

BRB No. 08-0636 BLA

L.M.P.)
(Widow of K.P.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 05/18/2009
)
KENTLAND ELKHORN COAL)
CORPORATION)
)
and)
)
THE PITTSTON COMPANY c/o ACORDIA)
EMPLOYER SERVICE)
)
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 Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

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

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denial of Benefits (2006-BLA-5590) of Administrative Law Judge Thomas F. Phalen, Jr., with respect to 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). In his Decision and Order, the administrative law judge credited the miner with twenty-two years of coal mine employment and considered the claim, filed on May 10, 2005, pursuant to the regulations set forth in 20 C.F.R. Part 718.¹ The administrative law judge accepted employer's stipulation to the existence of pneumoconiosis and determined that claimant was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that the miner's pneumoconiosis arose out of coal mine employment. The administrative law judge further found, however, that claimant failed to 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.

Claimant argues on appeal that the administrative law judge erred in allowing employer to develop post-hearing evidence without first determining whether employer had established good cause pursuant to 20 C.F.R. §725.456(b)(3). Claimant also argues that the administrative law judge did not properly weigh the medical evidence relevant to Section 718.205(c). Employer has responded and urges affirmance of the administrative law judge's evidentiary ruling and his determination that claimant did not establish that the miner's death was due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this 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. 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

¹ The miner died on March 27, 2005. Director's Exhibit 2. Claimant is the miner's surviving spouse. *Id.* The file containing the record in the survivor's claim includes a claim filed by the miner on March 23, 1976. Living Miner's Exhibit 1. The district director finally denied this claim on June 18, 1980, as the miner did not establish any of the elements of entitlement. *Id.*

death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *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 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 hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

We will first address claimant's argument that the administrative law judge erred in allowing employer to procure and submit Dr. Oesterling's report after the hearing, without first determining that employer established good cause for failing to exchange the evidence at least twenty days prior to the hearing in accordance with Section 725.456(b)(3).² In order to prevail, claimant must establish that the administrative law judge abused the broad discretion granted to him in resolving procedural issues. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986).

At the hearing, which was held on February 21, 2007, the parties and the administrative law judge discussed a motion that employer had filed requesting permission to develop evidence subsequent to the hearing, in light of claimant's failure to respond to a discovery request made shortly after the parties received the Notice of Hearing. Employer had asked claimant to provide any autopsy slides or reports that claimant had not previously submitted to employer. Employer had experienced difficulty in obtaining the slides, as it did not have the proper release form and was uncertain as to which facility had possession of the slides. Employer's Response Brief at 14-16. The position of claimant's counsel was that, because claimant did not have the slides in her possession, she had no obligation to produce them. Hearing Transcript at 9, 10. The administrative law judge stated:

“Well, at this point, I'm giving the benefit of the doubt to [employer's] problem in getting a hold of the slides. I'd like you to take another step to secure them. If you have a release or need a

² Under 20 C.F.R. §725.456(b)(3), any documentary evidence that is not exchanged within twenty days of the date of the hearing “may be admitted at the hearing with the written consent of the parties or on the record at the hearing, or upon a showing of good cause.” 20 C.F.R. §725.456(b)(3).

release, get further releases. If not, I'm going to allow one more attempt to get them.

Id. at 9. In response to a statement by claimant's counsel indicating that employer did not attempt to obtain the tissue slides, or to seek counsel's assistance, until the hearing, the administrative law judge stated: "Well, I have no way of knowing the ins and outs of that either and as I say, I'm allowing the benefit of the doubt[.]" *Id.* at 9-10. Accordingly, the administrative law judge gave employer until April 21, 2007, to submit a medical report based upon a review of the autopsy slides. *Id.* at 30-31. The administrative law judge also indicated that claimant would have the opportunity to respond to any evidence submitted by employer. *Id.* at 10-11, 30-31.

On March 28, 2007, employer filed a motion asking for additional time within which to obtain the post-hearing evidence, explaining that it had only recently obtained the documentation from claimant necessary for the release of the autopsy slides. Over claimant's objection, the administrative law judge granted employer's motion, stating: "I find that there is no harm to [claimant] in granting the request for an extension of time to submit medical evidence, nor is there any harm to [employer] in granting an extension to [claimant] to submit a response to the autopsy slide report[.]" Order of Administrative Law Judge dated April 30, 2007. The administrative law judge subsequently granted a request by claimant for an extension of time to submit her response evidence. Order of Administrative Law Judge dated June 20, 2007. Employer submitted Dr. Oesterling's report and claimant submitted Dr. Kahn's report in response. Claimant's Exhibit 3; Employer's Exhibit 3.

Based upon these facts, we decline to disturb the administrative law judge's resolution of this issue. Although the administrative law judge used imprecise language, he essentially credited employer's statements regarding the difficulties it had experienced in obtaining the slides and found that this constituted good cause for allowing employer additional time to procure a report based upon a review of the slides. Hearing Transcript at 9-10. We affirm the administrative law judge's determinations, as they do not represent an abuse of discretion. *Keener*, 23 BLR at 1-236; *Morgan*, 8 BLR at 1-493. Moreover, even if the administrative law judge did not render a complete good cause finding under Section 725.456(b)(3), claimant was not prejudiced by the admission of Dr. Oesterling's report, as the

administrative law judge gave her the opportunity to respond to Dr. Oesterling's opinion by submitting a report from Dr. Kahn.³

We will now address the administrative law judge's findings on the merits of entitlement. Pursuant to Section 718.205(c), the administrative law judge considered the death certificate, Dr. Jelic's autopsy report, and the medical opinions of Drs. Oesterling, Kahn, Thorarinsson, and Rosenberg. On the death certificate, Dr. Nelson identified cerebral infarction and end-stage chronic obstructive pulmonary disease (COPD) as the causes of death. Director's Exhibit 15.

Dr. Jelic performed the autopsy, which was restricted to the chest, and observed the presence of pneumonia in the lower lobe of the miner's right lung, bronchopneumonia in the lower lobe of the miner's left lung, acute exacerbation of chronic bronchitis, simple coal workers' pneumoconiosis and moderate emphysema. Director's Exhibit 17. Dr. Jelic did not offer an opinion as to the cause of the miner's death.

Dr. Oesterling reviewed the slides obtained during the autopsy and diagnosed "very mild macular coal workers' pneumoconiosis." Employer's Exhibit 3. Dr. Oesterling concluded that the miner's pneumoconiosis played no role in his death. *Id.*

Dr. Kahn reviewed the autopsy slides, Dr. Jelic's report, the death certificate, and Dr. Oesterling's report. Claimant's Exhibit 3. Dr. Kahn indicated that the miner suffered from lobar pneumonia, bronchopneumonia, pulmonary emphysema, exacerbation of COPD, pulmonary edema, and coal workers' pneumoconiosis. *Id.* With respect to the cause of the miner's death, Dr. Kahn opined that because the miner suffered from a number of conditions that adversely affected his pulmonary function, "having some 10% of his lower airway passages distorted by coal macules and coal micronodules was, in my opinion, indeed significant." *Id.* Dr. Kahn concluded that "the effects from each of the disease processes in [the miner's] case combined to compromise his pulmonary function and accelerate his death." *Id.*

The record contains two letters that Dr. Thorarinsson wrote on behalf of claimant and numerous records pertaining to his treatment of the miner's COPD from December 20, 1997 to the miner's death on March 27, 2005. In a letter dated

³ The administrative law judge's determination that Dr. Kahn's opinion, that pneumoconiosis was a contributing cause of the miner's death, was outweighed by Dr. Oesterling's contrary opinion, does not establish prejudice under the facts of this case. *See discussion infra* at 11.

October 25, 2005, Dr. Thorarinsson indicated that pneumoconiosis “was a contributing factor in the miner’s death.” Director’s Exhibit 21. In a supplemental letter dated December 27, 2006, Dr. Thorarinsson reiterated his opinion that pneumoconiosis was a contributing cause of the miner’s death and stated that pneumoconiosis “significantly interfered with the effectiveness of [the] treatment” that the miner received for his cerebral infarction, COPD, pneumonias and respiratory failure. Claimant’s Exhibit 1.

Dr. Rosenberg reviewed the miner’s medical records, including Dr. Jelic’s autopsy report and Dr. Thorarinsson’s records and reports. Dr. Rosenberg opined that the miner had a minimal degree of coal workers’ pneumoconiosis that played no role in the miner’s death. Employer’s Exhibits 1, 2.

The administrative law judge determined that the death certificate was entitled to little weight because Dr. Nelson did not identify pneumoconiosis as a cause of death and did not link the miner’s COPD to coal dust exposure. Decision and Order at 13; Director’s Exhibit 15. The administrative law judge also indicated that Dr. Nelson was unaware of the results of the miner’s autopsy. *Id.* With respect to Dr. Jelic’s autopsy report, the administrative law judge found that it “lack[ed] probative value regarding the death causation issue,” as Dr. Jelic did not address the cause of the miner’s demise. Decision and Order at 13; Director’s Exhibit 17. Regarding the opinions of Drs. Oesterling and Kahn, the administrative law judge gave greater weight to Dr. Oesterling’s opinion, that pneumoconiosis was not a contributing cause of the miner’s death, because his report was more detailed and included references to the miner’s smoking history, the medical literature, and photographic representations. Decision and Order at 14; Claimant’s Exhibit 3; Employer’s Exhibit 3. With respect to the opinions of Drs. Thorarinsson and Rosenberg, the administrative law judge acknowledged Dr. Thorarinsson’s status as the miner’s treating physician, but gave greater weight to Dr. Rosenberg’s determination that the miner’s death was not related to pneumoconiosis, as his opinion was better reasoned and better documented. Decision and Order at 14; Director’s Exhibit 21; Claimant’s Exhibit 1; Employer’s Exhibits 1, 2. The administrative law judge noted that Dr. Rosenberg provided a detailed explanation of his opinion at his deposition, while Dr. Thorarinsson’s letters included “very little analysis.” Decision and Order at 14; Claimant’s Exhibit 1. The administrative law judge indicated that Dr. Thorarinsson did not cite specific test results, or explain how they supported his opinion, and did not mention the miner’s smoking history in his second letter. *Id.* The administrative law judge also referred to Dr. Thorarinsson’s misidentification in his second letter of the year in which the miner died. *Id.* Based upon this weighing of the medical evidence, the administrative law judge found that claimant did not establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). *Id.*

Claimant argues on appeal that the administrative law judge erred in summarily dismissing the death certificate and the opinion of Dr. Kahn. Claimant also contends that the administrative law judge was required to accord determinative weight to Dr. Thorarinsson's opinion, in light of his status as the miner's treating physician. Claimant further maintains that the administrative law judge erred in according greater weight to the opinions of Drs. Oesterling and Rosenberg.

Claimant's allegations of error with respect to the administrative law judge's weighing of the evidence supportive of her burden of proof at Section 718.205(c) are without merit. Regarding the death certificate, the administrative law judge rationally determined that it was entitled to little weight, as Dr. Nelson did not identify pneumoconiosis as a cause of death and did not indicate that the miner's COPD was related to coal dust exposure, thereby satisfying the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2).⁴ See *Willis v. Birchfield Mining Co.*, 15 BLR 1-59 (1991); Decision and Order at 13; Director's Exhibit 15. The administrative law judge's finding that Dr. Kahn's opinion was insufficient to establish the requisite link between pneumoconiosis and the miner's death was within his discretion, based upon his accurate determination that Dr. Kahn did not cite any medical literature in support of his statement that "when the lungs are involved by other processes that compromise pulmonary function, every causal compromise becomes synergistic with the others to adversely [a]ffect the lung function." See *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); Decision and Order at 14; Claimant's Exhibit 3.

Similarly, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Thorarinsson's opinion, that pneumoconiosis was a contributing cause of the miner's death, was entitled to diminished weight because Dr. Thorarinsson "failed to cite specific test results, or explain how the clinical data supported his conclusion." *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order at 14; Director's Exhibit 21; Claimant's Exhibit 1. Although an administrative law judge may accord a treating physician's opinion controlling weight based upon the nature and extent of the physician's relationship with the miner and the frequency and extent

⁴ Under 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

of treatment, pursuant to 20 C.F.R. §718.104(d), the probative value of a treating physician's opinion must also be assessed in light of its reasoning and documentation. 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Campbell v. Director*, OWCP, 11 BLR 1-16 (1987). Because the administrative law judge rationally found that Dr. Thorarinsson's opinion was not well documented and well reasoned, he was not required to accord it determinative weight based upon Dr. Thorarinsson's status as the miner's treating physician.⁵ *Id.*

We affirm, therefore, the administrative law judge's finding that the medical evidence supportive of claimant's burden of proof under Section 718.205(c) was insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death. In light of this disposition, we need not address claimant's allegations of error regarding the administrative law judge's crediting of the opinions of Drs. Oesterling and Rosenberg pursuant to Section 718.205(c), as error, if any, in the administrative law judge's findings, is harmless. *Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director*, OWCP, 6 BLR 1-1276 (1984).

⁵ Because the administrative law judge provided valid alternative rationales for his weighing of the medical opinions of Drs. Kahn and Thorarinsson, we decline to address claimant's allegations of error regarding the administrative law judge's references to the miner's smoking history and Dr. Thorarinsson's misidentification of the year in which the miner died. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge