

BRB Nos. 02-0470 BLA
and 02-0470 BLA-A

FLORENCE DAVIS)
(Widow of WILLIAM E. DAVIS))
Claimant-Petitioner)
v.)
VALLEY CAMP 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 of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Thomas McK. Hazlett (Harper & Hazlett), St. Clairsville, Ohio, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Eugene Scalia, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant¹ appeals and employer cross-appeals the Decision and Order (01-BLA-0362)

¹Claimant is the surviving spouse of the deceased miner who died on July 9, 1999. Director's Exhibit 6.

of Administrative Law Judge Robert J. Lesnick denying benefits 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).² This case involves a survivor's claim filed on September 17, 1999.³ After noting employer's stipulation to twenty-seven years of coal mine employment and a finding that the miner suffered from "mild simple coal workers' pneumoconiosis," the administrative law judge found that claimant was entitled to a presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence was insufficient 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. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. Employer has filed a cross-appeal, arguing that the administrative law judge erred in his consideration of the evidence. Employer also contends that the administrative law judge erred by retroactively applying the revised regulations in the instant case. The Director, Office of Workers' Compensation Programs (the Director), responds, requesting that the Board reject employer's argument that the administrative law judge erred by retroactively applying the revised regulations.

The Board 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);

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The miner filed a claim with the Department of Labor (DOL) on October 29, 1997. Director's Exhibit 30. The DOL denied the claim on February 23, 1998. *Id.* There is no indication that the miner took any further action in regard to his 1997 claim.

O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). 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).⁴ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Feeley v.*

⁴Section 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

Director, OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish 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); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

death if it hastens the miner's death.

20 C.F.R. §718.205(c).

In his consideration of whether the evidence of record was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge credited the opinions of Drs. Perper, Tomashefski and Naeye that the miner's death was not due to pneumoconiosis over the contrary opinions of Drs. Adamovich and Georges. Decision and Order at 14-15. In making this determination, the administrative law judge properly found that Dr. Adamovich's opinion was too equivocal to support a finding that the miner's death was due to pneumoconiosis.⁵ See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 15; Director's Exhibit 7; Employer's Exhibit 7.

⁵Dr. Adamovich, the autopsy prosector, indicated that he "couldn't say for certain" that coal workers' pneumoconiosis played a role in causing the miner's death. Employer's Exhibit 7 at 22.

Dr. Georges, the miner's treating physician, opined that the miner's anthracosilicosis hastened his death. Director's Exhibit 22; Employer's Exhibit 8 at 16-18. Although the administrative law judge recognized Dr. Georges' status as the miner's treating physician, he noted that Dr. Georges had seen the miner primarily for non-respiratory conditions⁶ and had only treated the miner for "a couple of years." Decision and Order at 15. The administrative law judge further found that Dr. Georges' opinion was outweighed by the contrary opinions of three reviewing pathologists, Drs. Perper, Tomashefski and Naeye. *Id.* Drs. Perper, Tomashefski and Naeye opined that while the miner suffered from coal workers' pneumoconiosis, it did not cause or contribute to his death. Director's Exhibit 25; Employer's Exhibits 1, 3, 9. The administrative law judge acted within his discretion in crediting the opinions of Drs. Perper, Tomashefski and Naeye over that of Dr. Georges based upon their superior qualifications.⁷ See *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and

⁶Dr. Georges stated that:

[T]he last couple of years when I saw [the miner] his primary problem, like I said, I had just taken care of him in the hospital. I'd leave him for follow-up with his primary care physician. It was primarily just to treat the acute problem. I believe he was hospitalized with congestive heart failure, once with a stroke, maybe once with angina pectoris. It wasn't until the end, I believe, was the first time I ever hospitalized him for pneumonia.

Director's Exhibit 8 at 31-32.

⁷Drs. Tomashefski and Naeye are Board-certified in Anatomic and Clinical Pathology. Employer's Exhibits 2, 4. Dr. Perper is a forensic pathologist and a medicolegal consultant. Director's Exhibit 25. Dr. Georges is not Board-certified in any medical specialty. Employer's Exhibit 8 at 5.

The administrative law judge noted that Dr. Georges conceded that he was not a pulmonary expert. Decision and Order at 14. During his May 10, 2001 deposition, Dr. Georges stated that:

If there is any question about the development of asbestosis, black lung, pneumoconiosis, whatever term we want to use for industrial lung – potential industrial lung disease, I always recommend that they see a pulmonologist and get involved, you know, from that, so somebody knows their case and can better measure and follow them.

Employer's Exhibit 8 at 24.

Order at 15. The administrative law judge also found that the opinions of Drs. Perper, Tomashefski and Naeye were well-reasoned and documented. Decision and Order at 15. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Claimant, however, contends that the administrative law judge erred in failing to address whether the miner's death was due to "legal pneumoconiosis." Claimant argues that because the miner's emphysema was caused by his coal mine employment, it constitutes "legal pneumoconiosis" pursuant to 20 C.F.R. §718.201(a)(2).⁸ Because Drs. Adamovich, Georges, Hansbarger and Tomashefski attributed the miner's death to his emphysema,⁹ Director's Exhibits 7, 15; Employer's Exhibits 1, 8, 9, claimant argues that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

⁸"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.202(a)(2).

⁹Drs. Naeye and Altmeyer did not directly address whether the miner's death was due to his emphysema. Employer's Exhibits 3, 5. Dr. Perper stated that the "autopsy report substantiated the presence of severe acute bronchopneumonia as the immediate cause of death, with severe pulmonary emphysema and coronary arteriosclerotic cardio-vascular disease with marked cardiomegaly, as contributory causes of [the miner's] death. Director's Exhibit 25.

Based upon the facts of this case, we find no basis to remand the case to the administrative law judge for his consideration of whether the evidence is sufficient to establish that the miner's emphysema arose out of his coal mine employment, thereby constituting a finding of "legal pneumoconiosis" as defined at 20 C.F.R. §718.201(a)(2). Dr. Adamovich, the autopsy prosector, indicated that he did not have an opinion as to whether the miner's emphysema was caused by coal dust exposure or cigarette smoking. Employer's Exhibit 7 at 21. Dr. Georges also failed to definitively link the miner's emphysema to his coal mine employment.¹⁰ Drs. Hansbarger,¹¹ Perper,¹² Tomashefski,¹³

¹⁰During Dr. George's May 10, 2001 deposition, the following exchange took place:

Q. How much did [the miner's smoking history] contribute to his lung disease?

A. That's the big question, in my mind. I mean, I – in fact, my hats are off to a pulmonologist to try to distinguish the amount of smoking from black lung disease and heart disease. Certainly it has to play a significant role, as all physicians feel cigarette smoking does and would contribute to lung disease. I don't have a percentage. I wouldn't have that expertise.

Q. Did cigarette smoking, in this case, cause the emphysema which was seen by the pathologist at the autopsy?

A. It sure could, yes.

Employer's Exhibit 8 at 21.

The following exchange also took place:

Q. The mere presence of the pneumoconiosis in the lungs means that there had to be a clear demonstrative effect on his lung function?

A. Not necessarily. And again, I wasn't around when it was diagnosed. I don't know what his pulmonary function tests were like or anything like that and how you would discern how much is **emphysema, smoking related**, versus coal workers' pneumoconiosis. I had only seen him at the end of his life, you know, when everything was kind of starting to go.

Q. So your opinion's relatively qualified.

A. Oh, yes. Absolutely.

Naeye¹⁴ and Altmeyer¹⁵ similarly failed to attribute the miner's emphysema to his coal mine

Employer's Exhibit 8 at 28 (emphasis added).

Consequently, while Dr. Georges' deposition testimony indicates that he believed that the miner's emphysema was "smoking related," it does not support a finding that the miner's emphysema was attributable to his coal dust exposure.

¹¹Dr. Hansbarger did not address the etiology of the miner's emphysema. Director's Exhibit 15.

¹²Dr. Perper's opinion as to the cause of the miner's emphysema is not clear. Dr. Perper stated that:

[The miner's] lungs showed also microscopic evidence of severe pulmonary emphysema, a condition known to be associated with both smoking and exposure to coal mine dust. However, in view of the fact that [the miner] had a very mild simple coal workers' pneumoconiosis, one cannot reasonably assume that it caused any pulmonary emphysema, and particular, that it contributed to any degree to the severe emphysema substantiated at autopsy.

Director's Exhibit 25.

¹³In his report dated February 16, 2001, Dr. Tomashefski stated that:

neither coalworkers' pneumoconiosis, coal dust exposure, nor coal mine employment are a cause of atherosclerotic cardiovascular disease, mixed panacinar and centriacinar emphysema, or acute bronchopneumonia. It is therefore my opinion that [the miner's] death was totally unrelated to his occupation as a coal miner. Cigarette smoking is an important cause of pulmonary emphysema and a significant contributory risk factor for atherosclerotic cardiovascular disease. Within reasonable medical certainty, [the miner's] pulmonary emphysema was caused by his cigarette smoking habit.

Employer's Exhibit 1.

During his August 4, 2000 deposition, Dr. Tomashefski opined that the miner's emphysema was caused by his smoking. Employer's Exhibit 9 at 22, 33.

¹⁴Dr. Naeye indicated that he agreed with Dr. Perper's finding that the miner's

employment. Because there is no credible evidence linking the miner's emphysema, or any of his other lung diseases, to his coal mine employment, we find it unnecessary to remand the case to the administrative law judge to address whether the evidence is sufficient to establish that the miner's death was due to "legal pneumoconiosis."¹⁶

emphysema was attributable to cigarette smoking. Employer's Exhibit 3.

¹⁵Dr. Altmeyer opined that:

The moderate degree of airflow obstruction is consistent with his prior degree of cigarette smoking, which caused pulmonary emphysema, as documented by multiple pathologists. It is my opinion that the pulmonary emphysema is classic for the type caused by cigarette smoking and is not related in any way to simple coal workers' pneumoconiosis.

Employer's Exhibit 5.

¹⁶Claimant contends that the administrative law judge erred in stating that the miner's death certificate does not address the "causation issue." *See* Decision and Order at 5. Dr. Greco completed the miner's death certificate, attributing the miner's death to pneumonia.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. Consequently, we need not address employer's contentions regarding the administrative law judge's application of the revised regulations or the administrative law judge's consideration of the evidence. *Larioni, supra*.

Director's Exhibit 6. Because Dr. Greco did not attribute the miner's death to pneumoconiosis or indicate that the miner's pneumonia arose out of his coal mine employment, the death certificate does not support a finding of death due to pneumoconiosis. Consequently, the administrative law judge's error, if any, in his consideration of the miner's death certificate is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

BETTY JEAN HALL
Administrative Appeals Judge