

BRB No. 05-1010 BLA

ELEANORA M. VOYTEN)
(Widow of JOHN A. VOYTEN))
)
Claimant-Respondent)
)
v.)
)
CONSOLIDATION COAL COMPANY)
) DATE ISSUED: 09/15/2006
Employer-Petitioner)
)
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (04-BLA-5617) of Administrative Law Judge Michael P. Lesniak rendered 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 miner died on July 13, 2002 and claimant filed her claim for survivor's benefits on December 6, 2002. Director's Exhibits 4, 12. The administrative law judge credited the deceased miner with "at least twenty years" of coal mine employment and noted that the only issue for adjudication was whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R.

§718.205(c).¹ Decision and Order at 2, 3. The administrative law judge found that the “better reasoned and more persuasive” medical opinions established that pneumoconiosis hastened the miner’s death and was therefore a substantially contributing cause of death pursuant to 20 C.F.R. §718.205(c)(2),(5). Decision and Order at 20. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in relying on lay testimony to evaluate the credibility of the medical opinions on the cause of the miner’s death. Employer further asserts that the administrative law judge did not adequately consider and weigh the conflicting medical opinions. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers’ Compensation Programs has declined to file a substantive response in this appeal.

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 pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor’s claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a “substantially contributing cause or factor leading to” the miner’s death. 20 C.F.R. §718.205(c)(2), (4). 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989).

The record indicates that both of the miner’s claims for benefits were finally denied because he did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director’s Exhibits 1, 2. The evidence associated with the

¹ The record indicates that the miner’s coal mine employment occurred in Pennsylvania. Director’s Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*). At the hearing, employer conceded that the existence of pneumoconiosis arising out of coal mine employment was established. Hearing Tr. at 8, 9.

miner's claims and with his medical treatment records included non-qualifying² pulmonary function and blood gas studies conducted between 1983 and 1998. Director's Exhibits 1, 2, 16, 19. The last of these tests was administered four years before the miner's death. *Id.*

In November of 1997, the miner was diagnosed with cancer of the colon. Director's Exhibits 16, 19. Despite treatment, the cancer eventually spread to the miner's lungs and he died at home on July 13, 2002. Director's Exhibits 12, 16, 19; Hearing Tr. at 12. Dr. Bajwa, the miner's treating physician, completed a death certificate listing "Metastatic Carcinoma of Colon" as the immediate cause of death, and "Pneumoconiosis" as a significant condition contributing to death. Director's Exhibit 12. Dr. Bajwa also submitted a letter stating that "coal workers' pneumoconiosis substantially contributed" to the miner's death. Claimant's Exhibit 3.

Dr. Goldblatt, who is Board-certified in Anatomical and Clinical Pathology, conducted an autopsy limited to the chest. Dr. Goldblatt diagnosed cancer, coal workers' pneumoconiosis, severe emphysema, cor pulmonale, and coronary artery disease, all of which, he opined, contributed to the miner's death. Director's Exhibit 13. Dr. Goldblatt was deposed and testified that pneumoconiosis hastened the miner's death by causing hypoxemia, which decreased the oxygen supply to the heart, leading to cardiac arrhythmia. Employer's Exhibit 11 at 60-61, 70-71. Dr. Goldblatt explained that the pulmonary function and blood gas studies conducted years before the miner's death did not reflect his condition in 2002. Employer's Exhibit 11 at 30, 31. In Dr. Goldblatt's view, the miner's exercise blood gas studies reflected slight abnormalities that marked the beginning of a significant, chronic and progressive lung disease due to coal mine employment that worsened sufficiently to hasten the miner's death in 2002. Employer's Exhibit 11 at 28-29, 64, 70-71.

Dr. Perper, who is Board-certified in Anatomical, Surgical, and Forensic Pathology, reviewed the autopsy report, lung tissue slides, and the miner's medical records. Dr. Perper diagnosed cancer and "significant coal workers' pneumoconiosis of mild to moderate severity" with associated severe centrilobular emphysema. Director's Exhibit 14 at 28. Dr. Perper opined that pneumoconiosis hastened the miner's death by replacing his functioning lung tissue with pneumoconiotic lesions and emphysema, causing pulmonary insufficiency and hypoxemia. Director's Exhibit 14 at 30. Dr. Perper also opined that hypoxemia due to pneumoconiosis hastened the miner's death by triggering or aggravating a cardiac arrhythmia. *Id.* At his deposition, Dr. Perper testified

² A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

that the miner had cor pulmonale and that his lifetime blood gas studies, while not abnormal, were at the low end of normal and showed oxygen levels that dropped further with exercise. Claimant's Exhibit 1 at 16-17, 21, 24-29. Based on the miner's complaints of chronic shortness of breath, and the later findings on autopsy of significant coal workers' pneumoconiosis with emphysema and cor pulmonale, Dr. Perper opined that there was "a trend or a development of hypoxemia" due to pneumoconiosis, which hastened the miner's death. Claimant's Exhibit 1 at 24-26, 28.

Dr. Oesterling, who is Board-certified in Anatomic and Clinical Pathology and Nuclear Medicine, reviewed the autopsy report, lung tissue slides, and the miner's medical records. Dr. Oesterling diagnosed "[m]inimal" or "mild" coal workers' pneumoconiosis that was insufficient to affect the miner's pulmonary function or cause lifetime symptoms, and which played no role in the miner's death due to metastatic disease. Director's Exhibit 15 at 6, 7; Employer's Exhibit 4 at 4. Dr. Oesterling was deposed and explained that the pneumoconiosis he detected was insignificant, and that the miner died from cancer and its complications. Employer's Exhibit 10 at 24, 38, 46-47. Dr. Oesterling opined that the miner had biventricular enlargement rather than cor pulmonale. Employer's Exhibit 10 at 32.

Dr. Tomashefski, who is Board-certified in Anatomic and Clinical Pathology, reviewed the autopsy report, lung tissue slides, and the miner's medical records and concluded that he had "minimal" coal workers' pneumoconiosis that was "essentially . . . an incidental finding of no clinical impact." Employer's Exhibit 3 at 5; Employer's Exhibit 5 at 2. Dr. Tomashefski was deposed and explained that the miner's pneumoconiosis was so minimal that it would not have caused or affected a cardiac arrhythmia. Employer's Exhibit 8 at 30, 33. In addition to the autopsy findings, Dr. Tomashefski pointed to the miner's pulmonary function and blood gas studies that "were normal at least as measured years before his death." Employer's Exhibit 8 at 33. Dr. Tomashefski disagreed with the diagnosis of cor pulmonale because he suspected that the prosecutor did not measure the right ventricle at the proper spot, and he opined that none of the miner's emphysema was related to coal mine dust. Employer's Exhibit 8 at 27, 31, 42, 44. Dr. Tomashefski concluded that the miner's death was unrelated to pneumoconiosis and was probably due to a sudden cardiac event or sepsis. Employer's Exhibit 8 at 32.

Dr. Branscomb, who is Board-certified in Internal Medicine, and Dr. Fino, who is Board-certified in both Internal Medicine and Pulmonary Disease, reviewed the autopsy report and the miner's medical records and diagnosed coal workers' pneumoconiosis that was too mild to hasten the miner's death. Employer's Exhibits 1, 6. Both doctors noted that the miner's lifetime objective studies documented no respiratory or pulmonary impairment. Employer's Exhibit 1 at 10; Employer's Exhibit 6 at 13-15; Employer's Exhibit 9 at 13, 18-19, 25, 40.

Additionally, claimant and the miner's son testified at the hearing that the miner had difficulty breathing and was on an inhaler for his breathing problems. Hearing Tr. at 12-13, 18-19.

After setting forth and discussing the medical evidence in light of the physicians' credentials and reasoning, the administrative law judge found that pneumoconiosis hastened the miner's death. Initially, the administrative law judge discounted Dr. Bajwa's "brief letter" because Dr. Bajwa did not explain his conclusion. Decision and Order at 19. The administrative law judge found the opinions of Drs. Goldblatt and Perper "to be persuasive with respect to the extent of the Miner's pneumoconiosis and role of this disease in hastening the Miner's death." *Id.* The administrative law judge explained that he was persuaded that Dr. Goldblatt was in a better position to assess the extent of pneumoconiosis present, and he found that Dr. Goldblatt's opinion was corroborated by Dr. Perper's opinion. The administrative law judge additionally explained that although employer's experts opined that the clinical testing "last done years before the miner's death" did not demonstrate a pulmonary impairment, he credited the testimony of claimant and the miner's son "that the Miner suffered some breathing difficulty." Decision and Order at 19. The administrative law judge concluded that the opinions of Drs. Goldblatt and Perper were "better reasoned and more persuasive" than the other opinions of record, and established that pneumoconiosis hastened the miner's death. Decision and Order at 20. Finally, the administrative law judge noted that he considered the miner's death certificate and gave it "some, although not controlling, weight." Decision and Order at 20 n.3.

Employer contends that the administrative law judge erred in considering lay testimony from the miner's widow and son when he weighed the medical opinions. Employer's Brief at 5-7. Employer's contention lacks merit. An administrative law judge may not ignore lay testimony where it corroborates medical testimony and is consistent with the miner's medical records. *See Soubik v. Director, OWCP*, 366 F.3d 226, 232, 235 and n.13, 23 BLR 2-82, 2-95, 2-100 and n.13 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 587-88, 21 BLR 2-215, 2-230-32 (3d Cir. 1997). An administrative law judge may consider lay testimony when evaluating the credibility of medical opinions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

Although there were no objective test results reflecting the miner's respiratory capacity at the end of his life, the administrative law judge had before him credible medical evidence in the form of testimony from doctors that the miner had developed respiratory impairments due to pneumoconiosis near the end of his life. The administrative law judge also had before him uncontradicted testimony from the miner's widow and son that the miner had difficulty breathing and needed an inhaler for his breathing problems. When considering the opinions from Drs. Oesterling, Tomashefski, Branscomb, and Fino that the miner had no clinically significant impairment, the

administrative law judge permissibly found that the lay testimony “undermined to some extent” those opinions, while “provid[ing] substance to the opinions by Drs. Perper and Goldblatt.” Decision and Order at 19; *see Soubik*, 366 F.3d at 232, 235 and n.13, 23 BLR at 2-95, 2-100 and n.13; *Mancia*, 130 F.3d at 587-88, 21 BLR at 2-230-32. Although employer argues that lay testimony cannot establish the cause of a breathing impairment, the administrative law judge did not use the lay testimony to establish causation. He found the lay testimony “relevant to the determination of the nature and extent of any pulmonary or respiratory insufficiency.” Decision and Order at 19. The administrative law judge’s use of the lay testimony was consistent with law. *See Soubik*, 366 F.3d at 233 n.11, 23 BLR at 2-98 n.11. We therefore reject employer’s allegation of error.

Employer contends that the opinions of Drs. Perper and Goldblatt were not based on objective tests, that they were flawed, and were not credible. Employer’s Brief at 7-9. Review of the record, however, reflects that both Drs. Goldblatt and Perper based their opinions on the objective, clinical evidence in this record. Director’s Exhibits 13, 14; Claimant’s Exhibit 1 at 15, 19, 23-29; Employer’s Exhibit 11 at 29-31, 45-46, 64, 70-71. Additionally, contrary to employer’s contention, the lack of objective tests in the final years of the miner’s life does not mean that Drs. Goldblatt and Perper were unable to render a reasoned medical judgment that the miner was impaired by pneumoconiosis. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-235 (3d Cir. 1987). Employer essentially asks the Board to reweigh these opinions, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Employer argues that the administrative law judge did not resolve the conflict between the pathologists as to the degree of pneumoconiosis that was present in the miner’s lungs. Employer’s Brief at 7, 9. The administrative law judge specifically credited the opinions of Drs. Goldblatt and Perper over the opinions of Drs. Oesterling and Tomashefski that the miner’s pneumoconiosis was insignificant. The administrative law judge explained that Dr. Goldblatt “persuasively testified” that his ability to see the gross lung tissue before taking samples gave him a slight advantage over the reviewing pathologists when interpreting the lung tissue slides. Decision and Order at 19; *see Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-22-23 (1992). Additionally, the administrative law judge found Dr. Goldblatt’s opinion corroborated by Dr. Perper’s conclusions drawn from his review of the lung tissue slides. For these reasons, the administrative law judge credited Dr. Goldblatt’s and Dr. Perper’s opinions as to “the extent of the pneumoconiosis that was observed.” Decision and Order at 19. Additionally, the administrative law judge explained that he found the opinions of Drs. Goldblatt and Perper “better reasoned and more persuasive” than those of Drs. Oesterling and Tomashefski. Decision and Order at 20. These findings were within the administrative law judge’s discretion and are supported by substantial evidence. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

Consequently, we reject employer's allegation that the administrative law judge did not resolve the conflicting pathology opinions.

Employer argues that the administrative law judge did not adequately explain why the views of its experts were not credited. Employer's Brief at 9-10. As just discussed, the administrative law judge explained that he found the opinions of Drs. Goldblatt and Perper better reasoned and more persuasive than those of Drs. Oesterling and Tomaszewski. Additionally, he found the opinions of Drs. Branscomb and Fino that there was no significant pulmonary impairment undermined by the lay testimony that the miner had breathing problems and by the miner's complaints of shortness of breath. The administrative law judge also found that, in any event, "the more probative evidence" was the pathology evidence. Decision and Order at 20 n.3. Therefore, contrary to employer's argument, the administrative law judge explained why he did not credit the views of employer's medical experts.

Employer contends that the administrative law judge rendered inconsistent findings with respect to Dr. Bajwa's opinion. Employer's Brief at 4-5. Specifically, employer notes that the administrative law judge discounted Dr. Bajwa's brief letter stating that pneumoconiosis contributed to the miner's death because the opinion was unexplained, yet he gave the death certificate that Dr. Bajwa completed "some" weight. Decision and Order at 20 n.3, Director's Exhibit 12; Claimant's Exhibit 3. Review of the administrative law judge's decision reflects that he addressed the death certificate in a footnote at the end of his decision, after explaining that he based the award of benefits on his decision to credit the opinions of Drs. Goldblatt and Perper. Decision and Order at 20 and n.3. As noted, the administrative law judge gave the death certificate "some" weight. *Id.* In view of the administrative law judge's reliance on the opinions of Drs. Goldblatt and Perper, employer does not explain how error, if any, by the administrative law judge in according "some" weight to the death certificate completed by Dr. Bajwa affects the disposition of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore reject employer's contention and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge