

BRB No. 07-0254 BLA

F.W.)
(Widow of H.W.))
)
Claimant-Respondent)
)
v.)
)
THE FLORENCE MINING COMPANY)
) DATE ISSUED: 11/30/2007
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 On Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

George H. Thompson (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order On Remand – Awarding Benefits (2002-BLA-0422) of Administrative Law Judge Michael P. Lesniak rendered on a survivor’s claim filed on September 25, 2000, 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).¹ This case is before the Board for the third time. In his initial decision, the administrative law judge, after crediting the miner with at least twenty-eight years of

¹ The miner was awarded benefits on October 31, 1994, and died on August 25, 2000. Director’s Exhibits 4, 12. Claimant is the surviving spouse of the deceased miner.

coal mine employment, found, *inter alia*, that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203.² Although the administrative law judge found that the miner was not entitled to the presumption set forth at 20 C.F.R. §718.304, he found that the evidence was sufficient 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 awarded benefits.

The Board initially affirmed the administrative law judge's length of coal mine employment finding and his findings that the evidence established the existence pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203 as unchallenged on appeal. *[F.W.] v. The Florence Mining Co.*, BRB No. 04-0127 BLA (June 29, 2004) (unpub.). The Board, however, vacated the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and remanded the case for further consideration. *Id.*

In a Decision and Order dated June 6, 2005, the administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The Board again vacated the administrative law judge's findings as to the sufficiency of the evidence and remanded the case for the administrative law judge to consider whether the medical opinions of Drs. Awan and Comas rationally supported a finding that pneumoconiosis hastened the miner's death. *[F.W.] v. Florence Mining Co.*, BRB No. 05-0809 BLA (July 24, 2006) (J. Hall, dissenting) (unpub.).

On remand, in a Decision and Order dated November 16, 2006, the administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). Accordingly, the administrative law judge awarded benefits.

In the current appeal, employer argues that the administrative law judge failed to follow the Board's instructions on remand and erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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

² The administrative law judge also accepted employer's stipulation that the x-ray evidence established the existence of pneumoconiosis. 2003 Decision and Order at 4, 8.

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, 363 (1965).

Because this survivor’s claim was filed after January 1, 1982, claimant must establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (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 Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-107-8 (3d Cir. 1989).³

In the prior appeal, the Board vacated the administrative law judge’s finding that the evidence was sufficient to establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). The Board instructed the administrative law judge to consider the sufficiency of the medical opinions of Drs. Comas and Awan, who attended to the miner in the hospital prior to his death.

Dr. Comas began attending to the miner at the time of his emergency hospitalization on August 17, 2000. Director’s Exhibit 30. Dr. Comas noted a diagnosis of pneumoconiosis based on the medical history obtained from his family, and references to the condition in the miner’s medical records. Director’s Exhibit 30; Employer’s Exhibit 3 at 15-16. The miner underwent surgery that revealed significant metastases to the liver. Director’s Exhibit 30. Dr. Awan, a Board-certified oncologist, was consulted and recommended palliative and hospice care. Director’s Exhibit 30; Employer’s Exhibit 3. The miner died on August 25, 2000. Director’s Exhibit 30. The death certificate listed the cause of death as “poorly differentiated adenocarcinoma (metastatic to liver).” Director’s Exhibit 12. In a subsequent opinion, Dr. Comas opined that the miner’s treatment was compromised, and his life shortened, by his coal workers’ pneumoconiosis. Director’s Exhibit 29; Employer’s Exhibit 3. Dr. Fino, the only other physician to address the cause of the miner’s death, opined that the miner’s death was due to metastatic cancer, and that the miner’s coal dust inhalation did not contribute to, or hasten, his death. Director’s Exhibit 50.

On remand, as instructed by the Board, the administrative law judge reconsidered whether Dr. Awan’s opinion, that the miner was not a good candidate for aggressive therapy, could have been based on the presence of other conditions, rather than on the

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director’s Exhibit 7.

presence of pneumoconiosis. The administrative law judge noted that Dr. Awan's report contained a work history, findings related to examinations, medical history, and a history of the present illness. Decision and Order On Remand at 2; Employer's Exhibit 2. The administrative law judge stated that Dr. Awan listed his impressions as:

- 1) Metastatic liver disease biopsy proven. Primary site to be determined.
- 2) Newly onset diabetes mellitus.
- 3) Underlying significant comorbid conditions of left ventricular dysfunction.
- 4) Coal worker's pneumoconiosis.

Decision and Order On Remand at 2; Employer's Exhibit 2.

Dr. Awan reported his "Plan/Recommendation" for the miner. He said:

This patient is 81 years old in very poor medical condition. He has metastatic disease to the liver, primary unknown, which could be very well GI, such as pancreatic especially in the face of recently diagnosed diabetes versus metastatic disease from the lung. He is not a very good candidate for any aggressive therapy

Our recommendation at this time would be no further workup, hospice and palliative care as this is an incurable situation. The chance of response to palliative chemotherapy is very poor as the patient has a very poor performance status and the risk of toxicity is too high.

Employer's Exhibit 2.

The administrative law judge concluded that "upon a more thorough review, I note that Dr. Awan did not state that [the miner's] cancer was incurable – only that [the miner's] **situation** was incurable." Decision and Order On Remand at 2-3 (emphasis in original). The administrative law judge found that:

Based on a review of Dr. Awan's report, I find that he had sufficient knowledge of [the miner's] overall medical condition to render an opinion regarding [the miner's] overall health. Furthermore, I find that it was [the miner's] poor medical condition that caused Dr. Awan to conclude that [the miner] was not a good candidate for aggressive therapy. Thus, [the miner's] poor medical condition precluded used of aggressive therapies and rendered [the miner's] situation incurable.

Decision and Order On Remand at 3.

Employer argues that the administrative law judge erred in concluding that Dr. Awan considered the miner's pneumoconiosis to be a factor when Dr. Awan opined that the miner was not a good candidate for aggressive treatment. Employer argues that Dr.

Awan had an insufficient basis upon which to form a credible opinion as to the miner's overall medical condition because the history relied upon by Dr. Awan in forming his opinion "was shown to be inconsistent, non-existent or speculative at best." Employer's Brief at 9. In support, employer notes that Dr. Awan relied upon the medical history provided by the miner's family in rendering his opinion, and employer points to the absence of any reported clinical test results confirming the presence of pneumoconiosis. Employer's Brief at 10. Employer argues that Dr. Awan's conclusion that the miner was not a good candidate for aggressive therapy was based on the miner's poor condition due to lung cancer, and that the administrative law judge erred in proffering his own medical conclusion to the contrary. Employer's Brief at 11.

Despite employer's assertions, a medical report may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's medical and work history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65, 1-66 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); *Buffalo v. Director, OWCP*, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130, 1-133 (1979). Although Dr. Awan stated that most of the history of the miner's present illness was obtained from his hospital chart and his family, the administrative law judge found that Dr. Awan had also noted the miner's laboratory findings, chest x-rays, an echocardiogram and an ultrasound. Decision and Order On Remand at 2. Further, the administrative law judge found that Dr. Awan had factored in the miner's other medical conditions in his assessment that the miner was in a very poor medical condition. *Id.* Consequently, we reject employer's arguments that the bases for Dr. Awan's opinion are insufficient to form a credible opinion. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-732 (1985); *see also Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985); *Henning v. Peabody Coal Co.*, 7 BLR 1-753, 1-756 (1985).

In addition, the administrative law judge reasonably found that Dr. Awan's opinion was based on the miner's overall medical condition, because Dr. Awan did not state that the miner's cancer was incurable, but rather, opined that "the miner's **situation** was incurable." 2006 Decision and Order On Remand at 2-3 (emphasis in original). *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lafferty*, 12 BLR at 1-192; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Adamson v. Director, OWCP*, 7 BLR 1-229, 1-232 (1984). Because the administrative law judge acted within his discretion in drawing reasonable inferences from the medical evidence, we affirm his findings. *Id.*; *see also Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-388 (3d Cir. 2002).

Employer also challenges the administrative law judge's reliance upon Dr. Comas's reports, arguing that the reports are not well-reasoned. Employer argues that the administrative law judge ignored Dr. Comas's admissions, made during his deposition, as

to his lack of knowledge of the disease of coal workers' pneumoconiosis, his reliance upon a history of pneumoconiosis obtained strictly from the miner's family members, and the lack of test results diagnosing pneumoconiosis. Employer argues that in concluding that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2), the administrative law judge substituted his own medical opinion for that of the physicians.

On remand, the administrative law judge considered the basis for Dr. Comas's opinion and acted within his discretion in finding that, based on the facts of this case, and the available evidence at the time of treatment, Dr. Comas's reports were well reasoned and sufficient to establish that the miner's pneumoconiosis contributed to the miner's death. *Mabe*, 9 BLR at 1-68; *Brown*, 7 BLR at 1-732; *see also Roberts*, 8 BLR at 1-213; *Henning*, 7 BLR at 1-756; 2006 Decision and Order On Remand at 4. The administrative law judge observed that pursuant to Section 718.205(c)(5), the relevant inquiry is whether pneumoconiosis hastened the miner's death.⁴ Decision and Order On Remand at 3-4. The administrative law judge observed that "Dr. Awan's discussion of aggressive therapy and palliative care implies that there were options available that, if not an actual cure, could have reduced the severity of the disease and/or slowed the progression." Decision and Order On Remand at 3. The administrative law judge also considered Dr. Comas's deposition testimony, in which the physician explained that the miner's condition prevented the use of aggressive treatments, which could cause decreased physiology of the miner's cancer. Decision and Order On Remand at 3. The administrative law judge relied on the physicians' opinions to find that it was the miner's poor physical condition, including his pulmonary condition, which prevented the physicians' use of aggressive or palliative therapies that could have slowed the progression of the disease. Decision and Order at 3-4. Noting that Dr. Fino is not a Board-certified oncologist, the administrative law judge assigned little weight to Dr. Fino's opinion that there were no treatment options available, as he found that the opinion was contradicted by Dr. Comas's opinion and Dr. Awan's oncology report.⁵ *Id.*

⁴ Employer acknowledges that the physicians' course of treatment of the miner's cancer was limited due to the miner's deteriorated pulmonary condition, but employer states that that the miner's poor medical condition was due to incurable lung cancer, not pneumoconiosis. However, although the physicians diagnosed the miner's cancer as metastatic adenocarcinoma, and they opined that it had metastasized to his liver, a review of the record reveals no conclusive medical opinion as to the cancer's origin. Director's Exhibits 16, 29, 37, 50; Employer's Exhibits 1, 2, 3.

⁵ Dr. Fino reviewed the miner's medical records and acknowledged the presence of pneumoconiosis, which caused pulmonary disability, but he opined that there were no effective treatment options available for the miner's cancer, regardless of the miner's pulmonary condition. Director's Exhibit 50; Employer's Exhibit 1.

Contrary to employer's arguments, the administrative law judge acted within his discretion in crediting the opinions of Drs. Comas and Awan. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326, 10 BLR 2-220, 2-238 (3d Cir. 1987); *Mabe*, 9 BLR at 1-68; *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984). Specifically, the administrative law judge rationally found that the opinion of Dr. Comas, as supported by Dr. Awan, outweighed the opinion of Dr. Fino, and therefore rationally concluded that the medical opinion evidence is sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c).

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-128-9 (1987). As the administrative law judge's findings pursuant to Section 718.205(c)(5) are supported by substantial evidence, we affirm his award of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order On Remand – Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge