

BRB No. 09-0535 BLA

JOAN HAYTON)
(Widow of DELMON HAYTON))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 04/30/2010
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in the Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits in the Survivor's Claim (2008-BLA-5474) of Administrative Law Judge Larry S. Merck rendered pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ Director's Exhibit 2. Adjudicating the claim

¹ The miner filed a claim on August 25, 2005, which was denied by the district director on March 29, 2006, because the evidence was found to be insufficient to

pursuant to the regulations at 20 C.F.R. Part 718, the administrative law judge found that the record established one and three quarter years of coal mine employment and that the miner had a smoking history of at least forty-one pack years. The administrative law judge found that claimant established that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. The administrative law judge also found, however, 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 failing to find that pneumoconiosis contributed to the miner's death. Claimant specifically asserts that the administrative law judge erred in not assigning determinative weight to the opinion of Dr. Cox, the miner's treating physician, that the miner's pneumoconiosis hastened his death. The Director, Office of Workers' Compensation Programs (the Director), has responded, urging the Board to affirm the administrative law judge's denial of benefits.²

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 applicable law, they are binding upon this Board and may not be disturbed.³ 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).

To establish entitlement to survivor's benefits, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R.

establish any of the requisite elements of entitlement. Director's Exhibit 1. The miner took no further action with respect to the denial of his claim. He subsequently died on January 10, 2007. Director's Exhibit 9. Claimant filed her survivor's claim on April 17, 2007, which is the subject of this appeal. Director's Exhibit 2.

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of one and three quarter years coal mine employment, and his finding that the miner did not have complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1- 200 (1989) (*en banc*); Director's Exhibit 5.

§§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In this case, the administrative law judge found that while the miner suffered from clinical pneumoconiosis, there was no credible evidence to establish that clinical pneumoconiosis⁴ hastened the miner's death. The administrative law judge further found that while the miner was treated for chronic obstructive pulmonary disease (COPD), which contributed to his death, there was no credible evidence to link the miner's COPD to coal dust exposure. Thus, the administrative law judge denied benefits pursuant to Section 718.205(c).

Claimant asserts that the miner's treatment records from Pikeville Medical Center, along with the opinions by Drs. Dennis and Cox, establish that the miner's death was due to pneumoconiosis. Claimant argues that the administrative law judge erred in failing to accord proper weight to the opinion of Dr. Cox, the miner's treating physician. Claimant's arguments are rejected as they are without merit.

Pursuant to Section 718.205(c), the administrative law judge properly found that the death certificate, signed by Dr. Puram, attributed the miner's death to carcinoma of

⁴ Pursuant to 20 C.F.R. §718.201(a)(1):

Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

the lung with metastasis and did not address whether or not pneumoconiosis hastened the miner's death. Decision and Order at 14; Director's Exhibit 9. The administrative law judge also noted correctly that while medical records from Pikeville Medical Center document the miner's treatment for various medical conditions, including COPD, those records do not contain a medical opinion addressing the etiology of the miner's COPD or whether it was caused by coal dust exposure. Decision and Order at 14; Director's Exhibits 33, 34, 36.

Dr. Dennis performed the miner's autopsy on January 10, 2007 and rendered the following gross description in his report: "significant pulmonary congestion and edema with macular development on the surfaces of both the lungs, right and left respectively. Macular development measures to 0.1 to 0.5 [centimeters]." Director's Exhibit 24. Based on his microscopic evaluation, he diagnosed the following: 1) pulmonary congestion with edema, moderate to severe; 2) severe bronchopneumonia with aspiration pneumonia and pulmonary congestion; 3) moderate to severe bilateral pulmonary emboli; 4) coronary artery disease; 5) left ventricular hypertrophy; 6) hypertensive cardiovascular disease; 7) simple coal workers' pneumoconiosis; and 8) progressive massive fibrosis. *Id.* In his summary of findings, Dr. Dennis indicated that the miner had "significant" coal worker's pneumoconiosis with progressive massive fibrosis. *Id.* However, in a supplemental report dated September 8, 2008, Dr. Dennis revised his autopsy findings and clarified that there was no evidence of progressive massive fibrosis. Claimant's Exhibit 2.

Dr. Dennis wrote a one-sentence letter on September 26, 2007, stating that the miner had simple pneumoconiosis that complicated his pulmonary problems and contributed to his demise secondary to pneumonia and pulmonary congestion and edema. Director's Exhibit 27. Dr. Dennis also completed an undated form and check-marked boxes indicating that the miner had both clinical and legal pneumoconiosis. Claimant's Exhibit 1. When asked on the form whether the miner had any respiratory condition that was significantly contributed to, or aggravated by, coal dust exposure, Dr. Dennis wrote, "pneumonia-agonal and BLD [black lung disease]." *Id.* He also check-marked a box indicating that the pneumoconiosis hastened the miner's death; and, when asked to explain his rationale, he wrote, "unable to exchange [oxygen] for [carbon dioxide] – hypoxia." *Id.*

The administrative law judge found that "Dr. Dennis's conclusion as to whether pneumoconiosis hastened the [m]iner's death is conclusory and inadequate" because "[h]e does not explain how [the miner's] death was hastened by pneumoconiosis, i.e., a defined process that reduces the miner's life by an estimable amount of time." Decision and Order at 16. Thus, the administrative law judge found that Dr. Dennis's opinion was not reasoned and insufficient to satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.205(c).

With respect to Dr. Cox, the administrative law judge acknowledged that he treated the miner from “about April 29, 2005, to October 4, 2006.” Decision and Order at 12. The administrative law judge found that six pages of Dr. Cox’s treatment notes “are mostly unreadable.” *Id.* at 13; Director’s Exhibit 37. The administrative law judge also found that while Dr. Cox signed a form on September 5, 2007, indicating that the autopsy report served as the basis for his diagnosis of clinical pneumoconiosis, and also checked-marked “yes” on a box to indicate that pneumoconiosis hastened the miner’s death, Dr. Cox “provided no explanation as to what evidence he relied upon in the autopsy to reach his conclusion.” *Id.* Therefore, the administrative law judge gave Dr. Cox’s opinion no weight at 20 C.F.R. §718.205(c).

Because the administrative law judge has discretion, as the trier-of-fact, to assess the credibility of the medical experts, we affirm his finding that opinions of Drs. Dennis and Cox are conclusory and fail to adequately explain how pneumoconiosis contributed to or hastened the miner’s death. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-264; *U. S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1986) (*en banc*); Decision and Order at 17. Additionally, contrary to claimant’s assertion of error, to the extent that the administrative law judge specifically found that Dr. Cox’s opinion was not sufficiently reasoned, the administrative law judge was not required to assign controlling weight to Dr. Cox’s opinion, that the miner’s death was hastened by pneumoconiosis, based solely on his status as a treating physician.⁵ 20 C.F.R. §718.104(d)(5); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). We therefore affirm, as supported by substantial evidence, the administrative law judge’s conclusion that “no doctor of record has provided a well-reasoned and well-documented opinion on the issue of death due to pneumoconiosis” and his 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 17-

⁵ The regulation requires that the administrative law judge consider the credibility of the treating 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).

⁶ The record also contains a report by Dr. Perper who reviewed the miner’s autopsy slides and found “minimal anthracosis” of the lung, “insufficient for [a] diagnosis of coal workers’ pneumoconiosis.” Director’s Exhibit 40. Because we affirm the denial of benefits pursuant to 20 C.F.R. §718.205(c), it is not necessary that we address the Director’s assertion that the administrative law judge erred in his consideration of Dr. Perper’s opinion as to existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2). *See Skrack*, 6 BLR at 1-711; Director’s Brief at 1 n.1.

18. Because claimant did not satisfy her burden to prove that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits.⁷ *Anderson*, 12 BLR at 1-114; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in the Survivor's Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁷ Because the miner was not receiving benefits at the time of his death and he had less than fifteen years of coal mine employment, the recent amendments to the Act, which became effective on March 23, 2010, do not alter the outcome of this case.