BRB No. 04-0643 BLA

BETTY L. NEWMAN (Widow of JOHN E. NEWMAN)	)	
Claimant-Petitioner	)	DATE ISSUED: 04/22/2005
v.	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant[1] appeals the Decision and Order (03-BLA-6656) of Administrative Law Judge Paul H. Teitler denying benefits on a 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 involves a survivor's claim filed on January 27, 2003.[2] The

[1]Claimant is the surviving spouse of the deceased miner who died on October 15, 2002. Director's Exhibit 9.

[2]The miner filed a claim on July 31, 2000. In a Decision and Order dated September 21, 2001, Administrative Law Judge Ainsworth H. Brown awarded benefits in

administrative law judge initially noted that the Director, Office of Workers' Compensation Programs (the Director), agreed that the evidence was sufficient to establish (1) that the miner worked sixteen years in coal mine employment; (2) that the miner suffered from coal workers' pneumoconiosis arising out of his coal mine employment and (3) that the miner was totally disabled due to pneumoconiosis. The administrative law judge, therefore, found that the sole issue before him was whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in excluding the medical reports of Drs. Matthew Kraynak (M. Kraynak) and Simelaro. Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Director responds in support of the administrative law judge's denial of benefits.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge erred in excluding the reports of Drs. M. Kraynak and Simelaro. In accordance with 20 C.F.R. §725.414,[3] the

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the miner's claim. Director's Exhibit 1.

[3]Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical

administrative law judge limited claimant to the submission of two medical reports. Prior to the hearing, claimant submitted four medical reports: (1) Dr. Raymond Kraynak's (R. Kraynak's) December 1, 2003 report (Claimant's Exhibit 1); (2) Dr. M. Kraynak's December 3, 2003 medical report (Claimant's Exhibit 4); Dr. Simelaro's December 15, 2003 report (Claimant's Exhibit 6); and Dr. Prince's January 6, 2004 report (Claimant's Exhibit 8). At the hearing, claimant withdrew Dr. M. Kraynak's report from the record. Transcript at 5. In a subsequent telephone conversation, claimant indicated that she also wished to withdraw Dr. Simelaro's December 15, 2003 medical report from the record. *See* Decision and Order at 2.

To the extent that claimant asserts that the evidentiary limitations set forth at 20 C.F.R. §725.414 are invalid, her contention has no merit. The Board has rejected the argument that Section 725.414 conflicts with Section 923(b) of the Act. 30 U.S.C. §923(b); s*ee Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). The Board has also rejected the argument that the evidentiary limitations set forth at Section 725.414 are inconsistent with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); s*ee Dempsey*, *supra*.

Claimant was allowed to submit two medical reports in accordance with the evidentiary limitations set forth at 20 C.F.R. §725.414. Claimant does not contend that "good cause" exists for the introduction of evidence in excess of the evidentiary limitations of Section 725.414. *See* 20 C.F.R. §725.456(b)(1).[4] Consequently, we reject claimant's contention that the administrative law judge erred in excluding the reports of Drs. M. Kraynak and Simelaro from the record.

Claimant argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20

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report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

[4]Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

C.F.R. §718.205(c).[5] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Drs. R. Kraynak, Prince, Gutierrez and Sherman each attributed the miner's death to his cardiac disease. While Drs. R. Kraynak and Prince opined that pneumoconiosis also contributed to the miner's death, Claimant's Exhibits 1, 8, 10, Dr. Sherman opined that the miner's pneumoconiosis neither contributed to, nor hastened, his death. Director's Exhibit 30. Although Dr. Gutierrez attributed the miner's death to cardiopulmonary arrest due to ischemic cardiomyopathy and coronary disease, he did not directly address whether the miner's pneumoconiosis made any contribution to his death. Director's Exhibit 9.

In his consideration of whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge found that Dr. R. Kraynak failed to adequately explain the basis for his opinion that the miner's pneumoconiosis contributed to his death. Decision and Order at 6. The administrative law judge questioned Dr. Prince's opinion that the miner's

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[5]Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) 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).

pneumoconiosis contributed to his death because he found that the doctor's conclusions were not supported by the medical evidence. *Id.* The administrative law judge further found that Dr. Sherman's opinion was "well supported by the medical records of the treating physicians from the [Moffitt Heart & Vascular Group] during the miner's multiple hospitalizations." *Id.* The administrative law judge similarly found that Dr. Gutierrez's opinion regarding the miner's cause of death was supported by the miner's treatment records. *Id.* The administrative law judge, therefore, found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Claimant contends that the administrative law judge committed numerous errors in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant initially argues that the administrative law judge erred in "essentially" concluding that Dr. R. Kraynak was not a treating physician of the miner. We disagree. The administrative law judge acknowledged that Dr. R. Kraynak identified himself as the miner's "treating physician for coal workers' pneumoconiosis" and that claimant testified that Dr. R. Kraynak was the miner's treating physician. Decision and Order at 5. The administrative law judge, however, found that other evidence in the record "raise[d] questions about Dr. [R.] Kraynak's involvement with [the] ongoing treatment of the miner and…raise[d] questions about the extent of his knowledge in the miner's ongoing physical status and on-going care." *Id.* Notably, the administrative law judge found that there was no evidence that Dr. R. Kraynak consulted with the miner's cardiac physicians who treated the miner during multiple hospitalizations. *Id.* The administrative law judge also found that Dr. R. Kraynak's office notes "were cursory and brief and [were] in marked contrast to the extensive and detailed reports and hospital records prepared by the [miner's] cardiac physicians…." *Id.* Under the facts of this case, we find no error in the administrative law judge's determination that Dr. R. Kraynak's opinion was not entitled to the additional weight normally accorded a treating physician because there is evidence that casts doubt on the nature of his relationship to the miner and on the extent of his treatment. *See* 20 C.F.R. §718.104(d).

Claimant also argues that there is "no basis in the record to support the [administrative law judge's] rejection of Dr. R. Kraynak's opinion." Claimant's Brief at 8. The administrative law judge found that "Dr. [R.] Kraynak did not provide any basis for his comments that the miner's coal workers' pneumoconiosis contributed to his death other than noting a progression of his symptoms and the presence of chronic hypoxemia." Decision and Order at 6. Contrary to the administrative law judge's characterization, Dr. R. Kraynak provided a basis for his opinion that the miner's pneumoconiosis contributed

to his death.[6] Consequently, we hold that the administrative law judge erred in his consideration of Dr. R. Kraynak's opinion.

Claimant also argues that the administrative law judge erred in finding Dr. Prince's opinion insufficient to establish that the miner's death was due to pneumoconiosis. In a report dated January 6, 2004, Dr. Prince stated that:

> In summary, [the miner] was 77 years of age at the time of his death on 10/15/02 secondary to bi-ventricular heart failure. While there was significant left ventricular failure secondary to ischemic heart disease, there was clearly an element of right-sided heart failure due to severe pulmonary

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[6]During a January 2, 2004 deposition, Dr. R. Kraynak stated that:

> There is no doubt that coal worker's pneumoconiosis was a substantial contributing factor in this gentleman's death. This gentleman did have a severe cardiac condition. The inability of his lungs to function properly and adequately oxygenate the blood exacerbated this problem. When one reviews the hospital records they reveal multiple notations of black lung disease, shortness of breath, abnormal lung sounds, and wheezing. He was on a ventilator twice and received an extensive row of measures. Immediately prior to his last admission he had increase in his shortness of breath at home which necessitated his admission. He did not respond to aggressive treatment, including nebulizer and oxygen treatments, as well as bronchodilator medication. He did eventually succumb to multi-system failure and that part of this cascade that eventually caused his demise was the coal workers' pneumoconiosis that was present.
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> There is no doubt this gentleman did have severe cardiac disease. This cardiac disease was worsened by the diseased lungs that [the miner] suffered from. The heart had to work harder to pump the blood through the diseased lungs.
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> In addition, there was [sic] problems with oxygenation in the blood which would exacerbate the cardiac problem. I feel that if [the miner] did not have diseased lungs he would have been in a better position to fight off the cardiovascular problems that he had and would have survived longer.

Claimant's Exhibit 10 at 9-10.

> impairment. Even after maximal diuresis and correction of left ventricular dysfunction, he remained persistently hypoxemic during his final hospitalizations at Harrisburg. This severe hypoxemia represents a progression of the exercise-induced arterial oxygen desaturation first noted at Sudbury Hospital on 8/11/00. Hypoxemia and severe airflow obstruction resulted from pulmonary impairment due to pneumoconiosis. The presence of right-sided heart failure due to lung disease and chronic hypoxemia exacerbated [the miner's] left ventricular dysfunction due to coronary artery disease.
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> Thus, it is clear that death which occurred secondary to refractory b-ventricular heart failure was hastened by pulmonary impairment and chronic hypoxemia. Anthrosilicosis [sic] was a significant contributing factor to [the miner's] death due to refractory heart failure.

Claimant's Exhibit 8.

The administrative law judge's sole basis for discrediting Dr. Prince's opinion is that the doctor did not identify any evidence to support his finding of right-sided heart failure due to severe pulmonary impairment. *See* Decision and Order at 6. The administrative law judge noted that his own review of the records did not reveal any mention of right-sided heart failure due to pulmonary impairments. *Id.* However, as claimant notes, the administrative law judge, in his summary of the medical evidence, noted that Dr. Zornosa, in a letter dated October 9, 2002, "reported that the miner was again hospitalized primarily because of right-sided failure."[7] *Id.* at 4. The administrative law judge, on remand, should consider whether Dr. Prince's opinion, when considered in conjunction with Dr. Zornosa's opinion, is sufficient to support a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[8]

[7]In a letter dated October 9, 2002, Dr. Zornosa provided a summary of the miner's hospitalization from October 5, 2002 to October 9, 2002 at Harrisburg Hospital. Director's Exhibit 11. Dr. Zornosa noted that the miner had required hospitalization for his dyspnea. Dr. Zornosa further noted that the miner, on this occasion, had "manifested primarily right-sided failure." *Id.*

[8]The administrative law judge recognized that Dr. Prince is Board-certified in Internal Medicine. *See* Decision and Order at 5. However, as claimant accurately notes, the record reveals that Dr. Prince, in addition to being Board-certified in Internal Medicine, is also Board-certified in the subspecialties of Pulmonary Disease and Critical Care Medicine. *See* Claimant's Exhibit 9.

In light of the above referenced errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c)(2) and remand the case for further consideration.[9]

Claimant finally contends that the administrative law judge erred in relying upon treatment records that are not related to the treatment of a respiratory or pulmonary disease. Section 725.414(a)(4) provides that, notwithstanding the limitations of Section 725.414(a)(2) and (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Claimant has failed to establish that the records she seeks to exclude did not relate to a "respiratory or pulmonary or related disease." Consequently, under the facts of this case, we find no error in the administrative law judge's admission of claimant's hospitalization and treatment records.[10] *See* Director's Exhibits 10, 11.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

[9]Because no evidence of record supports a finding that pneumoconiosis was the cause of the miner's death, claimant is precluded from establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1). Moreover, because there is no evidence of complicated pneumoconiosis in the record, claimant is also precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3).

[10]Claimant accurately notes that the physicians from the Moffitt Heart & Vascular Group did not offer conclusions regarding the cause of the miner's death. The administrative law judge, however, "accorded the greatest weight to the treatment records from the [Moffitt Heart & Vascular Group] since their records and reports lend strong support to their conclusions." Decision and Order at 6. On remand, the administrative law judge is instructed to address the significance of the Moffitt Heart & Vascular Group records in the context of their relevance to the issue of the etiology of the miner's death.

I concur.

ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur with my colleagues. However, with respect to claimant's argument that the miner's hospital records are inadmissible, I would add that claimant has failed to show that those records are subject to limitation by 20 C.F.R. §725.414. Before the exception language of 20 C.F.R. §725.414(a)(4) comes into play, claimant must first show that the limitations of paragraphs (a)(2) or (a)(3) apply. She has not done so.

JUDITH S. BOGGS
Administrative Appeals Judge