

BRB No. 01-0159 BLA

EVELYN RUTH RICEWICK)
(Widow of CECIL CLARENCE RICEWICK))
))
Claimant-Petitioner)
v.))
))
CONSOLIDATION 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 On Remand - Denying Survivor's Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelley), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (1997-BLA-0427) of Administrative Law

¹ Claimant is the surviving spouse of the miner, Cecil C. Ricewick, who died on June 26, 1996. Director's Exhibit 9. The miner's widow filed a claim for survivor's benefits on February 26, 1996. Director's Exhibit 1.

Judge Clement J. Kichuk 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). This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge George P. Morin credited the miner with thirty-eight years of qualifying coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge noted that the parties did not contest the fact that the miner suffered from pneumoconiosis arising out of coal mine employment, see 20 C.F.R. §§718.202(a), 718.203(b) (2000), and found that the evidence of record failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1) or (c)(3) (2000). The administrative law judge further found, however, that claimant demonstrated that pneumoconiosis was a contributing cause of death pursuant to 20 C.F.R. §718.205(c)(2) (2000). Accordingly, benefits were awarded.

Employer appealed the award of benefits to the Board and in *Ricewick v. Consolidation Coal Co.*, BRB No. 98-1056 BLA (Feb. 29, 2000)(unpub.), the Board affirmed the administrative law judge's findings pursuant to Section 718.205(c)(1), (3) (2000) as unchallenged on appeal. The Board, however, vacated the administrative law judge's finding that claimant established that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2) (2000) and remanded the case to the administrative law judge for reconsideration of the medical opinions of Drs. Naeye, Bush, Goldblatt, Fino, Morgan and

² The 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 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Swedarsky thereunder.

On remand, the case was reassigned to Administrative Law Judge Clement J. Kichuk, who reconsidered the opinions of Drs. Naeye, Bush, Goldblatt, Fino, Morgan and Swedarsky and found that the evidence failed to establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2) (2000). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his consideration of the medical opinions of Drs. Swedarsky, Goldblatt, Naeye and Fino, in finding that claimant failed to establish that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(2) (2000). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief on the merits 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when claimant meets her burden of establishing that the miner's death was due to pneumoconiosis arising out of coal mine employment and where pneumoconiosis was a substantially contributing cause of death or where complicated pneumoconiosis is established. 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (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) (2001); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. In finding that the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c)(2) (2000), the administrative law judge permissibly relied upon the medical reports of Drs. Naeye and Fino, which found that pneumoconiosis did not play a role in or hasten the miner's death, over the contrary opinions of Drs.

Swedarsky and Goldblatt. Claimant initially contends that the administrative law judge erred in failing to give determinative weight to the opinion of Dr. Swedarsky on the basis of his status as the autopsy prosector. The United States Court of Appeals for the Fourth Circuit has held that an administrative law judge must refrain from giving determinative weight to the opinion of an autopsy prosector solely because the autopsy prosector was the only physician with an opportunity to conduct a gross examination near the time of death. See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2- (4th Cir. 2000). In the instant case, the administrative law judge reasonably determined that there was no indication that Dr. Swedarsky's gross examination provided him with a superior diagnostic advantage over the reviewing physicians. Decision and Order on Remand at 16. In addition, the administrative law judge rationally found that Dr. Swedarsky's final diagnoses and conclusion as to the cause of death were seriously undermined by the physician's admission at his deposition that he questioned his own diagnosis of complicated pneumoconiosis when confronted with the contrary opinions of Drs. Naeye and Kleinerman and the objective test results. Decision and Order on Remand at 16; Claimant's Exhibit 5 p. 36-38. Thus, the administrative law judge properly discredited Dr. Swedarsky's opinion upon finding that it was equivocal. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984).

Additionally, the administrative law judge properly discounted Dr. Goldblatt's opinion, that the miner suffered a myocardial infarction due to severe hypoxemia from pneumoconiosis and that the hypoxemia hastened the miner's death, inasmuch as there was no other physician who made such a finding and there was no corroborating objective data of record affirmatively indicating that the miner suffered from severe hypoxemia or myocardial infarction. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); Decision and Order on Remand at 17; Claimant's Exhibit 3. Furthermore, the administrative law judge acted within his discretion in crediting the opinions of Drs. Naeye and Fino, that the miner's pneumoconiosis was too mild to have contributed in any way to his death as the administrative law judge found these opinions better explained and supported by the objective evidence of record. Decision and Order on Remand at 17-18; Employer's Exhibit 3-4, 12; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, the administrative law judge permissibly found that the evidence was insufficient to establish death due to pneumoconiosis based on the more credible medical opinions by the physicians with superior qualifications who found that

pneumoconiosis did not cause or contribute to the miner's death. *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Finally, claimant asserts that the most probative medical opinions of record are those provided by Dr. Swedarsky, the autopsy prosector, and Dr. Goldblatt, a Board-certified pathologist, and maintains that because the contrary consultative opinions of Drs. Naeye and Fino were obtained by employer, they are not reliable. Claimant's arguments are tantamount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See O'Keeffe, supra*. Moreover, inasmuch as there is no evidence in the record of either bias or partiality on the part of the physicians who rendered opinions herein, the administrative law judge properly neither credited nor discounted the conflicting medical opinions on that basis alone. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

The administrative law judge has broad discretion in weighing and assessing the evidence of record in determining whether a party has met its burden of proof and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2001). Claimant's failure to establish death due to pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718 in this survivor's claim, precludes entitlement thereunder. *Shuff, supra*; *Trent, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge