless, to defer to Dr. Hatahet's opinion as the opinion of the miner's treating physician. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); 20 C.F.R. §718.104(d). Because the administrative law judge rationally gave no weight to the opinion of Dr. Hatahet, the only opinion of record that supports claimant's burden to establish that the

² The administrative law judge found that Dr. Hatahet did not offer an explanation for his opinion that the miner died due to lung disease, which was severe coal workers' pneumoconiosis/COPD, and did not account for the role the miner's nineteen other diagnoses, including renal failure, end stage emphysema, and heart disease, played in the miner's death. Decision and Order at 5-6. Even accepting Dr. Hatahet's report at face value, the administrative law judge found it ambiguous because it could mean any of three things: 1) that the miner died due to the combined effects of both coal workers' pneumoconiosis and COPD; 2) that the miner died due to the combined effects of either coal workers' pneumoconiosis or COPD; or 3) that the miner died due to coal workers' pneumoconiosis and COPD, which terms were used interchangeably. Decision and Order at 6.

miner's death was due to pneumoconiosis at Section 718.205(c), we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).³

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), an essential element of entitlement, we affirm the administrative law judge's denial of death benefits under 20 C.F.R. Part 718. *Sparks*, 213 F.3d 186, 22 BLR 2-251; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

³ Any error in the administrative law judge's treatment of the remaining opinions of Drs. Branscomb and Zaldivar is therefore harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 6-7; Employer's Exhibits 1 at 7; 2 at 47-48; 3 at 25-28; Exhibit 3 at 6 of Employer's Exhibit 2. In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), we need not address claimant's argument that the administrative law judge erred in failing to apply the doctrine of collateral estoppel to the miner's bullous emphysema, *see* Cl. Br. at 10-12, or employer's argument that the administrative law judge erred in applying the doctrine to find that claimant established the existence of pneumoconiosis, without considering two recent CT scans of the miner. Emp. Br. at 14-16.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge