

BRB No. 08-0129 BLA

C.M. (Survivor of and on behalf of)
U.M.))
)
Claimant-Respondent)
)
v.)
)
PAYBRA MINING COMPANY,)
INCORPORATED)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 10/23/2008
PNEUMOCONIOSIS)
FUND/BRICKSTREET)
)
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 – Denying Miner’s Benefits & Awarding Survivor Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Denying Miner’s Benefits & Awarding Survivor Benefits (04-BLA-6339 and 04-BLA-6340) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on claims 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” eighteen years of qualifying coal mine employment and noted that employer conceded that it was the responsible operator. Adjudicating the miner’s claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence of record established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), pneumoconiosis overall pursuant to 20 C.F.R. §718.202(a), and that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found the evidence of record failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) in the miner’s claim. Accordingly, benefits were denied in the miner’s claim. In the survivor’s claim, the administrative law judge found that the evidence of record established legal pneumoconiosis pursuant to Section 718.202(a)(4), pneumoconiosis overall pursuant to Section 718.202(a), and that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).¹ Accordingly, benefits were awarded in the survivor’s claim.

On appeal, employer contends that the administrative law judge erred in finding legal pneumoconiosis established at Section 718.202(a)(4) in the survivor’s claim based on the opinion of Dr. Perper and erred, therefore, in finding pneumoconiosis established overall at Section 718.202(a) in the survivor’s claim.² Employer argues that the administrative law judge erred in not crediting the opinion of Drs. Castle and Jarboe on the issue of legal pneumoconiosis in the survivor’s claim.³ Claimant has not responded

¹ The administrative law judge did not make a separate finding that the miner’s pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) in the survivor’s claim. A finding that the miner’s pneumoconiosis arose out of coal mine employment is, however, subsumed in the administrative law judge’s finding that the miner has legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Kiser v. L & J Equipment Co.*, 23 BLR 1-246 (2006).

² Employer also argues that the administrative law judge erred in finding pneumoconiosis established in the miner’s claim, however, we need not address that contention because claimant has not appealed the administrative law judge’s decision denying benefits in the miner’s claim.

³ The opinions of Drs. Perper and Ranavaya, for claimant, and the opinions of Drs. Castle and Jarboe, for employer, were submitted with the survivor’s claim. The administrative law judge discredited Dr. Ranavaya’s opinion of complicated pneumoconiosis as contrary to the weight of the evidence.

to this appeal. The Director, Office of Workers' Compensation Programs, has declined to respond to the 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 the applicable law,⁴ 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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that the miner's death was due to pneumoconiosis. Death due to pneumoconiosis is established if the miner's death was caused by pneumoconiosis, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, the miner's death was caused by complications of pneumoconiosis, or the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Employer argues that the administrative law judge erred in crediting the opinion of Dr. Perper, that the miner's chronic obstructive pulmonary disease (COPD) arose out of coal mine employment, and therefore, established legal pneumoconiosis⁵ at Section 718.202(a)(4) in the survivor's claim, over the contrary opinions of Drs. Castle and Jarboe. Specifically, employer contends: 1) that the administrative law judge erred in crediting Dr. Perper's opinion because it was based, in part, on a positive x-ray reading that was subsequently read as negative by a better qualified physician; 2) that the administrative law judge erred in crediting Dr. Perper's finding of legal pneumoconiosis based on the miner's treatment records since the administrative law judge had found that those same treatment records did not establish legal pneumoconiosis; 3) that the administrative law judge erred in relying on Dr. Perper's findings that the miner had

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in coal mining in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

⁵ Legal pneumoconiosis is defined to include any chronic lung disease or impairment and its sequelae arising out of coal mine employment, including chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201.

COPD before he developed lung cancer and that the miner's COPD continued to progress even after the miner stopped smoking, as these findings were not supported by the record; 4) that the administrative law judge erred in crediting Dr. Perper's opinion as it relied on general medical studies to link the miner's COPD to coal dust exposure rather than the particular circumstances of the miner's case; and 5) in discrediting the opinions of Drs. Castle and Jarboe, the administrative law judge impermissibly required employer to rule out legal pneumoconiosis when COPD is diagnosed, as opposed to making claimant bear the burden of establishing that the miner's COPD arose out of coal mine employment.

In finding that the medical opinion evidence established legal pneumoconiosis at Section 718.202(a)(4) in the survivor's claim, the administrative law judge accorded greater weight to the opinion of Dr. Perper, that the miner's COPD arose out of coal mine employment, than to the contrary opinions of Drs. Castle and Jarboe because he found that it was better documented and reasoned.⁶ Specifically, the administrative law judge noted that in addition to x-ray evidence of pneumoconiosis, Dr. Perper relied on the miner's long history of COPD, developing prior to the miner's lung cancer, and on the miner's treatment record, objective testing, and medical studies relevant to the issue of legal pneumoconiosis. Consequently, the administrative law judge found that legal pneumoconiosis was established in the survivor's claim at Section 718.202(a)(4), based on Dr. Perper's opinion. Turning to the medical evidence as a whole in the survivor's claim, the administrative law judge concluded that even though the x-ray, biopsy, and CT scan evidence did not establish clinical pneumoconiosis at Section 718.202(a)(1), (2), and the presumptions at Section 718.202(a)(3) are not available in this case, pneumoconiosis was established at Section 718.202(a) overall, based on Dr. Perper's well-documented and well-reasoned opinion diagnosing legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer argues that the administrative law judge erred in crediting Dr. Perper's opinion since it was based on a positive x-ray reading that was subsequently re-read as negative. A review of the administrative law judge's decision, however, shows that the administrative law judge's finding of legal pneumoconiosis is based on Dr. Perper's diagnosis that the miner had COPD arising out of coal mine employment, rather than

⁶ Employer also contends that the administrative law judge erred in crediting the opinion of Dr. Perper, a Board-certified pathologist, over the opinions of Drs. Castle and Jarboe, who were Board-certified pulmonologists. Employer contends that the qualifications of Drs. Castle and Jarboe are superior to those of Dr. Perper in this case, because the opinions at issue do not rely on pathology evidence. This argument is rejected. The administrative law judge recognized the credentials of the physicians, but permissibly credited the opinion of Dr. Perper over the contrary opinions of Drs. Castle and Jarboe because it was better reasoned and documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

clinical pneumoconiosis. A review of the record shows that while Dr. Perper's finding of clinical pneumoconiosis was based, in part, on a positive x-ray reading, the administrative law judge found that his diagnosis of legal pneumoconiosis was based on several other factors. Specifically, the administrative law judge noted that while Dr. Perper referred to positive x-ray readings in his report, he also referred to the miner's twenty-eight year history of coal mine employment, a significant smoking history, a diagnosis of COPD, treatment and hospital records, evidence of worsening respiratory symptoms, and medical literature as supportive of his finding of legal pneumoconiosis. Accordingly, we reject employer's argument that the administrative law judge erred in crediting Dr. Perper's finding of legal pneumoconiosis because it was based on a positive x-ray, which was subsequently re-read as negative. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Second, employer contends that the administrative law judge erred in relying on the miner's treatment records as supportive of Dr. Perper's opinion that the miner had COPD due to coal mine employment, when the administrative law judge found that the same records were not probative of the issue of legal pneumoconiosis. In addressing the treatment records, the administrative law judge found that, "standing alone", they could not establish legal pneumoconiosis because they did not relate the miner's COPD to coal mine employment. Decision and Order at 21. However, the administrative law judge rationally found that they were supportive of Dr. Perper's opinion because the records were replete with references to the miner's treatment for "worsening" COPD prior to his cancer diagnosis. Accordingly, we reject employer's argument that the administrative law judge erred in crediting Dr. Perper's opinion as supported by the miner's treatment record. *See Stiltner*, 86 F.3d at 343, 20 BLR at 2-259; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Third, employer asserts that the administrative law judge erred in crediting Dr. Perper's opinion that the miner's COPD was due to coal mine employment because Dr. Perper found that the miner was being treated for COPD prior to the advent of his lung cancer. Specifically, employer contends that Dr. Perper's opinion attributing COPD to coal mine employment is not reasonable because the miner's pulmonary function studies did not show a severe COPD until after the advent of the miner's lung cancer.

The administrative law judge did not, however, rely solely on the miner's pulmonary function studies to credit Dr. Perper's opinion. In finding that Dr. Perper's opinion established legal pneumoconiosis, the administrative law judge noted that Dr. Perper relied on many factors in making his diagnosis. Specifically the administrative law judge noted that Dr. Perper relied on the miner's medical records that documented

the miner's need for treatment with bronchodilators because of his worsening COPD, prior to the development of his lung cancer. Further, the administrative law judge relied on the totality of Dr. Perper's opinion, which included a review of the miner's symptoms, history, Dr. Perper's physical findings and objective studies. Thus, contrary to employer's argument, the administrative law judge permissibly found that Dr. Perper's opinion, attributing the miner's COPD to coal mine employment, was supported by the record. *See Stiltner*, 86 F.3d at 343, 20 BLR at 2-259; *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Anderson*, 12 BLR at 1-112; *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Fourth, employer contends that the administrative law judge erred in crediting Dr. Perper's opinion because it relied on generalized medical studies to link the miner's chronic obstructive pulmonary disease to coal mine employment, as opposed to the particular circumstances of the miner's condition. Specifically, employer contends that Dr. Perper's opinion is not credible because it is based on a presumption that all COPD is related to coal dust exposure. However, contrary to employer's assertion, the administrative law judge did not rely on medical studies alone to find that the miner's COPD arose out of coal mine employment. Rather, the administrative law judge noted that while Dr. Perper cited to medical studies that supported his findings, his diagnosis of legal pneumoconiosis was based on a review of the miner's history, symptomatology, and objective evidence. Accordingly, we reject employer's argument. *See Clark*, 12 BLR at 1-155; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Fifth, employer contends that the administrative law judge erred in rejecting the opinions of Drs. Castle and Jarboe, based on the administrative law judge's assumption that COPD is always due to coal mine employment, rather than requiring claimant to carry the burden of establishing that the miner's COPD arose out of coal mine employment. This argument is rejected, however, as the administrative law judge permissibly credited Dr. Perper's diagnosis of legal pneumoconiosis based on the facts in the miner's case, as discussed above. The administrative law judge permissibly rejected the opinions of Drs. Castle and Jarboe because, while Dr. Castle acknowledged that the miner's coal mine employment was sufficient to cause COPD, he did not explain why he believed the miner's long history of treatment for COPD was unrelated to coal mine employment. The administrative law judge, therefore, permissibly found that the opinion of Dr. Castle was not as well-reasoned as the opinion of Dr. Perper. *See Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-112. The administrative law judge also permissibly found that that Dr. Jarboe's opinion was not as well reasoned as that of Dr. Perper, as Dr. Jarboe, unlike Dr. Perper, failed to reference any medical literature to support his opinion. Decision and Order at 22; Employer's Exhibit 9; *see Clark*, 12 BLR at 1-155; *Stark*, at 9 BLR 1-37.

In sum, therefore, employer's arguments concerning the evaluation of the medical opinion evidence are rejected and the administrative law judge's finding that legal pneumoconiosis was established at Section 718.202(a)(4) is affirmed. Likewise, the administrative law judge's finding that pneumoconiosis overall was established at Section 718.202(a) is affirmed.

Finally, employer argues that the administrative law judge's finding that the miner's lung cancer was related to his coal dust exposure was not supported by substantial evidence. We need not address this argument however, as the administrative law judge properly found that Dr. Perper's opinion established that the miner's COPD arose out of coal mine employment and contributed to his death, a finding sufficient to establish legal pneumoconiosis at 20 C.F.R. §718.201 and death due to pneumoconiosis at Section 718.205. Dr. Perper's additional finding that the miner's lung cancer was related to coal dust exposure does not affect the administrative law judge's finding that Dr. Perper's opinion establishes legal pneumoconiosis and death due to pneumoconiosis. Consequently, employer's argument is moot. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-32 (1984). The administrative law judge's finding that the miner's pneumoconiosis caused, substantially contributed to, and hastened the miner's death at 20 C.F.R. §718.205(c) is affirmed, as employer has not challenged the administrative law judge's finding that legal pneumoconiosis (COPD) contributed to the miner's death. Decision and Order at 23. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *see* Employer's Brief at 13.

Accordingly, the administrative law judge's decision awarding benefits in the survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge