

BRB No. 98-1087 BLA

MARY KLOTZ)
(Widow of STEVE KLOTZ))
)
 Claimant-Petitioner)
)
 v.)
)
 CONSOLIDATION COAL COMPANY)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judges.

PER CURIAM:

Claimant, the surviving spouse of a deceased miner, appeals the Decision and Order - Denying Benefits (96-BLA-1412) of Administrative Law Judge Michael P. Lesniak with respect to a 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 her application for benefits on November 17, 1995.¹ Director's Exhibit 1. The

¹The miner filed an application for benefits on April 5, 1978. Director's Exhibit 22A. In a Decision and Order issued on May 20, 1983, Administrative Law Judge Leonard N. Lawrence denied the claim on the ground that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2). The Board affirmed the denial of benefits in a Decision and Order issued on March 31, 1986. *Klotz v.*

administrative law judge noted that inasmuch as employer conceded that the miner was suffering from simple pneumoconiosis arising out of coal mine employment, the sole issue before him was whether the miner's death was due to, or hastened by, pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and in accordance with the standard adopted by the United States Court of Appeals for the Sixth Circuit in *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).² The administrative law judge found that the physicians of record agreed that the principal cause of the miner's demise was malignant lymphoma. The administrative law judge then determined that the preponderance of the relevant evidence did not support a finding that pneumoconiosis contributed to or hastened the miner's death. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the relevant medical opinions of record. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.³

Consolidation Coal Co., BRB No. 83-1438 BLA (Mar. 31, 1986)(unpub.). The miner took no further action with respect to his claim. The miner's death certificate lists the date of the miner's death as September 19, 1995 and identifies the immediate cause of death as intra-abdominal malignancy, source unknown. Director's Exhibit 3A.

²The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that, for the purposes of 20 C.F.R. §718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death where pneumoconiosis actually hastens death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

³We affirm the administrative law judge's finding that pneumoconiosis did not cause the miner's death pursuant to 20 C.F.R. §718.205(c)(1), as it is unchallenged on

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In considering whether claimant met her burden under Section 718.205(c)(2), the administrative law judge weighed the medical opinions of Drs. Long, Cohen, Farthing, Fino, Kleinerman, and Naeye. Dr. Long reviewed the evidence of record at the request of the Department of Labor, provided two reports and was deposed twice. Dr. Long indicated that pneumoconiosis could not be discounted as a contributing cause in the miner's demise, as it compromised the miner's respiratory reserve. Director's Exhibits 6A, 18A; Claimant's Exhibit 1; Employer's Exhibit 4. Dr. Cohen reviewed medical records submitted to him by claimant's counsel and determined that the miner suffered from a mild restrictive impairment caused by pneumoconiosis. Claimant's Exhibit 1. Dr. Cohen also stated that the miner had moderate emphysema related to coal dust exposure. *Id.* The doctor also concluded that pneumoconiosis contributed to the miner's death because it reduced his pulmonary reserve. *Id.*

Dr. Farthing performed the autopsy, which was limited to the miner's chest, and determined that the miner suffered from simple coal workers' pneumoconiosis, which played no role in causing or hastening his death. Director's Exhibits 4A, 17A. Dr. Fino reviewed the medical evidence of record and stated that pneumoconiosis did not contribute in any way to the miner's death. Employer's Exhibits 1, 8. Dr. Kleinerman reviewed the medical evidence of record and tissue slides obtained during the autopsy. Employer's Exhibit 2. Dr. Kleinerman indicated that the miner's pneumoconiosis was too mild to have contributed in any way to his demise. Employer's Exhibits 2, 7. Dr. Naeye also reviewed the medical evidence and tissue slides and determined that the miner's pneumoconiosis did not contribute to or hasten his death. Employer's Exhibit 5.

The administrative law judge gave little weight to Dr. Long's opinion on the ground that her diagnosis of obstructive and restrictive impairments was called into question by her admission that she could not validate the results of the pulmonary function study upon

appeal. Proof of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3) is not available in this case, as the presumption set forth in 20 C.F.R. §718.304 cannot be invoked due to the absence of evidence that the miner suffered from complicated pneumoconiosis.

which she based her findings and her acknowledgment that the results of a later study did not reflect any impairment. Decision and Order at 5; Claimant's Exhibit 4 at 26. The administrative law judge also noted Dr. Long's statement that the type of emphysema diagnosed on autopsy is not typically associated with coal dust exposure. Decision and Order at 5; Claimant's Exhibit 4 at 43. In addition, the administrative law judge referred to the fact that Dr. Long did not review all of the relevant evidence of record and admitted that she had not reviewed the scientific literature recently concerning the issue of whether pneumoconiosis progresses after coal dust inhalation ends. Decision and Order at 5; Claimant's Exhibit 4 at 41. Finally, the administrative law judge determined that many of Dr. Long's statements were equivocal. Decision and Order at 5. Accordingly, the administrative law judge gave little weight to Dr. Long's opinion and stated that he would "defer to the opinions of Drs. Cohen and Fino as [B]oard-certified pulmonary specialists who had the opportunity to more thoroughly review the evidence in the record and provide citations to support their conclusions." *Id.* The administrative law judge concluded that Dr. Fino's opinion was corroborated by Drs. Kleinerman, Farthing, and Naeye, as well as Dr. Strimlan, a pulmonary specialist who examined the miner in 1981 and found no respiratory impairment. Decision and Order at 6; Director's Exhibit 22A. The administrative law judge determined, therefore, that the preponderance of the evidence as a whole does not prove that the miner's death was due to or hastened by pneumoconiosis pursuant to Section 718.205(c). *Id.*

Claimant contends that the administrative law judge erred in determining that the opinions of Drs. Fino, Naeye, Kleinerman, and Farthing outweighed the contrary opinions of Drs. Cohen and Long. Claimant asserts specifically that Dr. Cohen's use of different predicted normal values in assessing the significance of the pulmonary function studies of record and the fact that he did not review the pulmonary function study obtained by Dr. Strimlan on January 29, 1981 do not detract from the probative value of his opinion. Claimant also maintains that Dr. Long's statements regarding the connection between the effect of pneumoconiosis on the miner's respiratory capacity and his death support Dr. Cohen's conclusions. In addition, claimant alleges that the opinions of Drs. Fino, Kleinerman, and Naeye are not reasoned, as each relied upon the flawed premise that pneumoconiosis cannot progress after exposure to coal dust has ended. Claimant further asserts that Dr. Kleinerman relied upon an inaccurate smoking history and that Dr. Naeye stated incorrectly that coal dust exposure does not cause emphysema.

These contentions have merit, in part. The administrative law judge acted within his discretion in determining that Dr. Long's opinion was entitled to little weight on the grounds that the doctor's conclusions were equivocal and were based upon a review of the record that was not as thorough as that performed by Drs. Fino and Cohen. See *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). In addition, with respect to the conflict between the opinions of Drs. Fino and Cohen regarding the effect that the clinical pneumoconiosis diagnosed on autopsy had upon the miner's death, the administrative law judge acted rationally in finding that Dr. Fino's

opinion outweighed that of Dr. Cohen inasmuch as Dr. Fino's determination was supported by the statements of Dr. Kleinerman, a specialist in pulmonary pathology and pneumoconiosis, and Drs. Naeye and Farthing. See *Clark, supra*. The alleged flaws identified by claimant regarding the progressive nature of pneumoconiosis and the miner's smoking history are not relevant, as these factors do not pertain to the physicians' respective assessments of the severity of the clinical pneumoconiosis found on autopsy. Thus, the administrative law judge's finding that claimant did not prove that clinical pneumoconiosis contributed to or hastened the miner's death is rational and supported by substantial evidence. See *Brown, supra*; 20 C.F.R. §718.205(c)(2).

Under Section 718.205(c), however, the administrative law judge is required to determine whether the evidence establishes that either clinical pneumoconiosis or pneumoconiosis as defined in 20 C.F.R. §718.201 caused or contributed to the miner's death.⁴ See generally *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). As noted by claimant, in the present case, the administrative law judge did not resolve the conflict between the opinions of Drs. Naeye and Kleinerman and the opinion of Dr. Cohen regarding the issue of whether emphysema, related to coal dust exposure, contributed to the miner's demise.⁵ Drs. Naeye and Kleinerman both stated that the type of emphysema seen on autopsy was caused by cigarette smoking rather than coal dust exposure. Employer's Exhibits 2, 5, 7. Dr. Cohen attributed it to both smoking and the inhalation of coal dust and indicated that it contributed to the miner's death. Claimant's Exhibit 1. The administrative law judge suggested that Dr. Cohen's diagnosis of a mixed obstructive and restrictive impairment based upon the objective tests performed in 1978 and 1982 was not credible because Dr. Cohen did not review all of the pulmonary function studies of record and used different predicted normal values than those used by the administering physicians. Decision and Order at 5. Although this finding was within the administrative law judge's discretion, see *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985), the administrative law judge did not address the credibility of Dr. Cohen's statement that the

⁴20 C.F.R. §718.201 provides, in relevant part, that:

[P]neumoconiosis means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment... "[A] rising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §718.201.

⁵Dr. Fino did not mention emphysema in his reports. Employer's Exhibits 1, 8. Dr. Farthing diagnosed a 10 x 6 centimeter emphysematous bleb in the left upper lobe of the miner's lungs. Director's Exhibit 4A.

emphysema diagnosed on autopsy was related to coal dust exposure and contributed to the miner's death. We vacate the administrative law judge's finding pertaining to Section 718.205(c)(2), therefore, and remand the case to the administrative law judge for consideration of the issue of whether pneumoconiosis, as defined in Section 718.201, contributed to or hastened the miner's death. See *Brown, supra*. In this regard, the administrative law judge should consider the length of the miner's smoking history in assessing the credibility of the relevant opinions. See *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge