

BRB No. 09-0369 BLA

VINA J. DOTSON)
(Widow of ROBERT B. DOTSON))
)
Claimant-Respondent)
)
v.)
) DATE ISSUED: 11/09/2009
MCCOY ELKHORN COAL)
CORPORATION)
)
and)
)
JAMES RIVER COAL 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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Todd P. Kennedy (Jones, Walters, Turner & Shelton), Norton, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (07-BLA-5727, 07-BLA-5728) of Administrative Law Judge Thomas F. Phalen, Jr., awarding 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).¹ The administrative law judge credited the miner with at least nineteen years of coal mine employment.² 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 simple, clinical pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a)(2), and he found that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found 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.

On appeal, employer contends that the administrative law judge erred in his analysis of the autopsy and medical opinion evidence in determining that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal.⁴

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, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine

¹ In the same Decision and Order, the administrative law judge denied the miner's subsequent claim. Claimant, the miner's widow, has not appealed the denial of the miner's subsequent claim.

² The record indicates that the miner's last coal mine employment was in Kentucky. Director's Exhibits 4, 13. Accordingly, the Board will apply the law 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*).

³ Although the autopsy prosector, Dr. Dennis, also diagnosed progressive massive fibrosis, the administrative law judge found that the weight of the evidence did not establish that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.

⁴ We affirm the administrative law judge's finding that the existence of simple, clinical pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the irrebuttable presumption related to complicated pneumoconiosis, provided at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of the 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, 17 BLR 2-135 (6th Cir. 1989).

In determining whether pneumoconiosis was a substantially contributing cause of the miner's death, the administrative law judge considered the miner's death certificate and the reports of Drs. Dennis, Perper, Askin, and Caffrey. The death certificate listed the immediate cause of death as "ASP pneumonia" due to chronic obstructive pulmonary disease (COPD).⁵ Director's Exhibit 49. Dr. Dennis, whose credentials are not of record, conducted the autopsy and diagnosed, *inter alia*, "anthracosilicosis, moderate to severe with progressive massive fibrosis." Director's Exhibit 50 at 4. Dr. Dennis opined that the miner "died . . . a pulmonary death with pulmonary congestion and edema, pulmonary emboli, emphysema, and moderate to severe anthracosilicosis with progressive massive fibrosis." *Id.* Dr. Perper, who is Board-certified in Anatomical and Clinical Pathology, reviewed the autopsy report and slides and the miner's medical records, and diagnosed "substantial and significant coal workers' pneumoconiosis" with "associated emphysema." Claimant's Exhibit 1 at 18, 23. Dr. Perper opined that coal workers' pneumoconiosis and emphysema hastened the miner's death by contributing to his pulmonary dysfunction, and by causing a pulmonary embolism and bronchopneumonia. *Id.* at 24.

In contrast, Drs. Askin and Caffrey, both of whom are Board-certified in Anatomical and Clinical Pathology, reviewed the miner's autopsy report and slides and concluded that the miner's pneumoconiosis was too mild to affect his pulmonary function or to have played a role in his death due to pneumonia, emphysema, and heart failure.⁶ Director's Exhibits 38, 55; Employer's Exhibit 1. In a supplemental report, Dr. Caffrey

⁵ The administrative law judge discounted the death certificate because it did not link the miner's chronic obstructive pulmonary disease to coal mine dust exposure. Decision and Order at 26. The death certificate is not discussed further herein.

⁶ Dr. Caffrey also reviewed the miner's medical treatment records in rendering his opinion. Director's Exhibit 38.

disagreed with several of Dr. Perper's conclusions. Employer's Exhibit 1. Specifically, Dr. Caffrey disagreed with Dr. Perper's assessment that the miner's pneumoconiosis was substantial and significant, noting that the lesions of coal workers' pneumoconiosis made up less than 2% of the lung tissue, a "mild or minimal" amount of disease. Employer's Exhibit 1 at 2. Given the "paucity of the lesions," Dr. Caffrey reiterated that the miner's pneumoconiosis was too mild to have hastened his death. *Id.* at 3. Dr. Caffrey further disagreed with Dr. Perper's opinion that the miner's emphysema and COPD were related to coal dust exposure. Dr. Caffrey noted that the miner's smoking history was the "number one cause" of the emphysema, and he opined that, although coal dust can cause emphysema, the amount of coal dust present in the miner's lungs was minimal and did not cause emphysema. *Id.*

The administrative law judge found that Dr. Dennis's opinion was well-reasoned and documented, because the physician diagnosed clinical pneumoconiosis, "using words that indicate it was a 'substantially contributing cause.'" Decision and Order at 24. With respect to Dr. Perper's opinion, the administrative law judge found that Dr. Perper "referenced the documented presence of significant and severe coal workers' pneumoconiosis," and explained that the miner's COPD was related to coal dust exposure, because it was unlikely that his remote smoking history had caused COPD. *Id.* For these reasons, the administrative law judge concluded that Dr. Perper's opinion was well-reasoned and documented. The administrative law judge discounted the opinions of Drs. Askin and Caffrey as insufficiently reasoned because he found that the doctors did not explain why the miner did not have legal pneumoconiosis.⁷ Decision and Order at 24-25. The administrative law judge therefore found that the miner's death was due to pneumoconiosis.

Employer contends that the administrative law judge, in finding that the miner's death was due to pneumoconiosis, did not resolve relevant conflicts in the doctors' reports or adequately explain the basis for his findings. Employer's Brief at 3, 5-8. Employer's contention has merit.

With respect to whether clinical pneumoconiosis hastened the miner's death, the administrative law judge did not indicate how he resolved the conflict in the doctors' opinions as to the degree of pneumoconiosis that was present in the miner's lungs, and whether the pneumoconiosis was sufficient to hasten the miner's death. As noted, Dr. Dennis characterized the pneumoconiosis as moderate to severe with progressive massive fibrosis and Dr. Perper assessed the pneumoconiosis as significant and substantial. In contrast, Drs. Askin and Caffrey opined that the pneumoconiosis was too minimal or

⁷ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

mild to have hastened the miner's death. Because the administrative law judge did not resolve the conflicting evidence on this issue and make a finding, we must vacate his determination pursuant to Section 718.205(c) and remand this case for further consideration of whether clinical pneumoconiosis hastened the miner's death. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

With respect to whether legal pneumoconiosis hastened the miner's death, the administrative law judge credited Dr. Perper's opinion that the miner's emphysema and COPD were related to coal dust exposure⁸ and contributed to his death. However, as employer contends, the administrative law judge found Dr. Perper's opinion to be well-reasoned without explaining how he weighed Dr. Caffrey's disagreement with Dr. Perper's diagnosis of legal pneumoconiosis. *See Rowe*, 710 F.2d 255, 5 BLR 2-103. Further, we agree with employer that substantial evidence does not support the administrative law judge's finding that Dr. Caffrey did not explain his basis for concluding that the miner did not have legal pneumoconiosis. *See* 30 U.S.C. §923(b); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). The record reflects that Dr. Caffrey explained that the miner did not have legal pneumoconiosis because the amount of coal dust that was present in his lungs was too minimal to have caused emphysema. Claimant's Exhibit 1 at 3. The administrative law judge therefore erred in discounting Dr. Caffrey's opinion on this basis.

Further, the administrative law judge faulted Dr. Askin for not explaining why the miner's emphysema and bronchitis did not constitute legal pneumoconiosis. As just discussed, the administrative law judge erred in his analysis of the evidence when he determined that the miner had legal pneumoconiosis. The administrative law judge, on remand, must reconsider whether claimant has established that the miner had legal pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 280-81, 18 BLR 2A-6-9 (1994); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003). Therefore, he must also reconsider Dr. Askin's opinion.

⁸ The administrative law judge did not address whether legal pneumoconiosis was established under 20 C.F.R. §718.202(a)(4), but instead addressed this issue when he weighed the opinions as to the cause of the miner's death under 20 C.F.R. §718.205(c). Because pneumoconiosis is a threshold issue in a survivor's claim, the administrative law judge, on remand, should first address whether the existence of legal pneumoconiosis is established pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4), before addressing whether the miner's death was due to legal pneumoconiosis. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

In sum, we vacate the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and remand this case for further consideration. On remand, the administrative law judge must determine whether the relevant evidence establishes that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Pursuant to 20 C.F.R. §718.205(c), the administrative law judge must reconsider the doctors' conflicting opinions as to the degree of clinical pneumoconiosis that was present, make a finding, and then determine whether clinical pneumoconiosis hastened the miner's death. If the administrative law judge has found that the existence of legal pneumoconiosis is established, he must consider whether legal pneumoconiosis hastened the miner's death. In addressing the foregoing issues on remand, the administrative law judge should reconsider the opinions of Drs. Dennis, Perper, Caffrey, and Askin, taking into account the respective analyses and the quality of the physicians' comparative reasoning, along with the physicians' qualifications, and explain the weight he accords each physician's conclusions. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Accordingly, the administrative law judge's Decision and Order 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