

BRB No. 09-0538 BLA

CAROL K. PEARCE)
(o/b/o and as survivor of KENNETH)
PEARCE))
)
Claimant-Respondent)
)
v.)
)
PENNSYLVANIA MINES CORPORATION) DATE ISSUED: 04/28/2010
)
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 – Denying Benefits in the Living Miner’s Claim and Awarding Benefits in the Survivor’s Claim of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Denying Benefits in the Living Miner’s Claim and Awarding Benefits in the Survivor’s Claim (2007-BLA-05397 and 2007-BLA-05398) of Administrative Law Judge Michael P. Lesniak (the administrative law judge), on claims¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30

¹ The miner’s claim was filed on May 20, 2004. The miner died on January 1, 2005. The survivor’s claim was filed on February 22, 2006. The claims have been consolidated.

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).² The administrative law judge found that the parties stipulated that the miner had twenty years of qualifying coal mine employment, had pneumoconiosis based on the autopsy evidence at 20 C.F.R. §718.202(a)(2), and that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). The administrative law judge denied benefits on the miner's claim, however, because he found that the evidence failed to establish that the miner was totally disabled at 20 C.F.R. §718.204(b).³ Finding death due to pneumoconiosis at 20 C.F.R. §718.205(c)(death causation), the administrative law judge awarded benefits on the survivor's claim.

On appeal, employer asserts that the administrative law judge erred in finding that Dr. Oesterling's opinion supported a finding of death causation at Section 718.205(c) in the survivor's claim. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief.

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,⁴ 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not affect the miner's claim, as it was filed prior to January 1, 2005.

³ The administrative law judge's denial of the miner's claim because total disability was not established at 20 C.F.R. §718.204(b) is affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The Board will apply the law of the United States Court of Appeals for the Third Circuit, as claimant was last employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that the presumption relating to complicated pneumoconiosis, set forth 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 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, 13 BLR 2-100 (3d Cir. 1989).

The medical opinion evidence relevant to death causation consists of the following: the report of Dr. Bush, who opined that less than 5% of the miner's lung tissue was destroyed by pneumoconiosis and that pneumoconiosis was, therefore, too mild, in extent and degree, to have contributed to the miner's death; the report of Dr. Hurwitz, who found that coal workers' pneumoconiosis played no role in the miner's death; the opinion of Dr. Perper that coal workers' pneumoconiosis was a substantial contributing factor in the miner's death "by the direct and extensive replacement of normal lung tissue by non-breathing pneumonotic lesions associated with centrilobular emphysema and resulting hypoxemia," and the opinion of Dr. Oesterling who stated both that coal workers' pneumoconiosis was not a factor in hastening the miner's death and then stated, in response to a hypothetical question on deposition, that pneumoconiosis would be a contributing cause of death when the lungs of a person, who already has underlying lung damage, are damaged by the congestion caused by heart disease. Decision and Order at 23.

In considering the medical opinion evidence on the issue of death causation at 20 C.F.R. §718.205(c), the administrative law judge rejected Dr. Bush's opinion because he found that Dr. Bush's failure to account for the presence of silicotic nodules and centrilobular emphysema, which was noted by other physicians, meant that he underestimated the amount of damage that had been done to the miner's lung tissue by pneumoconiosis. Decision and Order at 22. Additionally, the administrative law judge found that Dr. Bush's opinion was unreasoned because Dr. Bush did not adequately explain how the miner's hypoxemia was not a result of his coal workers' pneumoconiosis.

Regarding the opinion of Dr. Hurwitz, who found that coal workers' pneumoconiosis played no role in the miner's death, the administrative law judge accorded it less weight because it was based on an incorrect smoking history⁵ and because Dr. Hurwitz did not address the effect of the documented fluid build-up in the

⁵ Dr. Hurwitz found that the miner had a 23 pack year smoking history, in contrast to the administrative law judge's finding of a less than 10 pack year smoking history. Decision and Order at 22-23.

miner's lung on the cardiac arrhythmia that was the ultimate cause of his death. Decision and Order at 23.

The administrative law judge found the opinion of Dr. Perper, who found that coal workers' pneumoconiosis was a substantial contributing factor in the miner's death, to be persuasive. Decision and Order at 23. The administrative law judge noted that Dr. Perper explained how the miner's pneumoconiosis, with associated centrilobular emphysema, replaced the miner's normal lung tissue and caused hypoxemia, which could "cause a shut-off of vital nervous respiratory and circulatory centers, biochemical abnormalities such as respiratory/metabolic acidosis, or precipitate/aggravate a cardiac arrhythmia particularly in patients with [coronary artery disease]." Decision and Order at 23. Despite stating that he found Dr. Perper's opinion persuasive, however, the administrative law judge accorded the opinion only "partial weight" because Dr. Perper provided "no objective diagnostic testing that shows [that] the miner suffered from chronic hypoxemia," and "when discussing the mechanism of death, he seems to be talking about generalities and not about the specific facts of this particular case." Decision and Order at 23.

Likewise, the administrative law judge accorded "partial weight" to Dr. Oesterling's opinion. The administrative law judge found that Dr. Oesterling opined that the miner had only mild coal workers' pneumoconiosis and that the level of structural change to the miner's lungs by coal workers' pneumoconiosis, "appeared insufficient to have resulted in significant functional change in terms of the miner's respiratory ability." Decision and Order at 24. The administrative law judge further observed that Dr. Oesterling opined that "without functional change, [coal workers' pneumoconiosis] would not in any way appear to be a factor in hastening the miner's death." Decision and Order at 24. Nonetheless, the administrative law judge credited Dr. Oesterling's deposition testimony, because he found that Dr. Oesterling "convincingly explained" in response to a hypothetical question on cross-examination, how coal workers' pneumoconiosis "would be a contributing factor to the miner's death." Decision and Order at 24. Dr. Oesterling explained that "if a person has an underlying lung disease with 10% destruction [of lung tissue] and 30% [of lung tissue] fills with fluid, [due to heart disease], then it would be his opinion that the lung disease would be a contributing factor to the death." Decision and Order at 24.

Consequently, given Dr. Oesterling's deposition testimony, along with Dr. Perper's opinion, and medical evidence showing that the miner's lungs had been damaged by coal workers' pneumoconiosis and centrilobular emphysema due to coal mine employment,⁶ the administrative law judge concluded that the evidence in this case,

⁶ The administrative law judge observed that, among the final pathologic diagnoses on autopsy were pneumoconiosis, *i.e.*, "anthracosilicosis of lungs, pleura and

though flawed, established that the miner's pneumoconiosis "hastened" his death. Decision and Order at 25.

At the outset, we affirm the administrative law judge's credibility findings regarding the opinions of Drs. Bush and Hurwitz, as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer argues, however, that the administrative law judge erred in finding Dr. Oesterling's opinion supportive of a finding of death causation. Specifically, employer contends that the administrative law judge erred in relying on Dr. Oesterling's answer to a hypothetical question posed to him on cross-examination to find that Dr. Oesterling's opinion supported a finding of death causation at Section 718.205(c).

We agree. In this case, the administrative law judge found that Dr. Oesterling's opinion established that pneumoconiosis "hastened" the miner's death based on Dr. Oesterling's response to a hypothetical question. Decision and Order at 24. The administrative law judge concluded "that the hypothetical [question] given to Dr. Oesterling at his deposition is exactly what happened in this case." Decision and Order at 24. Such reasoning on the part of the administrative law judge, however, is insufficient to support a finding of death causation because, in providing it, the administrative law judge has impermissibly substituted his opinion for that of a physician. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Dr. Oesterling did not directly opine that pneumoconiosis "hastened" this miner's death. Rather, he merely explained how pneumoconiosis could, "hypothetically" hasten death, given certain facts. Dr. Oesterling did not find that these facts existed in this case. Indeed, he opined to the contrary. *See* Employer's Exhibit 3 at 26-28, 34-37 (Oesterling Deposition). Consequently, the administrative law judge did not have a rational basis upon which to find death causation. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

pulmonary hilar lymph nodes," pulmonary edema, and congestion. Director's Exhibit 11. The administrative law judge noted that the doctors, in this case, agreed that a small portion of the miner's lung tissue had been destroyed by coal workers' pneumoconiosis. Director's Exhibits 12, 14; Employer's Exhibit 5. The administrative law judge further noted that, based on review of the miner's autopsy slides and additional medical records, the doctors agreed that the miner died of cardiac failure due to coronary artery disease and that his lungs were extremely heavy from congestion and pulmonary edema due to sudden cardiac failure. Director's Exhibits 12, 14; Employer's Exhibit 5.

Moreover, although employer does not challenge the administrative law judge's accordance of "partial weight" to Dr. Perper's opinion, that pneumoconiosis substantially contributed to the miner's death, the administrative law judge's finding that Dr. Perper's opinion was not supported by objective diagnostic testing and that, in discussing the mechanism of death, Dr. Perper appeared to rely on generalities, rather than specific facts, also renders the administrative law judge's reliance on Dr. Perper's opinion faulty. Decision and Order at 23; *see Lango*, 104 F.3d at 578, 21 BLR at 2-20-21; *Clark v. Karst-Robbins Coal Corp.*, 12 BLR 1-149 (1986)(*en banc*). Because the administrative law judge found that Dr. Perper's opinion was unreasoned, it does not provide a sufficient basis upon which to establish death causation. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

In sum, therefore, neither the opinion of Dr. Oesterling, nor the opinion of Dr. Perper, is sufficient to establish the miner's death causation at Section 718.205(c), as discussed, *supra*. We must, therefore, reverse the administrative law judge's finding that the evidence in this case establishes death causation at Section 718.205(c), and the award of benefits in the survivor's claim.⁷

⁷ Because we affirm, as unchallenged on appeal, the administrative law judge's finding that total disability was not established at Section 718.204(b) in the miner's claim, *see Skrack*, 6 BLR at 1-711, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, to the survivor's claim, would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits in the Living Miner's Claim and Awarding Benefits in the Survivor's Claim is affirmed in part and reversed in part.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge