

BRB No. 99-0571 BLA

YVONNE NUTTER)
(Widow of PAUL NUTTER))
)
Claimant-Respondent)
)
v.)
)
PEABODY COAL COMPANY) DATE ISSUED:
)
and)
)
OLD REPUBLIC INSURANCE)
COMPANY)
)
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 - Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Esq., Inez, Kentucky, for claimant.

Terri L. Bowman (Arter & Hadden), Washington, D.C., for employer.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative

Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (96-BLA-0078) of Administrative Law Judge Joseph E. Kane on a survivor's claim¹ 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). After noting that the miner had filed a successful claim for benefits, and crediting the miner with fifteen and three-quarter years of coal mine employment, the administrative law judge found that the record contained three medical opinions addressing the cause of death. The administrative law judge found that claimant established by a preponderance of the evidence that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, survivor's benefits were awarded, commencing December 1, 1991.

On appeal, employer contends that the administrative law judge erred in his consideration of the medical evidence and applied an incorrect legal standard in reviewing the evidence. Claimant responds, urging affirmance. Employer filed a reply brief, clarifying some of the contentions raised in its petition for review. The Director, Office of Workers' Compensation Programs (the Director), submitted a letter stating that the administrative law judge applied the correct legal standard in this case.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law, they are binding upon this Board and may not be disturbed. 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).

¹Claimant is Yvonne J. Nutter, the widow of Paul Nutter, the miner, who died on November 4, 1991. Claimant filed the instant survivor's claim on November 30, 1993. Director's Exhibit 1.

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis.² 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2).³ See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 135 (6th Cir. 1993).

In determining whether pneumoconiosis hastened the miner's death, the administrative law judge found that Dr. Schowengerdt was the miner's treating physician during the last four or five years of the miner's life, including treatment for the miner's lung cancer, and that on the basis of pathology reports and the miner's clinical history, the physician found that pneumoconiosis contributed to the miner's death. Decision and Order at 8 - 9. The administrative law judge

²At the hearing, conducted on April 8, 1998, employer withdrew controversion of the issue of the existence of pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.201, 718.202, 718.203. Hearing Transcript at 8 - 9.

³This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment occurred in the State of Ohio. Director's Exhibit 15; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

also found that Dr. Schowengerdt signed the death certificate, which included silicopneumoconiosis as a contributing cause of death, but stated that “while the apparent conclusory opinion may seem suspect, his opinion is consistent with the opinion of Dr. Green.” Decision and Order at 9. The administrative law judge further found that as the treating physician, Dr. Schowengerdt would be the physician most familiar with the miner’s conditions. *Id.* The administrative law judge further found, however, that Dr. Schowengerdt’s opinions were not as well reasoned as those of Drs. Green and Mendelsohn, that the physician was not a pathologist or pulmonary specialist, and therefore, assigned lesser weight to the physician’s opinion. The administrative law judge then considered the opinions of Drs. Green and Mendelsohn, whom the administrative law judge found to be “equally well qualified pathologists” and to whose opinions he accorded significant weight. Decision and Order at 9. The administrative law judge found, however, that Dr. Mendelsohn’s opinion, that pneumoconiosis did not contribute to the miner’s death, was not adequately explained and was a definitive statement in spite of having no autopsy to review. *Id.* Moreover, the administrative law judge found that the physician’s failure to consider whether the miner’s death was even remotely hastened by pneumoconiosis was contrary to the progressive nature of pneumoconiosis. Turning to Dr. Green’s opinion, the administrative law judge found that the physician had offered specific reasons for his opinion regarding the role of pneumoconiosis in the miner’s death, namely that extensive pneumoconiotic lesions were found in the left lower lobe and it was reasonable to conclude that the upper lobe would have been more severely affected, and had provided a more detailed and thorough opinion than Dr. Mendelsohn. Decision and Order at 9. Acknowledging that this case presented a “close question”, the administrative law judge concluded that the greater weight of the evidence establishes that pneumoconiosis hastened the miner’s death pursuant to Section 718.205(c)(2).

Employer contends that the administrative law judge erred in rejecting Dr. Mendelsohn’s opinion.⁴ Employer is correct that claimant bears the burden of

⁴Dr. Mendelsohn submitted a letter on November 27, 1996, stating his opinion based on his review of the miner’s medical records, five pathology slides, and medical history. Dr. Mendelsohn concluded that the miner had suffered from simple coal workers’ pneumoconiosis and squamous cell carcinoma of the lung as a consequence of the miner’s smoking history of one and one-half packs of cigarettes per day for thirty-eight years. The physician further stated that the miner’s coal mine employment was in no way related to his developing bronchogenic squamous cell carcinoma, which was the cause of the miner’s death. The physician initially opined that pneumoconiosis did not significantly

proof in affirmatively establishing that pneumoconiosis hastened the miner's death. See *Brown, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). In addition, the administrative law judge erred in determining to accord less weight to Dr. Mendelsohn's opinion because the physician "did not appear to consider that the miner's death was even remotely hastened by pneumoconiosis." Decision and Order at 9. The "progressive nature of pneumoconiosis" does not necessitate a finding that pneumoconiosis contributed to the miner's death. *Id.* The administrative law judge's consideration of Dr. Mendelsohn's opinions however does not require remand, inasmuch as the administrative law judge provided a valid rationale for his decision to accord diminished weight to Dr. Mendelsohn's opinion, because the physician did not adequately explain why he found that pneumoconiosis did not contribute to the miner's death. The administrative law judge acted within his discretion in determining that Dr. Mendelsohn's opinion acknowledged that the miner suffered from coal worker's pneumoconiosis but did not persuasively counter the other evidence of record, and we therefore, affirm the administrative law judge's determination that Dr. Mendelsohn's opinion was entitled to less weight as it was not sufficiently explained. See *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

contribute to the miner's death, and later, in his summary, stated that neither the anthracosis nor simple coal workers' pneumoconiosis contributed to the miner's death. Employer's Exhibit 1. On October 25, 1998, Dr. Mendelsohn responded to Dr. Green's July 10, 1998 opinion that pneumoconiosis would have contributed to the miner's death by causing additional ventilatory impairment in an already compromised lung, and reiterated his opinion that the miner's death was due to lung cancer and pneumonia, with simple coal workers' pneumoconiosis not contributing to death. Employer's Exhibit 3.

Employer further contends that the administrative law judge erred in relying on the speculative opinion of Dr. Green and the unreasoned opinion of Dr. Schowengerdt. Dr. Green, a board-certified pathologist, submitted a report dated July 10, 1998. Based on a review of the miner's medical records and lung biopsy slides, Dr. Green stated that the miner died of respiratory failure as a result of underlying lung cancer and its complications, and that the miner's simple macular and micronodular coal workers' pneumoconiosis would have contributed to death by causing additional ventilatory impairment in an already seriously compromised lung. Claimant's Exhibit 2. We disagree with employer that the administrative law judge erred in finding Dr. Green's opinion reasoned since it was speculative, on the issue of causation. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Green's opinion that pneumoconiosis "would have" hastened death by contributing to the respiratory failure and that the miner's pneumoconiosis "would have" contributed to death by causing additional ventilatory impairment was sufficient to establish that the miner's death was hastened by pneumoconiosis. *Brown, supra*. Moreover, the administrative law judge permissibly determined that Dr. Green's opinion was better reasoned, detailed and thorough, and listed all of the evidence considered by the physician in reaching his conclusion that pneumoconiosis contributed to the miner's death, and was therefore entitled to determinative weight. See *Lafferty, supra*; *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Dr. Schowengerdt, the miner's treating physician, completed the miner's death certificate and listed black lung disease as a contributing cause in the miner's death. Director's Exhibit 3. He also submitted an opinion on April 16, 1996, in which he stated that the miner's death occurred as a combination of cancer of the lung and black lung disease, as supported by clinical history and pathological reports. Claimant's Exhibit 1. The physician submitted a second letter on August 18, 1998, stating that the miner's death was probably substantially hastened by the presence of advanced pneumoconiosis of the lung. The administrative law judge also rationally found that although Dr. Schowengerdt's opinion was not as well reasoned as the others in the record, and that the physician was neither a pathologist nor a pulmonary specialist, the opinion was nevertheless entitled to some weight as Dr. Schowengerdt was the miner's treating physician and was most likely to be familiar with the miner's condition.⁵ See *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Thus, as the

⁵ Dr. Schowengerdt was the miner's treating physician from 1986 or 1987 until his death in 1991. Claimant's Exhibit 1; Decision and Order at 5.

administrative law judge permissibly relied on Dr. Green's opinion and found that Dr. Schowengerdt's opinion supported Dr. Green's opinion, we affirm the administrative law judge's finding that claimant established the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2).

Employer also contends that the administrative law judge applied an incorrect legal standard in his assessment of the evidence inasmuch as the holding enunciated in *Peabody Coal Co. v. Smith* [Harlan], 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997) requires more than a de minimus contribution of pneumoconiosis in the miner's death. The Director responded asserting that employer's interpretation of *Smith* is "overly expansive", as *Smith* held that a miner must prove more than an infinitesimal contribution by pneumoconiosis to his total disability, but did not address the issue in terms of death due to pneumoconiosis. Director's Response Letter dated May 10, 1999. We agree with the Director that the court's holding in *Smith* does not alter its prior holding that death is due to pneumoconiosis when it is established that the miner's pneumoconiosis hastens death in any way. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Inasmuch as the administrative law judge acted within his discretion in relying upon the opinion of Dr. Green, as supported by the opinion of Dr. Schowengerdt, we affirm his determination that claimant established that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2). See *Griffith, supra*; *Brown, supra*.

Lastly, employer generally contends that the administrative law judge erred by failing to discuss the medical evidence developed in regard to the miner's claim. The administrative law judge did not make specific reference to the evidence contained in Director's Exhibit 15. However, employer withdrew controversion of the existence of pneumoconiosis and agreed that the only issue before the administrative law judge was whether pneumoconiosis played a role in the miner's death. Hearing Transcript at 8 - 9. Employer has referred to the x-rays and objective tests in the miner's claim, but has failed to indicate their relevance in establishing the causal connection in the miner's death. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark, supra*; *Anderson v. Valley of Utah, Inc.*, 12 BLR 1-111 (1989). As the administrative law judge properly considered the evidence pursuant to Section 718.205(c)(2), we affirm his finding that claimant established her entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order - Awarding

Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge