

BRB No. 06-0734 BLA

RUBY J. HESS)
(Widow of CURTIS H. HESS))
)
Claimant-Petitioner)
)
v.)
)
N S COAL CORPORATION) DATE ISSUED: 05/24/2007
)
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ruby J. Hess, Wise, Virginia, *pro se*.¹

Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

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

PER CURIAM:

¹Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant² appeals, without the assistance of counsel, the Decision and Order (04-BLA-6519 and 04-BLA-6259) of Administrative Law Judge Linda S. Chapman denying benefits on claims 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). This case involves a miner's subsequent claim filed on September 2, 2003³ and a survivor's claim filed on August 30, 2004. In regard to the miner's claim, the administrative law judge found that the newly submitted evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a),⁴ thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior, 2000 claim became final. *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Consequently, the administrative law judge considered the miner's 2003 claim on the merits. Although the administrative law judge found that the evidence established that the miner was totally disabled, *see* 20 C.F.R. §718.204(b), she found that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits in the miner's claim. In regard to the survivor's claim, the administrative law judge found that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), but that the evidence

² Claimant is the surviving spouse of the deceased miner who died on May 1, 2001. Director's Exhibit 73.

³ The miner filed three previous claims. The first, filed on December 30, 1980, was denied as abandoned on March 20, 1981. Director's Exhibit 1. The second, filed on November 30, 1981, was denied on July 29, 1992, because the miner had not established the existence of pneumoconiosis or that he was totally disabled. *Id.* His third claim, filed on April 4, 2000, was denied on July 17, 2002, because the miner had not established the existence of pneumoconiosis. Director's Exhibit 2.

⁴ Although the administrative law judge found that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and that claimant was not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3), the administrative law judge found that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 14-16. In her consideration of the newly submitted medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that Drs. Castle and Fino, after reviewing the autopsy results, acknowledged that there was pathologic evidence of pneumoconiosis. *Id.* at 16. Considering all of the newly submitted evidence together, the administrative law judge found that it established the existence of pneumoconiosis. *Id.*; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

did not 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 in the survivor's claim.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits in both the miner's claim and the survivor's claim. Employer responds in support of the administrative law judge's denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

The Miner's Claim

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Total Disability Due to Pneumoconiosis

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, pursuant to 20 C.F.R. §718.204(b) (2000), a miner must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Revised Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).⁵

The administrative law judge initially considered the evidence submitted in connection with the miner's 2003 claim. In a Progress Note dated July 24, 2003, Dr. Smiddy stated that he had seen the miner on several occasions and had repeatedly found him to have "severe respiratory impairment by coal workers' pneumoconiosis." Director's Exhibit 32. The administrative law judge, however, properly discredited Dr. Smiddy's opinion, because the doctor "did not explain how he arrived at [his] conclusion, or articulate any clinical basis for [his] finding." *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 17. The administrative law judge further noted that Dr. Smiddy "offered no support for his brief and conclusory statements, and did not offer any explanation of how the medical evidence supported his opinions." *Id.* The administrative law judge permissibly found that Dr. Smiddy's opinion did not support a finding that the miner's total disability was due to pneumoconiosis.

⁵In enacting this revised regulation, the Department of Labor explained:

The Department did not mean to alter the current law through its proposals, however, or to suggest that *any* adverse effect, no matter how limited, was sufficient to establish total disability due to pneumoconiosis. Rather, the Department meant only to codify the numerous decisions of the courts of appeals which, in the process of deciding when a miner is totally disabled due to pneumoconiosis, have also ruled on what evidence is legally sufficient to establish that element of entitlement. In order to clarify this consistent intent, the Department has added the word "material" to §718.204(c)(i) and "materially" to §718.204(c)(ii). In so doing, the Department intends merely to implement the holdings of the courts of appeals. Thus, evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability.

65 Fed. Reg. 79,946 (2000) (emphasis in original).

In a report dated September 30, 2003, Dr. Baker opined that the miner's severe pulmonary impairment was due to coal dust exposure and cigarette smoking. Director's Exhibit 13. The administrative law judge permissibly found that Dr. Baker's opinion was not sufficiently reasoned, noting that "Dr. Baker offered no explanation of how he arrived at his conclusion that coal dust exposure contributed to [the miner's] bronchitis, COPD, and hypoxemia." Decision and Order at 17; *see Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. The administrative law judge permissibly found that Dr. Baker's opinion did not support a finding that the miner's total disability was due to pneumoconiosis.

The administrative law judge properly found that Drs. Fino, Castle, and Naeye each opined that, although the miner suffered from pneumoconiosis, the disease did not contribute to his pulmonary disability.⁶ Decision and Order at 17. The administrative law judge found that these physicians explained how the records, including the autopsy findings, supported their conclusions. *Id.* Because the administrative law judge permissibly found that their opinions were well-reasoned and supported by the objective medical evidence, she properly accorded greater weight to the opinions of Drs. Fino, Castle, and Naeye. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

The administrative law judge also considered the evidence submitted in connection with the miner's previous claims. She found that the medical opinion evidence submitted in connection with the miner's previous claims was not competent to establish that pneumoconiosis or coal dust exposure played a role in the miner's respiratory disability, because those opinions were based on a review of only a small

⁶ Dr. Fino attributed the miner's disabling lung condition to severe emphysema due to cigarette smoking. Employer's Exhibit 10; Employer's Exhibit 12. Dr. Fino further opined that the miner's disabling lung disease was neither contributed to, nor caused by, the inhalation of coal mine dust. *Id.*

Dr. Castle opined that the miner suffered from a severe respiratory impairment due to tobacco smoke induced pulmonary emphysema with an asthmatic component. Director's Exhibit 35; Employer's Exhibits 9, 13. Dr. Castle further opined that the miner was not disabled as a result of coal workers' pneumoconiosis or any other process arising out of his coal mine employment. *Id.*

Dr. Naeye opined that the miner's simple pneumoconiosis was not severe enough to have been disabling. Employer's Exhibit 7. Dr. Naeye opined that the miner's cigarette smoking was the "dominating cause of his chronic bronchitis, centrilobular emphysema, cardiac damage and death." *Id.*

portion of the medical evidence. Decision and Order at 17. In weighing medical reports, an administrative law judge may properly find that a doctor's opinion based on limited clinical data is entitled to less weight than conflicting reports based upon more comprehensive documentation. *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the "preponderance of the reliable medical evidence" did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 18.

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we affirm the administrative law judge's denial of benefits in the miner's claim. *Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2.

The Survivor's Claim

Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁷ *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

⁷Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) 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).

OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

Dr. Barongan, the miner's treating physician, completed the miner's death certificate. He listed the immediate cause of the miner's death as coronary artery disease due to biventricular cardiac hypertrophy. Director's Exhibit 7 (Survivor's Claim). In the section requesting a listing of "[o]ther significant conditions contributing to death but not resulting in the underlying cause," Dr. Barongan listed cor pulmonale due to pneumoconiosis and chronic obstructive pulmonary disease. *Id.* The administrative law judge permissibly found that the miner's death certificate did not establish that the miner's death was due to pneumoconiosis, because it was not a reasoned medical finding.⁸ Decision and Order at 6; see *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000).

Dr. Barongan also completed a report dated March 8, 2005, wherein he stated that:

The cause of [the miner's] death was coronary artery disease, biventricular cardiac hypertrophy, [secondary] to cor-pulmonale from chronic obstructive pulmonary disease with pneumoconiosis.

When [the miner] came for his appointments he was always short of breath, wheezing and coughing. He always had to sit and rest awhile before he could answer any questions. [The miner] had coal workers [sic] pneumoconiosis that would contribute to a cardiopulmonary strain.

[The miner] had been trying to get his black lung benefits for sometime. He worried about this and when he did he became nervous and that caused his breathing problems to increase.

Director's Exhibit 13 (Survivor's Claim).

The administrative law judge found that Dr. Barongan did not offer any

⁸Dr. Barongan provided no explanation for his findings on the miner's death certificate. See Director's Exhibit 7 (Survivor's Claim).

explanation for his statement that the miner's pneumoconiosis caused cor pulmonale, which in turn contributed to the miner's death. Decision and Order at 23. The administrative law judge, therefore, permissibly found that Dr. Barongan's opinion was not sufficiently reasoned. *Id.*; see *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

Dr. Naeye reviewed the miner's autopsy slides and medical evidence. In a report dated August 29, 2005, Dr. Naeye opined that the miner's coal workers' pneumoconiosis was not severe enough to have had a measurable role in his death. Employer's Exhibit 7. Dr. Naeye opined that the miner's cigarette smoking was "the dominating cause of his chronic bronchitis, centrilobular emphysema, cardiac damage and death." *Id.* Although the administrative law judge found that Dr. Naeye's opinion did not establish that pneumoconiosis was a factor in the miner's death, she noted that Dr. Naeye's report also did not "exclude pneumoconiosis as a factor, however 'insignificant.'" Decision and Order at 23. The administrative law judge, therefore, found that Dr. Naeye's report was "inconclusive." *Id.* We find no error in the administrative law judge's determination that Dr. Naeye's opinion did not support a finding that the miner's death was due to pneumoconiosis.

The administrative law judge correctly stated that Drs. Castle and Fino, the only other physicians to address the cause of the miner's death, opined that pneumoconiosis did not have any impact on the miner's death.⁹ Decision and Order at 23-24. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).¹⁰

⁹ Dr. Fino opined that the miner's coal workers' pneumoconiosis and coal mine dust inhalation did not hasten or participate in his death. Employer's Exhibit 10. He stated that, if the miner died a respiratory death, it was unrelated to coal mine dust exposure or a coal mine dust-related disease. Employer's Exhibit 12 at 19.

Dr. Castle opined that the miner's death was not caused or hastened by his coal workers' pneumoconiosis. Employer's Exhibit 13 at 22-23.

The administrative law judge accurately noted that Dr. Buddington, the autopsy prosector, did not address the cause of the miner's death. Decision and Order at 23; Claimant's Exhibit 1.

¹⁰ Because there is no evidence of complicated pneumoconiosis in the record, claimant is precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. See 20 C.F.R. §718.205(c)(3).

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

REGINA C. McGRANERY
Administrative Appeals Judge