

BRB No. 07-0243 BLA

R.L.)
(Widow of L.L.))
)
Claimant-Respondent)
)
v.)
)
ALPINE CONSTRUCTION COMPANY) DATE ISSUED: 11/30/2007
)
and)
)
LIBERTY MUTUAL INSURANCE)
COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

Scott M. Busser (Zarlengo, Mott, Zarlengo and Winbourn, P.C.), Denver,
Colorado, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-BLA-5707)
of Administrative Law Judge Alice M. Craft rendered 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). The administrative law judge
accepted the stipulation of the parties that the miner engaged in qualifying coal mine

employment for twenty-three years, and adjudicated this survivor's claim, filed on November 8, 2002, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4), 718.203(b), and that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2), (5). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that the evidence was sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death at 20 C.F.R. §718.205(c).¹ Claimant, the miner's widow, has not filed a response brief. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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, 363 (1965).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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 also Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996).²

¹ We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was sufficient to establish clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

² The Board will apply the law of the United States Court of Appeals for the Tenth Circuit, as the miner was last employed in the coal mining industry in Oklahoma. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Employer contends that the administrative law judge erred in relying on the opinion of Dr. Kirk, the miner's treating physician, to support her finding that claimant established that pneumoconiosis was a substantially contributing cause of the miner's death at Section 718.205(c). Employer notes that Dr. Kirk, who identified himself as a Doctor of Osteopathy/surgeon-physician, without producing any credentials, did not diagnose pneumoconiosis, but merely stated that "[b]y his medical history [the miner] had been diagnosed with coal workers' pneumoconiosis." Director's Exhibit 6. Employer maintains that Dr. Kirk's report lacks adequate explanation and documentation, and thus does not constitute a well reasoned medical opinion sufficient to establish that clinical pneumoconiosis³ was a substantially contributing cause of the miner's death. Employer asserts that, by contrast, the opinion of Dr. Repsher, a pulmonary expert, is well reasoned and establishes that the miner's death was caused by conditions unrelated to pneumoconiosis, *i.e.*, complications of aspiration pneumonia following a cerebral vascular accident (CVA). Employer's Brief at 3-6. While some of employer's specific arguments regarding the administrative law judge's weighing of Dr. Kirk's opinion have merit, employer has identified no error in the administrative law judge's weighing of Dr. Repsher's opinion.

In evaluating the conflicting medical opinions of record, the administrative law judge acknowledged Dr. Repsher's credentials, but permissibly discounted his opinion because it was based on a determination, contrary to the administrative law judge's finding, that the miner did not suffer from clinical pneumoconiosis. Decision and Order at 18; *see Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Abshire v. D & L Coal Co.*, 22 BLR 1- 202, 214 (2002)(*en banc*). Additionally, the administrative law judge acted within her discretion in according Dr. Repsher's opinion less weight, as the physician relied in part on inadmissible evidence from the miner's claim. Decision and Order at 18; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (McGranery and Hall, JJ., concurring and dissenting). As substantial evidence supports the administrative law judge's findings, we affirm her weighing of Dr. Repsher's opinion.

With respect to Dr. Kirk's opinion, however, we agree with employer's argument that the administrative law judge failed to adequately explain why she concluded that it was well reasoned. Dr. Kirk indicated on the miner's death certificate that the immediate

³ The administrative law judge determined that legal pneumoconiosis, as defined at 20 C.F.R. 718.201(a)(2), was not established, as Dr. Conklin was the only physician who opined that the miner's chronic obstructive pulmonary disease was "due to black lung, which was associated with years of coal mining." Director's Exhibit 5. The administrative law judge accorded little weight to Dr. Conklin's opinion because the physician offered no basis for his conclusion. Decision and Order at 16.

cause of death was “aspiration pneumonia, due to (or as a consequence of) cerebral vascular accident,” Director’s Exhibit 4, and stated in a subsequent letter to claimant that the miner’s “aspiration pneumonia(s), in addition to his pneumoconiosis and chronic obstructive pulmonary disease, presented an overwhelming loss of respiratory functions....[t]his inability to breathe adequately led to his cardiac failure and eventual death...I cannot say that pneumoconiosis was the cause of [the miner’s] death, but I do believe it contributed to his compromised respiratory status that was a direct cause for his death.” Director’s Exhibit 6. In according substantial weight to Dr. Kirk’s opinion, the administrative law judge stated that the physician “treated and oversaw treatment for multiple and frequent respiratory and pulmonary conditions during the Miner’s last four years of life,”⁴ and the administrative law judge concluded that “[g]iven Dr. Kirk’s extensive treatment of the Miner, and taking into account the other factors listed in 20 C.F.R. §718.104(d), I find Dr. Kirk’s opinion well reasoned. . . .” Decision and Order at 18. The administrative law judge, however, did not set forth the relative weight she applied to the various factors at Section 718.104(d). Moreover, while the administrative law judge is not required to defer to a physician with superior qualifications, the physician’s pulmonary expertise is a factor to be considered in evaluating the reliability of a medical opinion. *See generally Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-67 (2004)(*en banc*); *Collins v. J & L Steel*, 21 BLR 1-181, 189 (1999). As the administrative law judge appears to have mechanically credited the opinion based on Dr. Kirk’s status as the miner’s treating physician, as opposed to examining the validity of his reasoning in light of the underlying documentation, *see generally Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), we vacate her finding that pneumoconiosis was a substantially contributing cause of the miner’s death at Section 718.205(c), and remand this case for further consideration of Dr. Kirk’s opinion. On remand, the administrative law judge is instructed to explicitly apply the factors enumerated at Section 718.104(d) in

⁴ Employer argues that the administrative law judge did not identify the basis for this statement, since Dr. Kirk merely indicated that he treated the miner for “various ailments,” including vascular disease, an abdominal aortic aneurysm, post-operative care, a CVA, and resultant episodes of aspiration pneumonia, but did not state that he treated the miner for pneumoconiosis, nor did he indicate the actual frequency of treatment and/or the objective tests measuring respiratory function that he conducted or reviewed before finding that pneumoconiosis contributed to the miner’s death. Employer’s Brief at 4; Director’s Exhibit 6; *see* 20 C.F.R. §718.104(d)(1)-(4). Noting that an unsupported medical conclusion does not take the place of the required reasoning, *see generally Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997), employer asserts that Dr. Kirk’s failure to cite to any testing or examination results, provide medical reasoning, or offer specifics regarding his treatment of the miner’s chronic respiratory or pulmonary conditions rather than non-pulmonary problems, renders his opinion unreasoned. Employer’s Brief at 4.

assessing the credibility of Dr. Kirk's opinion. The administrative law judge must then set forth a rationale that comports with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), in determining whether the opinion is sufficiently reasoned to meet claimant's burden of establishing that clinical pneumoconiosis was a substantially contributing cause of the miner's death at Section 718.205(c). *See Pickup*, 100 F.3d 871, 20 BLR 2-334; *Trumbo*, 17 BLR at 1-88, 1-89; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge