

BRB No. 09-0183 BLA

R.T.)
(Widow of J. T.))
)
Claimant-Petitioner)
)
v.)
)
T & T KENTUCKY COAL COMPANY) DATE ISSUED: 09/08/2009
)
and)
)
KENTUCKY COAL PRODUCERS)
SELF-INSURANCE FUND)
)
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 on Remand – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand – Denial of Benefits (01-BLA-0149) of Administrative Law Judge Joseph E. Kane 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). This case is before the Board for the fourth time. In our last decision, we set forth this claim’s full procedural history. [*R.T.*] *v. T & T Ky. Coal Co.*, BRB No. 06-0619 BLA, slip op. at 2-3 (May 31, 2007)(unpub.). In this decision we will discuss the procedural history related to the administrative law judge’s most recent decision to deny survivor’s benefits.

In a Decision and Order on Remand dated April 20, 2006, the administrative law judge found that claimant established that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Specifically, the administrative law judge credited Dr. Dennis’s autopsy diagnosis of moderate to severe anthracosilicosis, and rejected the opinions of employer’s experts, Drs. Fino, Caffrey, Hansbarger, Naeye, and Branscomb, that the miner’s death was not hastened by pneumoconiosis because he found that their opinions did not account for Dr. Dennis’s assessment of the degree of pneumoconiosis present in the miner’s lungs. Further, the administrative law judge credited Dr. Perper’s opinion that the miner’s death was hastened by significant pneumoconiosis because he found that Dr. Perper’s opinion was consistent with the autopsy prosector’s findings. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer’s appeal, the Board vacated the award of benefits and remanded the case for further consideration of whether claimant established that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Board found no error in the administrative law judge’s determination to credit the opinion of the autopsy prosector, Dr. Dennis, that moderate to severe pneumoconiosis was present in the miner’s lungs, but held that the administrative law judge erred in relying on Dr. Dennis’s opinion to discount the opinions of employer’s experts relevant to the issue of death causation. [*R.T.*], slip op. at 5-6. Specifically, the Board held that the administrative law judge mischaracterized the opinions of employer’s experts as having diagnosed only mild pneumoconiosis, when the record reflected that they diagnosed “mild to moderate,” “moderate,” or “moderately severe” pneumoconiosis. [*R.T.*], slip op. at 6. Further, the Board agreed with employer that the administrative law judge failed to follow the Board’s previous instruction to address whether Dr. Perper offered a documented and reasoned opinion sufficient to satisfy claimant’s burden to establish that pneumoconiosis hastened the miner’s death. *Id.* Therefore, the Board instructed the administrative law

¹ Claimant is the widow of the miner, who died on February 5, 2000. Director’s Exhibit 10. Claimant filed her claim for survivor’s benefits on March 7, 2000.

judge to reweigh the opinions of Drs. Dennis and Perper against the conflicting opinions of employer's experts, and to explain his findings.² [*R.T.*], slip op. at 6-7.

On remand, the administrative law judge found that Dr. Dennis did not adequately explain the basis for his opinion that pneumoconiosis hastened the miner's death. The administrative law judge further found that Dr. Perper provided a well-documented and reasoned opinion that pneumoconiosis hastened the miner's death. Further, the administrative law judge found that Drs. Caffrey and Hansbarger also provided thorough, detailed, and well-reasoned opinions that the miner's pneumoconiosis did not contribute to his death from lung cancer, brain cancer, and chronic lung disease due to smoking.³ Weighing Dr. Perper's opinion against those of Drs. Caffrey and Hansbarger, the administrative law judge concluded that claimant did not meet her burden to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence in determining that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's 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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30

² The Board held that the administrative law judge properly assigned little probative weight to the death certificate, which did not mention pneumoconiosis as a contributing cause of the miner's death, because he was unable to determine whether the coroner who completed the death certificate had any personal knowledge of the miner's condition. [*R.T.*] v. *T & T Ky. Coal Co.*, BRB No. 06-0619 BLA, slip op. at 4-5 (May 31, 2007)(unpub.).

³ The administrative law judge discounted the opinions of Drs. Branscomb, Fino, and Naeye, that the miner's death was unrelated to pneumoconiosis, for reasons that we need not address to dispose of claimant's appeal.

⁴ The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 2-4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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 prove 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). In a survivor’s claim 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, if pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, if death was caused by complications of pneumoconiosis, or if the irrebuttable presumption related to complicated pneumoconiosis, provided at 20 C.F.R. §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); *Brown v. Rock Creek Mining, Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1989). Failure to establish anyone of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Claimant contends that the administrative law judge “should have accorded greater weight to the opinion of Dr. Dennis as he was the only pathologist to perform an autopsy.” Claimant’s Brief at 10. We disagree. There is no requirement that the administrative law judge credit the opinion of the pathologist who performs the autopsy. See *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-22-23 (1992). The Board instructed the administrative law judge to explain how Dr. Dennis’s opinion supported a finding that the miner’s death was hastened by pneumoconiosis. [*R.T.*], slip op. at 3, 5 n.3. In accordance with the Board’s remand instructions, the administrative law judge considered Dr. Dennis’s opinion as to the cause of death,⁵ and permissibly found that Dr.

⁵ Dr. Dennis summarized his opinion as to the cause of death as follows:

This patient died as a result of pulmonary disease. The disease included anthracosilicosis, moderate to severe. Macules and papules were present as well as dense fibrotic nodules were scattered throughout the entire architecture of the lung. The patient also had a small cell carcinoma, residual tumor identified . . . behind the aorta. There is no evidence to suggest that the tumor caused the patient’s death. The patient[’]s death was entirely pulmonary. Clinical correlation is . . . recommended. Extensive bronchopneumonia was present as well as extensive anthracosilicosis, moderate to severe.

Director’s Exhibit 186 at 3.

Dennis “did not explain the basis for his conclusion . . . other than by stating that the miner’s death was ‘entirely pulmonary’ and that ‘the disease included anthracosilicosis, moderate to severe.’” Decision and Order at 4; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). He further found that Dr. Dennis did not explain the basis for his conclusion that cancer played no role in the miner’s death. Substantial evidence supports the administrative law judge’s credibility determination regarding Dr. Dennis’s opinion, and the Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. We therefore reject claimant’s allegation of error.

Claimant next contends that the administrative law should have accorded greater weight to Dr. Perper’s opinion because it was “better supported by” more extensive documentation than were the opinions of employer’s experts. Claimant’s Brief at 7-8. We reject claimant’s contention, as the Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. The administrative law judge considered that Dr. Perper conducted “an exhaustive thirty-eight page medical review” and the administrative law judge found his report to be “very well-documented” and well-reasoned.⁶ Decision and Order on Remand at 4, 8. However, the administrative law judge also considered that Drs. Caffrey and Hansbarger conducted thorough, detailed reviews of the miner’s autopsy evidence and medical records,⁷ and he permissibly found their reports to be well-

⁶ Dr. Perper opined that the miner had clinical coal workers’ pneumoconiosis that was sufficiently severe to have hastened his death. Director’s Exhibit 189 at 27. Dr. Perper further opined that the miner had severe emphysema, and he noted that the medical literature substantiates that coal dust exposure can result in emphysema. *Id.* Dr. Perper also diagnosed the miner with “terminal bronchopneumonia,” and noted that medical studies have shown that exposure to silica decreases the body’s immunological resistance to bacterial and fungal infections. *Id.* Dr. Perper concluded that “the mechanism of death of the above conditions is through hypoxemia both directly and indirectly on the background of severe arteriosclerotic heart disease.” Director’s Exhibit 189 at 28.

⁷ Dr. Caffrey opined that the miner’s mild to moderate simple coal workers’ pneumoconiosis was insufficient to have resulted in impairment or to have hastened the miner’s death from smoking-related lung cancer that metastasized to his brain. Director’s Exhibits 183, 187, 200. Dr. Caffrey further opined that the miner had centrilobular and panlobular emphysema due to smoking. *Id.* Additionally, Dr. Caffrey stated that the miner’s terminal bronchopneumonia developed because of his lung cancer. Director’s Exhibit 200 at 8. Dr. Hansbarger opined that the miner’s moderate anthracosilicosis was insufficient to have produced any impairment or to have hastened the miner’s death due to smoking-related lung cancer with metastasis to the brain. Director’s Exhibit 186. Dr. Hansbarger noted further that the miner’s severe chronic obstructive pulmonary disease

documented and reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order on Remand at 10-11.

Claimant alleges that Drs. Caffrey and Hansbarger “reviewed only information provided to them by the employer, which did not paint a true and accurate picture of [the miner’s] medical health” Claimant’s Brief at 9. Claimant does not specify what information she believes was omitted from the medical evidence that was provided to Drs. Caffrey and Hansbarger for review. The administrative law judge found no deficiencies in the documentation underlying the opinions of Drs. Caffrey and Hansbarger. Substantial evidence supports his discretionary finding that their opinions were well-documented and reasoned. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Consequently, we reject claimant’s allegation concerning the documentation provided to Drs. Caffrey and Hansbarger.

In accordance with the Board’s remand instructions, the administrative law judge weighed Dr. Perper’s opinion against those of Drs. Caffrey and Hansbarger. In considering the physicians’ credentials, the administrative law judge found all three physicians to be “well-qualified pathologists who rendered detailed and reasoned reports.” Decision and Order on Remand at 13. In comparing the physicians’ opinions, the administrative law judge acted within his discretion as the fact-finder when he found that there was “no basis for giving greater weight to Dr. Perper’s opinion.” Decision and Order on Remand at 13; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). The administrative law judge considered Dr. Perper’s allegation that Drs. Caffrey and Hansbarger failed to accurately measure the pneumoconiosis nodules and lesions in the miner’s lungs, but reasonably found “no basis for concluding that Dr. Perper’s measurements are more accurate” than those of equally qualified pathologists who reviewed the same slides. *Id.* at 14; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, the administrative law judge permissibly found Dr. Perper’s opinion, that the miner’s emphysema and pneumonia arose out of his coal mine employment and contributed to his death, to be a generalized opinion that was based more on citations to medical literature than on the specifics of the miner’s case. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge therefore determined that claimant did not meet her burden of proving that the miner’s death was due to pneumoconiosis. The determination of whether Dr. Perper’s opinion was persuasive, when weighed against the contrary evidence, was committed to the administrative law judge’s discretion. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Other than arguing that the administrative law judge should have weighed the conflicting

was due to his “long pack year history of cigarette smoking” Director’s Exhibit 186 at 45.

opinions differently, claimant has not challenged the administrative law judge's comparative weighing of the doctors' opinions. Because substantial evidence supports the administrative law judge's permissible credibility determinations, we reject claimant's allegation of error in the weight accorded to Dr. Perper's opinion. *See Anderson*, 12 BLR at 1-113.

Therefore, we affirm the administrative law judge's finding that claimant failed to meet her burden of proving that the miner's death was due to, or hastened by, pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because claimant did not establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge