

BRB No. 08-0626 BLA

D.V.F.)
(Widow of J.C.F.))
)
Claimant-Respondent)
)
v.)
)
SOUTHERN OHIO COAL COMPANY)
) DATE ISSUED: 05/29/2009
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Award of Survivor Claim of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Survivor Claim (2006-BLA-5653) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a claim¹ filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

¹ Claimant, D.V.F., is the widow of the miner, J.C.F., who died on April 30, 2005. Decision and Order at 4; Director's Exhibits 1, 2, 8, 9. Claimant filed her survivor's claim on June 1, 2005. Director's Exhibit 4. Claimant's counsel informed the Board that

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge accepted the parties' stipulation that the miner had pneumoconiosis arising out of more than twenty-five years of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. Thus, the administrative law judge considered the sole issue to be whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In weighing the evidence pursuant to 20 C.F.R. §718.205(c), the administrative law judge found that Dr. Serfontein's opinion established that the miner's death was caused by pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in relying on the opinion of Dr. Serfontein to find that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c), asserting that the doctor's opinion is unreasoned and undocumented. Employer further contends that the administrative law judge erred in discrediting the opinions of Drs. Farney and Fino, that the miner's death was unrelated to pneumoconiosis. Claimant responded to employer's appeal, urging the Board to affirm the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not participate in the appeal before the Board, unless specifically requested to do so.

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.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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*,

claimant died on November 23, 2008. Because claimant's counsel has filed a Notice of Death of Claimant-Respondent and Motion to Substitute Representative of the Estate of Claimant as Respondent, claimant's daughter, K.F., the personal representative of claimant's estate, will receive service of all documents in this case. [*D.V.F.*] *v. Southern Ohio Coal Co.*, BRB No. 08-0626 BLA (Feb. 9, 2009)(Order).

² Because the miner's last coal mine employment was in Ohio, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1.

17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, a miner's death will be considered 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), (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); *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).

In this case, the miner's death certificate was signed by Dr. Serfontein, who treated the miner during his terminal hospitalization from April 21 - 30, 2005. Director's Exhibit 9. Dr. Serfontein listed interstitial lung disease due to coal workers' pneumoconiosis and cor pulmonale as causes of the miner's death. *Id.* Dr. Serfontein testified that he "was 80 percent sure [the miner] had coal workers' pneumoconiosis" and that "[i]f he had pneumoconiosis, that would be the reason why he ultimately died." Director's Exhibit 20 at 15. Conversely, after reviewing the miner's treatment and medical records, Dr. Farney opined that the miner died as a result of multisystem failures, and that coal dust exposure did not contribute to his death. Director's Exhibit 19; Employer's Exhibits 5, 9. In addition, after reviewing the miner's treatment and medical records, Dr. Fino attributed the miner's death to his severe lung disease, but opined that coal dust exposure did not cause the miner's pulmonary disease and that pneumoconiosis did not cause, contribute to, or hasten the miner's death. Employer's Exhibits 6, 10.

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge found that the opinions of Drs. Farney and Fino were entitled to "diminished probative value" because they did not adequately explain their conclusions that pneumoconiosis did not contribute to the miner's death, even though the presence of pneumoconiosis was established by stipulation.³ Decision and Order at 14-15. The administrative law judge found that Dr. Serfontein's "sufficiently documented and reasoned" opinion, that the miner died of respiratory failure due to his pneumoconiosis, outweighed the contrary opinions of Drs. Farney and Fino which contained "various documentation and reasoning shortfalls." Decision and Order at 16. The administrative law judge noted that Dr. Serfontein believed the miner suffered from pneumoconiosis because: first, the miner had decreased air entry and fine crackles consistent with an interstitial lung disease; second, the miner had a history of coal mine employment; third, pneumoconiosis may cause pulmonary

³ Dr. Farney opined that the miner's death was due to progressive multisystem and cardiopulmonary failure, attributable to chronic heart failure, hypertension, and atrial fibrillation, while Dr. Fino opined that the miner died from respiratory failure due to a severe lung disease that was unrelated to coal mine employment, with congestive heart failure being a contributing cause. Employer's Exhibits 5, 10.

obstruction; fourth, although pneumoconiosis was not specifically diagnosed radiographically, widespread interstitial lung disease was reported; and fifth, since the miner not smoked for thirty years, smoking could not account for the advanced damage to his lungs. *Id.* at 11-12; Director's Exhibit 20 at 13. The administrative law judge concluded that:

Although Dr. Serfontein only treated [the miner] during the last nine days of his life, he was nevertheless well positioned to assess the circumstances of [the miner's] death. During the course of [the miner's] final hospitalization, a detailed documentary basis of objective medical evidence was developed including chest x-rays, a CT scan, multiple physical examinations revealing rales and rhonchi, an echocardiogram, and several arterial blood gas studies showing a progressive deterioration of [the miner's] oxygenation capacity. Although Dr. Serfontein did not specifically diagnose pneumoconiosis, he noted several discriminating factors that reasonably lead to his belief, consistent with the stipulation of fact, that [the miner] had coal workers' pneumoconiosis. Additionally, based on the extensive array of objective medical evidence developed in the course of his treatment of [the miner] and his detailed discharge summary, Dr. Serfontein presented a sufficiently documented and reasoned medical opinion that [the miner] died a respiratory death due to coal workers' pneumoconiosis.

Decision and Order at 15-16.

Employer specifically argues that the administrative law judge erred in finding Dr. Serfontein's opinion to be documented and reasoned in light of the "critical shortcomings" related to his opinion. Employer's Brief at 3. Employer asserts that Dr. Serfontein's diagnosis of chronic obstructive pulmonary disease (COPD) is contradicted by Dr. Fino's opinion that a diagnosis of COPD is not supported by the underlying objective testing.⁴ *Id.* at 3-4. In addition, employer argues that Dr. Serfontein had limited knowledge of the miner's condition and that his opinion is equivocal and speculative. *Id.* at 4-5. Employer's contentions are without merit.

⁴ Employer notes that "Dr. Fino explained that [chronic obstructive pulmonary disease] COPD was an incorrect diagnosis, because the pulmonary function studies [from 1979, 1980, 1981 and 1998] did not reveal any obstruction." Employer's Brief at 3; Employer's Exhibit 10 at 15-16. Dr. Fino further testified that, in his experience and even in his own practice, "a lot of times any chronic lung condition gets the name COPD." Employer's Exhibit 20 at 17. Dr. Fino concluded that the miner "had a pulmonary fibrotic condition, not COPD." *Id.*

A “reasoned” opinion is one in which the underlying documentation adequately supports the physician’s conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). A “documented” opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields*, 10 BLR at 1-22. Dr. Serfontein was consulted during the miner’s terminal hospitalization and provided an opinion regarding the miner’s persistent hypoxemia and shortness of breath which led to his hospitalization. Director’s Exhibit 11. In recording the miner’s medical history and the history of the miner’s present illness, Dr. Serfontein noted that the miner was “known with (sic) coal workers’ pneumoconiosis and underlying COPD,” as well as multiple cardiac problems. *Id.* During a physical examination of the miner, Dr. Serfontein noted that, among other symptoms such as scattered rales and rhonchi bilaterally, chest x-rays and a CT scan showing extensive chronic interstitial fibrosis, severe structural damage, and congestive heart failure, there was a “mild increase in the AP diameter [of the chest] suggestive of COPD.” *Id.* In addition, during his deposition, when asked for the basis of the statement in his report regarding the miner’s known history of coal workers’ pneumoconiosis and COPD, Dr. Serfontein stated that:

It was on clinical examination there were signs of COPD and I think later on I did explain there was some decreased air entry on both sides and on examination he has fine crackles which we usually get with interstitial lung disease and with his history of exposure to dust and nearly the absence of smoking for pretty much 30 years, the only conclusion I could come to [was] that it was secondary to pneumoconiosis and pneumoconiosis does cause an obstructive lung disease. So that’s why I made both diagnoses.

Director’s Exhibit 20 at 9. Dr. Serfontein determined that the miner’s significant underlying lung disease due to coal workers’ pneumoconiosis was chronic and irreversible and more pronounced than his COPD, which “plays a minor role in his current exacerbation.” *Id.*

Contrary to employer’s contention, the administrative law judge reasonably determined that, in light of Dr. Serfontein’s reliance on his examinations of the miner and the extensive array of objective medicine evidence developed in the course of his treatment,” his opinion is documented and reasoned. *Fields*, 10 BLR at 1-22; *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Likewise, we reject employer’s assertion that the administrative law judge erred in failing to consider the “equivocal and speculative” nature of Dr. Serfontein’s opinion. Employer’s Brief at 4. The administrative law judge specifically considered the independent factors discussed by Dr. Serfontein to support his reliance on a presumed diagnosis of pneumoconiosis. Decision and Order at 11-12. Employer’s argument that Dr. Serfontein’s opinion is not documented and reasoned is essentially a request for the Board to evaluate the credibility of Dr. Serfontein’s opinion, which we are not

empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Rinkes v. Consolidation Coal Co.*, 6 BLR 1-826 (1984). We therefore reject employer's contention that Dr. Serfontein's opinion is legally insufficient to support claimant's burden of proof at 20 C.F.R. §718.205(c), as the administrative law judge's credibility determinations are within his discretion and supported by substantial evidence. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *see generally Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002).

Employer further argues that the administrative law judge did not provide valid reasons for giving less weight to the opinions of Drs. Farney and Fino and that he failed to consider the physicians' qualifications. Employer's Brief at 6-8. We disagree. The administrative law judge was entitled to "diminished weight due to inaccurate documentation" because, although Dr. Farney acknowledged the "possibility" that the miner had pneumoconiosis, he also provided a detailed explanation of why a diagnosis of pneumoconiosis was not supported by the objective medical evidence. Decision and Order at 15. The administrative law judge therefore found that "Dr. Farney effectively believed [the miner] did not have black lung disease and thus was not in a position to determine the role coal workers' pneumoconiosis played in [the miner's] death." *Id.* Similarly, the administrative law judge found that Dr. Fino's opinion suffered from a "reasoning shortfall" because, although Dr. Fino assumed the presence of pneumoconiosis, he "did not then explain how he was able to conclude that black lung disease was not a factor in [the miner's] respiratory death." *Id.* Thus, the administrative law judge found that Dr. Fino did not sufficiently address the role the miner's pneumoconiosis may have had in his death. *Id.* We hold that the administrative law judge acted within his discretion in according "diminished probative value" to the opinions of Drs. Farney and Fino, which he found lacked sufficient documentation and reasoning, respectively, in light of the stipulation that the miner had coal workers' pneumoconiosis. *See Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89, n.4; *see also Skukan v. Consolidation Coal Co.*, 99 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1231 (1994); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Additionally, the administrative law judge specifically noted the credentials of all three physicians. The administrative law judge acknowledged that Dr. Serfontein was Board-certified in internal medicine, Dr. Farney was Board-certified in internal medicine and pulmonary medicine and that Dr. Fino was Board-certified in internal medicine and

pulmonary disease. Decision and Order at 11-13; *see* Director’s Exhibits 19, 20; Employer’s Exhibit 7. However, because the administrative law judge reasonably determined that the opinions of Drs. Farney and Fino were not well-reasoned and well-documented, he was not required to accord their opinions enhanced weight based on their qualifications. *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005)

We therefore reject employer’s allegations of error and affirm the administrative law judge’s finding that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), as it is supported by substantial evidence. Consequently, we affirm the administrative law judge’s award of survivor’s benefits.

Accordingly, the administrative law judge’s Decision and Order – Award of Survivor Claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge