

BRB No. 07-0284 BLA

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| F.B., now F.E. |) | |
| (Widow of J.B.) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 11/30/2007 |
| |) | |
| DIAMOND MAY COAL COMPANY |) | |
| |) | |
| and |) | |
| |) | |
| KENTUCKY COAL PRODUCERS' |) | |
| SELF-INSURANCE FUND |) | |
| |) | |
| 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 Denying Survivor's Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

David H. Neeley (Neeley Law Office, P.S.C.), Prestonsburg, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Survivor's Benefits (04-BLA-5921) 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 credited the miner with at least twenty-two years of coal mine employment² pursuant to the parties' stipulation. Decision and Order at 5. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the autopsy evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b). The administrative law judge further found that claimant did not 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 his analysis of the evidence regarding whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1,

¹ Claimant is the miner's widow. The miner died on November 23, 2001. Director's Exhibit 14. Claimant filed this claim for survivor's benefits on January 28, 2002. Director's Exhibit 3. The district director denied benefits in a proposed decision and order issued on November 17, 2003. Director's Exhibit 47. Claimant requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 48.

² The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

1982, where pneumoconiosis is not the cause of death, 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 hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Claimant contends that the administrative law judge erred in his weighing of the medical opinions pursuant to 20 C.F.R. §718.205(c). The administrative law judge considered the opinions of the miner's treating physicians, Drs. Chaney and Koura, and the opinions of Drs. Westerfield and Caffrey, submitted by employer.³ Director's Exhibit 44; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 2.

Dr. Chaney, in a questionnaire dated June 26, 2003, opined that black lung disease hastened the miner's death, noting that the miner had some shortness of breath. Director's Exhibit 44. Dr. Chaney stated that lung cancer was a contributing factor to death. *Id.* In a report dated June 15, 2005, Dr. Chaney opined further that:

Although cancer was ultimately the culprit in his death . . . his life was shortened and his death hastened by pneumoconiosis. In the absence of pre-existing [chronic obstructive pulmonary disease] caused by pneumoconiosis and smoking, his life may have been extended by a few days, weeks, or even months. [The miner] died from lung cancer, but coal workers' pneumoconiosis hastened his death.

Claimant's Exhibit 1. Dr. Koura, in a report dated December 28, 2005, also opined that pneumoconiosis hastened the miner's death, Claimant's Exhibit 2, using language that the administrative law judge found "identically verbatim" to that used by Dr. Chaney in his June 15, 2005 opinion. Decision and Order at 7 n.5.

By contrast, Drs. Westerfield and Caffrey concluded that the miner died due to metastatic lung cancer that was unrelated to coal mine dust exposure, and opined that the

³ The administrative law judge also considered an autopsy report and the miner's death certificate. As summarized by the administrative law judge, the autopsy prosector diagnosed the miner with "simple coal miners' pneumoconiosis," lung cancer, and several other conditions. Director's Exhibit 17. The autopsy prosector's report did not address the cause of the miner's death. Dr. Chaney completed the miner's death certificate and listed the cause of death as pneumonia, due to carcinoma of the lung. Director's Exhibit 14. No other causes or conditions were listed.

mild degree of simple coal workers' pneumoconiosis that he had did not contribute to or hasten his death. Employer's Exhibits 1, 2.

The administrative law judge found that the opinions of Drs. Chaney and Koura were poorly reasoned, and accorded them less weight. He further determined that the contrary opinions by Drs. Westerfield and Caffrey were well reasoned, and accorded them greater weight. The administrative law judge therefore found that claimant did not prove by a preponderance of the evidence that pneumoconiosis hastened the miner's death.

Claimant contends that the administrative law judge erred in not according greater weight to the opinions of Drs. Chaney and Koura, as claimant's treating physicians. Claimant argues that the administrative law judge's "only fault with either doctor was that their reports were identical." Claimant's Brief at 8. We disagree.

The administrative law judge determined that Drs. Chaney and Koura did not adequately tie their opinions to the underlying medical evidence of record. The administrative law judge first noted that he was "disquieted by the almost verbatim medical reports of Claimant's Drs. Chaney and Koura." Decision and Order at 7, n.5. Further, as noted above, the administrative law judge found that the opinions of Drs. Chaney and Koura were poorly reasoned. Specifically, the administrative law judge permissibly found that, although Drs. Chaney and Koura attributed the miner's death partly to chronic obstructive pulmonary disease due to both smoking and coal dust exposure, they failed to address the fact that "they had both diagnosed [the miner] as a 120 pack-year smoker, not an insignificant fact when discussing pulmonary diseases." Decision and Order at 8; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Substantial evidence supports the administrative law judge's finding. Director's Exhibit 18 at 71, 73. Further, the administrative law judge noted that, although Dr. Chaney identified shortness of breath as a reason for concluding that pneumoconiosis contributed to the miner's death, Dr. Chaney in his treatment notes stated, as late as May 15, 2000, that the miner was having no problems with shortness of breath. Decision and Order at 8. Moreover, the administrative law judge permissibly found that Drs. Chaney and Koura did not explain how the simple coal workers' pneumoconiosis that was detected on autopsy hastened the miner's death. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Contrary to claimant's contention, the administrative law judge was not required to accord greater weight to the opinions of Drs. Chaney and Koura because of their status as the miner's treating physicians. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The administrative law judge properly assessed the credibility of the opinions in light of their reasoning and documentation. *See* 20 C.F.R.

§718.104(d)(5) Therefore, we reject claimant's argument that the administrative law judge was required to accord greater weight to the opinions of Drs. Chaney and Koura based on their status as treating physicians.

Further, as the administrative law judge permissibly discredited the opinions of Drs. Chaney and Koura, the only opinions supportive of a finding that pneumoconiosis was a substantially contributing cause of the miner's death, any error in the administrative law judge's decision to accord greater weight to the contrary opinions of Drs. Westerfield and Caffrey on the issue would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We therefore decline to address claimant's arguments regarding the opinions of Drs. Westerfield and Caffrey, and we affirm the administrative law judge's finding that claimant did not establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Because claimant failed to establish that pneumoconiosis was a substantially contributing cause of the miner's death, a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order Denying Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge