

BRB No. 01-0252 BLA

ANN KRISKO)
(Widow of JOSEPH KRISKO))
)
Claimant-Petitioner)
)
v.)
)
BETHENERGY MINES, INCORPORATED) DATE ISSUED:
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Denying of Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, the widow of the miner, appeals the Decision and Order - Denying Benefits (99-BLA-1232) of Administrative Law Judge Gerald M. Tierney 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 found at least thirty-one years of coal

¹ The Department of Labor has amended the regulations implementing the

mine employment established and, based on the filing date, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 2. Considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge concluded that the evidence was sufficient to establish the existence of pneumoconiosis, but insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death. Thus, the administrative law judge found that a mistake in a determination of fact sufficient to justify modification of the previous denial of benefits was not warranted. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the medical opinion evidence sufficient to establish death due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating the he would not participate in this appeal.

Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 107 (2000) to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief 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, determines that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). 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 Association v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

² The miner died on March 11, 1998. Director's Exhibit 6. Claimant filed a claim for survivor's benefits on March 23, 1998, which was denied by the district director on July 22, 1998 because the evidence did not show that pneumoconiosis caused the miner's death. Director's Exhibits 1, 11. Claimant filed a request for modification with additional evidence on November 30, 1998, which was denied by the district director on March 19, 1999. Director's Exhibits 20, 22. Subsequent to that denial, claimant requested a hearing before an administrative law judge. Director's Exhibits 30, 36, which was held by Administrative Law Judge Gerald M. Tierney on April 12, 2000.

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).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine 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); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims 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, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 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); see *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

Furthermore, in determining whether modification has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); see *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Moreover, citing *O'Keeffe, supra*, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, held that on its face the modification provision permits a reopening of the case with no limitation on particular factual errors and that broad discretion is provided to the trier-of-fact to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53, 2-62 (3d Cir. 1995).

Claimant first contends that the administrative law judge erred in rejecting

the opinion of Dr. Naeye. In considering the opinion of Dr. Naeye, the administrative law judge found its credibility diminished because it consisted of two contradictory reports: first, that the miner had a mild to moderately severe pneumoconiosis, that played no significant role in the miner's death, but "might" have shortened the miner's life, Director's Exhibit 16; and second, on reviewing additional evidence, that, tissues removed at autopsy for microscopic review were not representative of the miner's lungs as a whole, and that pneumoconiosis did not hasten the miner's death. The administrative law judge also found its credibility diminished because it was equivocal as to whether pneumoconiosis "might" have shortened the miner's life and because its autopsy findings were not supported by the autopsy findings of the other pathologists. This was rational. Decision and Order at 3 n.3; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 19 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1- 113 (1988). Accordingly, we reject claimant's contention that the administrative law judge erred in his consideration of Dr. Naeye's opinion.

Next, claimant contends that the administrative law judge erred in not according greater weight to the opinion of Dr. Rizkalla, who as the autopsy prosector was in a better position to determine the cause of the miner's death. In considering Dr. Rizkalla's opinion, the administrative law judge noted that while the opinion of Dr. Rizkalla, as that of the autopsy prosector, had an "edge" over the opinions of the other pathologists, because Dr. Rizkalla identified this "edge" as a "feeling" and "human nature," but did not point to any tangible factors which would entitle his opinion to greater weight, the opinion was not entitled to any greater weight because he was the autopsy prosector. Thus, contrary to

³ The death certificate lists the immediate cause of death as metastatic prostatic carcinoma, Director's Exhibit 6; Dr. Perper found moderately severe pneumoconiosis, emphysema and cor pulmonale and opined that pneumoconiosis was a significant contributing factor in death, Claimant's Exhibit 3; Dr. Schaaf found that the final event was consistent with bronchopneumonia and that pneumoconiosis hastened death, Claimant's Exhibit 1; Dr. Bush found a mild degree of pneumoconiosis and that death was due to the effects of prostate cancer unrelated to pneumoconiosis, Director's Exhibits 21, 23; Employer's Exhibit 5; Dr. Kane found mild pneumoconiosis, death due to the effects of prostate cancer and that death was not related to pneumoconiosis, Employer's Exhibits 2, 4; Dr. Kleinerman found mild pneumoconiosis and death due to primary prostatic carcinoma with metastases, Director's Exhibit 27; Dr. Griffin found death due to prostatic adenocarcinoma unrelated to the simple pneumoconiosis, Director's Exhibits 33, 34; Drs. Mendelow and Solic also found death due to prostate cancer unrelated to pneumoconiosis. Director's Exhibits 38, 41-9; 4-6.

claimant's contention, the administrative law judge's treatment of Dr. Rizkalla's opinion was proper. *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992).

Finally, claimant contends that the diagnoses by Drs. Naeye, Rizkalla and Perper of moderately severe coal workers' pneumoconiosis support a finding that the miner's lungs were so weakened by this condition that it led to the cause of his ultimate death from pneumonia. In evaluating the opinions, the administrative law judge found that: the miner's pneumoconiosis played a key role to those physicians who found that pneumoconiosis played a role in the miner's death because, in addition to the debilitating nature of the miner's cancer, the miner's moderately severe pneumoconiosis likewise weakened his lungs and predisposed him to pneumonia, the immediate cause of death; while the physicians who found that pneumoconiosis did not cause death characterized the degree of pneumoconiosis seen on autopsy as mild and found that the miner's pneumoconiosis was not related to the pneumonia which caused his death. Specifically, the administrative law judge noted that Dr. Bush testified that pneumonia and pneumoconiosis were not anatomically associated and that pneumonia was an independent process that was acute and developed terminally with no relation to the limited amount of pneumoconiosis present, and that Dr. Solic, a pulmonologist, and Dr. Kane, an oncologist, agreed that pneumoconiosis had no effect on the miner's development of pneumonia and subsequent death, with Dr. Solic explaining that pneumonia was present in almost all patients in the miner's severely debilitated and heavily medicated condition, and Dr. Kane explaining that patients like the miner characteristically become bedridden with the inability to clear respiratory secretions and generally develop a terminal pneumonia. Further, the administrative law judge noted that the physicians who found that pneumoconiosis did not cause death further pointed to the absence of evidence during the miner's life of pulmonary complaints and treatment for pulmonary disease as support for their opinions. Additionally, as discussed above, the administrative law judge rationally accorded diminished weight to the opinion of Dr. Naeye.

Thus, contrary to claimant's contention, the administrative law judge rationally accorded greater weight to the opinions of the physicians who found no relation between the miner's pneumoconiosis and subsequent pneumonia and rationally found that the miner's death was not due to pneumoconiosis. See *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Dillon, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Hall v. Director, OWCP*, 8 BLR 1-195 (1985); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730 (1983); see also *Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, the administrative law judge rationally concluded that the evidence of record was insufficient to establish that pneumoconiosis caused, contributed to, or hastened

the miner's death. See *Lukosevicz, supra*; *Trumbo, supra*; see also *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP [Ondecko]*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Consequently, we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact sufficient to warrant modification of the previous denial. *Keating, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge