

BRB No. 07-0677 BLA

J.H.)
(Widow of J.J.H.))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 04/29/2008
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-05778) of Administrative Law Judge Janice K. Bullard rendered 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). Claimant is the widow of the miner who died on July 17, 2005.¹ Claimant filed a survivor's claim for benefits on August 8, 2005.

¹ The miner's claim for benefits was granted. *Hizny v. Director, OWCP*, BRB No. 87-1941 BLA (March 2, 1989) (unpublished).

Director's Exhibits 2, 4. The administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The parties stipulated, and the administrative law judge found, that the miner had one and one-half years of coal mine employment and had pneumoconiosis arising out of his coal mine employment.² The administrative law judge found, however, that the evidence was insufficient to establish that th

e 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 finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, has submitted a response brief, urging affirmance.

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, 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits in a claim filed after January 1, 1982, 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *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). 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 hastened 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, 2-107-8 (3d Cir. 1989).³

² These findings are not challenged on appeal, and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The law of the United States Court of Appeals for the Third Circuit is applicable, as the miner was employed in the coal mine industry in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

In this case, the administrative law judge found that claimant did not establish that the miner's pneumoconiosis "contributed to or hastened" his death from lung cancer. Decision and Order at 7. In this regard, the administrative law judge gave consideration to the opinion of the miner's treating physician, Dr. Manganiello, that the miner's pulmonary impairment due to pneumoconiosis precluded him from undergoing chemotherapy to treat his lung cancer and, thus, hastened his death. Decision and Order at 2-3, 6; Claimant's Exhibits 1, 2. The administrative law judge determined, however, that Dr. Manganiello's opinion that chemotherapy was foreclosed by the miner's pulmonary condition due to pneumoconiosis is contradicted by the preponderance of the evidence, and therefore found it insufficient to establish that the miner's pneumoconiosis "contributed to or hastened" his death.⁴ Decision and Order at 6-7; Claimant's Exhibit 2 at 14-16.

Claimant argues that the administrative law judge erred in rejecting Dr. Manganiello's deposition testimony that the decision to forego chemotherapy was made on the basis of the miner's pneumoconiosis, or chronic obstructive pulmonary disease (COPD) related to his coal mine employment. Claimant's Exhibit 2 at 14-16. Claimant contends, in this regard, that the administrative law judge erroneously failed to credit the testimony of Dr. Manganiello and the miner's son that there were numerous discussions between Dr. Manganiello and the miner and his family regarding the preclusion of chemotherapy on the basis of the miner's pulmonary condition.

We reject this contention. The administrative law judge specifically set forth the testimony of both Dr. Manganiello and the miner's son regarding these discussions. Decision and Order at 2-3; Claimant's Exhibit 2 at 35-38; Hearing Transcript at 8-9. The administrative law judge, however, further considered Dr. Manganiello's acknowledgment in his deposition testimony that he was unable to point to any documentation in the medical records of any discussions of the miner's inability to undergo chemotherapy because of his pulmonary impairment. Decision and Order at 3,

⁴ The administrative law judge also considered the miner's death certificate, which listed metastatic lung cancer as the immediate cause of death and coal worker's pneumoconiosis as a significant condition contributing to death. Decision and Order at 5-6; Director's Exhibit 4. As there was no evidence that the physician who signed the death certificate had any involvement in the miner's treatment and no reason was provided for listing pneumoconiosis as a significant contributing factor in the miner's death, the administrative law judge permissibly gave no weight to this conclusory statement. Decision and Order at 6; *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3^d Cir. 1997). Moreover, this finding is not challenged on appeal by claimant, and, thus, is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

6; Claimant's Exhibit 2 at 35-38. Moreover, the administrative law judge properly determined that references in the miner's hospital records to the decision to forego chemotherapy demonstrate that the decision not to pursue this treatment was made on the basis of the progression of the miner's cancer, and not because chemotherapy was contraindicated due to his pulmonary condition. Decision and Order at 4-6; Director's Exhibits 6-8.

Section 718.104(d)(5) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). The Board is not empowered to reweigh the evidence or to substitute its inferences for those of the administrative law judge. *See generally Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002). In this case, substantial evidence supports the administrative law judge's finding that Dr. Manganiello's deposition testimony that the miner's pneumoconiosis precluded him from undergoing chemotherapy is not well-reasoned or documented in view of the other evidence of record.⁵ Decision and Order at 6; *see* Director's Exhibits 6, 7, 16; Claimant's Exhibit 4. Therefore, we affirm the administrative law judge's rejection of Dr. Manganiello's opinion. *See Lango*, 104 F.3d 573, 21 BLR 2-12.

Because the administrative law judge permissibly discounted the only medical opinion of record that could support a finding that pneumoconiosis substantially contributed to or hastened the miner's death, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).⁶ Decision and Order at 6-7; *Lukosevic*, 888 F.2d 1001,

⁵ In challenging this finding, claimant points to a notation in the hospital records in which Dr. Manganiello stated on July 6, 2005 that chemotherapy was not recommended by Oncology on the basis of the miner's difficulty swallowing and increased congestion. Director's Exhibit 7. This is the sole reference in the hospital records that might be viewed as supportive of Dr. Manganiello's deposition testimony that the miner's pneumoconiosis prevented him from receiving chemotherapy. The administrative law judge rationally exercised her discretion in evaluating the records of the miner's hospitalizations and drew reasonable inferences from those records, and her finding that Dr. Manganiello's opinion is contradicted by statements in the record is supported by substantial evidence.

⁶ Thus, we need not address in detail claimant's contentions with respect to the administrative law judge's finding that Dr. Sherman's opinion is well-documented and supported by the record. Decision and Order at 3-4, 6; Director's Exhibits 8, 16. We note, however, our disagreement with claimant's contention that Dr. Sherman's statement

13 BLR 2-100. In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), an essential element of entitlement to benefits in a survivor's claim, we affirm the administrative law judge's denial of benefits. *See Trumbo*, 17 BLR 1-85.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

that the miner may have gained a small amount of time had he undergone chemotherapy, *see* Director's Exhibit 8, satisfies claimant's burden of establishing that pneumoconiosis hastened the miner's death. Claimant cannot meet this burden merely by producing a medical opinion that the miner's life may have been prolonged by chemotherapy; rather, claimant also must demonstrate that it was the miner's pneumoconiosis, or his coal mine employment-related chronic obstructive pulmonary disease (COPD), that prevented him from undergoing chemotherapy. As Dr. Sherman stated that there is no documentation in the medical records that chemotherapy was foreclosed by the miner's COPD, Director's Exhibit 16, his opinion does not satisfy claimant's burden of establishing that the miner's pneumoconiosis hastened his death. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).