

BRB No. 05-0951 BLA

DOROTHY W. McCARTY)
(Widow of LEONARD N. McCARTY))
)
Claimant-Respondent)
)
v.)
)
U.S. STEEL MINING COMPANY, LLC) DATE ISSUED: 05/22/2006
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of Decision and Order – Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

James N. Nolan (Wells, Anderson & Bains, LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (03-BLA-0286) of Administrative Law Judge Gerald M. Tierney, which was issued 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). Claimant filed the instant survivor’s claim on August 9, 2000. Director’s Exhibits 10, 15, 18. Following the district director’s denial of her claim, claimant filed a timely request for modification on May 23, 2002. In his Decision and Order, the administrative law judge determined that claimant established a mistake in a determination of fact with respect to the prior denial of her claim as required by 20 C.F.R. §725.310. The administrative law judge

specifically found that that the miner suffered from coal workers' pneumoconiosis, and that his death was due to pneumoconiosis pursuant to 20 C.F.R. §725.205(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge erred in weighing the conflicting medical opinion evidence relevant to the existence of pneumoconiosis and the cause of the miner's death. Claimant responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to respond to the appeal.

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, and in accordance with applicable law.¹ 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).

The sole ground available for modification in a survivor's claim is that a mistake in a determination of fact was made in the initial decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989); see *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003). To establish entitlement to survivors' benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). 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).

In the instant case, the administrative law judge noted the miner died on June 21, 1997 at the age of 75 years. Decision and Order at 2. The miner's death certificate was signed his treating physician, Dr. Jones, and listed renal failure as the immediate cause of death, with pneumonia listed as another significant condition contributing to death. Director's Exhibit 7; Decision and Order at 4. There was no autopsy performed.

¹ Because claimant's last coal mine employment occurred in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

In considering the medical opinion evidence relevant to whether the miner suffered from pneumoconiosis,² the administrative law judge noted that Dr. Jones's treatment notes identified that the miner had chronic obstructive pulmonary disease (COPD). In reports dated May 9 and October 11, 2002, Dr. Jones opined that the miner's COPD was due to a combination of smoking and coal dust exposure, although he was unable to quantify how much each factor contributed. Dr. Jones opined that COPD hastened the miner's death as it compromised the miner's lungs making him more susceptible to pneumonia. Dr. Jones further opined that the miner's COPD complicated the treatment and management of renal failure. Director's Exhibits 18, 24; Decision and Order at 4-5.

In addition to this evidence, the administrative law judge also considered the opinions of Drs. Cohen, Hasson and Rosenberg. Decision and Order at 4-11. Dr. Cohen opined that the miner had coal workers' pneumoconiosis and COPD due in part to coal dust exposure. He further opined that the miner's death was hastened by pneumoconiosis. Claimant's Exhibits 1-3. In contrast, Drs. Hasson and Rosenberg agreed that the miner's COPD was due to smoking. Employer's Exhibits 1, 2, 4. Dr. Hasson opined that COPD due to smoking was a significant factor leading to the miner's death. Employer's Exhibit 1. Dr. Rosenberg opined that the miner's death was neither caused nor hastened by his past history of coal dust exposure. Employer's Exhibit 2. Dr. Rosenberg also opined that the miner's mild degree of respiratory impairment attributable to his COPD from smoking would not have compromised his lung function or hastened his death from complications of pneumonia or renal failure. Employer's Exhibit 4.

In weighing the conflicting opinions relevant to Section 718.202(a)(4), the administrative law judge assigned greatest probative weight to Dr. Cohen's opinion that the miner's COPD was due to both smoking and coal dust exposure, and thus found that claimant established the existence of legal pneumoconiosis. Employer maintains that the administrative law judge's decision was arbitrary. Employer contends that the administrative law judge erred by not questioning the veracity of Dr. Jones's opinion given that his treatment records reflect the doctor had not attributed the miner's COPD to

² The administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Since there was no biopsy or autopsy evidence, the administrative law judge found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Claimant was also unable to avail herself of the presumptions for establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). We affirm the administrative law judge's findings at Section 718.202(a)(1)-(3) as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

coal dust exposure until after the miner's death. Employer's Brief at 3-4. Employer also contends that Dr. Jones was not as well qualified as employer's experts. Employer's Brief at 4. With respect to Dr. Cohen, employer argues that his opinion was entitled to less weight than the opinions of employer's experts because Dr. Cohen neglected to address the rationale provided by Drs. Hasson and Rosenberg for their opinion that the miner's COPD was caused by smoking, and the miner's death was unrelated to coal dust exposure. Employer's Brief at 4-6. Employer asserts that the administrative law judge erred in crediting Dr. Cohen's opinion at Section 718.202(a)(4) because he failed to account for the negative x-ray reports and stated that his opinion would remain the same regardless of the x-ray evidence. Employer's Brief at 7-8.

Employer's assertions of error are without merit. We affirm the administrative law judge's finding at Section 718.202(a)(4) because he properly exercised his discretion in resolving the conflicts in the medical opinion evidence, and in assigning less weight to the opinions of Drs. Hasson and Rosenberg. The administrative law judge properly took into account the qualifications of the physicians³ and noted any deficiencies in their opinions.⁴ Although the administrative law judge observed that Dr. Jones "did not expand on his rationale for concluding that coal mine dust exposure contributed to the miner's [COPD]," the administrative law judge permissibly found Dr. Jones's 2002 reports to be corroborative overall of Dr. Cohen's well-reasoned opinion regarding the etiology of the miner's COPD. Decision and Order at 10. The administrative law judge properly stated that Dr. Cohen diagnosed coal workers' pneumoconiosis based on the miner's symptoms and history of coal dust exposure, and that he diagnosed chronic obstructive pulmonary disease (COPD) due to smoking and coal dust exposure based on a careful review of the physical findings and objective test results obtained prior to the

³ The administrative law judge noted that Drs. Jones, Cohen, Hasson and Rosenberg were Board-certified pulmonary specialists. Decision and Order at 4-5. The administrative law judge, however, also acknowledged "Dr. Cohen's experience in the specific area of black lung." Decision and Order at 10.

⁴ The administrative law judge related that while Dr. Hasson acknowledged that the miner had spent a significant length of time in coal mining, the doctor opined that there was no evidence of coal workers' pneumoconiosis based on the treatment notes from claimant's treating physician, which had included only a diagnosis of chronic obstructive pulmonary disease (COPD). Decision and Order at 6. The administrative law judge stated that Dr. Hasson appeared to be unaware that Dr. Jones had in fact attributed the miner's COPD in part to coal dust exposure, and the administrative law judge reasonably questioned whether Dr. Hasson had considered whether the miner's respiratory condition would meet the legal definition of pneumoconiosis. Decision and Order at 9.

miner's death. Decision and Order at 5. Comparing Dr. Cohen's opinion to the opinions of employer's medical experts, the administrative law judge permissibly found Dr. Cohen's opinion to be better reasoned and documented. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Contrary to employer's assertion, the administrative law judge cited specific instances where Dr. Cohen had countered Dr. Rosenberg's criticisms of his medical findings, and thus, had persuaded the administrative law judge to accept Dr. Cohen's interpretation of the miner's objective test results.⁵ Employer's Brief at 5-7; Decision and Order at 10. Because the administrative law judge properly found Dr. Cohen's opinion to be better supported by the objective evidence, see *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), we affirm the administrative law judge's credibility findings.

Additionally, we reject employer's assertion that Dr. Cohen failed to account for claimant's negative x-rays,⁶ and thus, that his opinion should not have been credited at

⁵ As one example, the administrative law judge stated:

With regard to Dr. Rosenberg's comments on arterial blood gas test results. Dr. Cohen stated that Dr. Rosenberg made much of the normal blood gases in 1979. Dr. Cohen stated that coal workers' pneumoconiosis is clearly a progressive disease and the fact that the miner's blood gases were normal at that time in no way supports the conclusion that the miner did not have physiologically significant pneumoconiosis (displayed by his hypoxemia on arterial blood gas testing) in the 1990's. Dr. Cohen also stated that Dr. Rosenberg ruled out any significant lung disease because there was no finding of cor-pulmonale. Dr. Cohen stated that Dr. Rosenberg should understand that cor-pulmonale only occurs in severe impairment. He stated that the miner did not have severe impairment but had impairment which was clinically significant, enough to reduce his pulmonary reserve. Finally, Dr. Cohen stated that Dr. Rosenberg provided no rationale as to why the miner's coal mine dust exposure was not significantly contributory to the development of his chronic obstructive pulmonary disease (other than to note the lack of a restrictive impairment). He stated that Dr. Rosenberg did not discuss the relationship between coal mine dust exposure and the development of obstructive lung disease.

Decision and Order at 9.

⁶ As related by the administrative law judge, Dr. Cohen opined that even if the sum of the miner's x-rays were negative for pneumoconiosis, "it would not change his opinion that the miner had substantial historical, physical and physiological evidence of coal workers' pneumoconiosis related to coal mine dust exposure." Decision and Order

Section 718.202(a)(4) in light of the overwhelmingly negative x-ray evidence. Employer's Brief at 7-8. Section 718.202(a)(1)-(4) sets forth separate and distinct methods for establishing the existence of pneumoconiosis: a finding that the x-ray evidence does not establish the existence of clinical pneumoconiosis does not preclude an administrative law judge from finding that the medical opinion evidence establishes either the existence of legal or clinical pneumoconiosis. See *Cornett v. Benham Coal Co., Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Section 718.202(a)(4) also specifically provides, in pertinent part, "[a] determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in [Section] 718.201."⁷ Section 718.202(a)(4) recognizes a type of disease process separate and distinct from that demonstrated by x-ray, biopsy, and autopsy evidence. Thus, contrary to employer's assertion, the administrative law judge was not precluded from finding the existence of legal pneumoconiosis established based on doctors' opinions even though he had found that the preponderance of the x-ray evidence did not establish the existence of clinical pneumoconiosis. See 20 C.F.R. §718.202(a)(1)-(4); *U.S. Steel Mining Co., LLC v. Director, OWCP [Jones]*, 386 F.3d 977, 982-83, 23 BLR 2-213, 2-222-23 (11th Cir. 2004); *Cornett*, 227 F.3d at 575, 22 BLR at 2-119; see *Church v. Eastern Associated Coal Corp.*, 21 BLR 1-51 (1997), *rev'g in part and aff'g in part on recon.*, 20 BLR 1-8 (1996); *Clark*, 12 BLR at 1-149.

For the most part, employer seeks to have the Board reweigh the evidence. The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom, see *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge when rational and supported by substantial evidence, see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm as supported by substantial the administrative law judge's

at 5; Claimant's Exhibit 1. In this regard, Dr. Cohen noted that the miner had two pulmonary function studies that showed moderate obstruction consistent with his occupational exposure to coal dust. Claimant's Exhibit 1.

⁷ Section 718.201 provides that the definition for pneumoconiosis includes "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. §718.201(a).

finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

We next address the administrative law judge's findings as to the cause of the miner's death. We disagree with employer that administrative law judge erred in finding that the miner's death was hastened by pneumoconiosis. At Section 718.205(c), the administrative law judge properly discussed the opinions of employer's experts. He noted that Dr. Hasson opined that pneumoconiosis did not contribute to the miner's death, and that Dr. Rosenberg was of the opinion that the miner's death was not caused, hastened, or materially affected by coal dust exposure. Decision and Order at 12. The administrative law judge, however, properly found that since "neither Dr. Hasson nor Dr. Rosenberg found [clinical or legal] pneumoconiosis to exist in this case, their opinions as to whether it played a role in the miner's death can carry little weight. *See generally Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004) (Roth, J., dissenting); *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002) (*en banc*).

Contrary to employer's assertion, the administrative law judge had discretion to credit the opinions of Drs. Cohen and Jones that pneumoconiosis hastened the miner's death. Decision and Order at 12. The administrative law judge correctly noted that these physicians were in agreement that the miner's COPD due to smoking and coal dust exposure compromised the miner's lungs and made him more susceptible to the pneumonia he suffered during his final hospitalization, and that COPD contributed to the miner's death by complicating the treatment and management of his renal failure. *Id.* The administrative law judge further noted that while Dr. Hasson disagreed with Drs. Cohen and Jones as to the etiology of claimant's COPD, even Dr. Hasson acknowledged that the miner's death was related, in part, to his respiratory condition. Employer's Exhibit 1; Decision and Order at 12. Only Dr. Rosenberg was of the opinion that the miner's respiratory condition played no role whatsoever in his death. Thus, because substantial evidence supports the administrative law judge's determination that the miner's death was hastened by pneumoconiosis, we affirm his findings pursuant to 20 C.F.R. §718.205(c).

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is hereby affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge