

BRB No. 05-0862 BLA

ALICE McCARTY)
(Widow of JACK McCARTY))
)
 Claimant-Petitioner)
)
 v.)
)
 WESTMORELAND COAL COMPANY) DATE ISSUED: 08/24/2006
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denial of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams and Rutherford), Norton, Virginia, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson and Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denial of Claim (05-BLA-5118) of Administrative Law Judge Daniel F. Solomon on a survivor’s claim filed pursuant to the

¹ The miner, Jack McCarty, died on January 19, 2001. Director’s Exhibit 10. Claimant filed a claim for survivor’s benefits on August 18, 2003, which was denied in a Proposed Decision and Order on June 30, 2004. Director’s Exhibits 2, 32. Claimant requested a formal hearing on July 28, 2004, and the case was transferred to the Office of the Administrative Law Judges on October 19, 2004. Director’s Exhibits 35, 41. A hearing was held on April 6, 2005.

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). The parties stipulated to, and the administrative law judge found, that the miner had 38.17 years of coal mine employment. Decision and Order at 2. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The parties stipulated to the existence of pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.202(a), 718.203(c). Hearing Transcript at 6. The administrative law judge found the evidence insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that Dr. Perper’s opinion is sufficient to establish that pneumoconiosis was a “contributing factor in [the miner’s] death.”² Claimant urges the Board to reverse the administrative law judge’s denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers’ Compensation Programs, is not participating in this 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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred by incorrectly evaluating Dr. Perper’s opinion and finding it not well reasoned on the grounds that it was “based on faulty assumptions and premises.” Claimant’s Brief at 3. Claimant specifically contends that the administrative law judge erred in finding that Dr. Perper’s opinion was not well reasoned “by incorrectly assuming Dr. Perper based his conclusion [that pneumoconiosis was a contributory factor] upon Mr. McCarty suffering from complicated pneumoconiosis instead of simple pneumoconiosis.” Claimant’s Brief at 3.

In a report dated November 18, 2003, Dr. Perper found, “In Mr. McCarty’s case, the autopsy findings are exceedingly clear as to the presence of complicated coal workers’ pneumoconiosis.”³ Director’s Exhibit 11 at 16. In the “conclusion” section of

² We affirm the administrative law judge’s finding that the existence of pneumoconiosis arising out of coal mine employment is established at 20 C.F.R. §§718.202(a) and 718.203, as unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Dr. Perper also noted that the autopsy prosector, Dr. Adelson, listed, “A possible area of pulmonary consolidation, measuring 4.5 cm, near the pleural surface of the left lung.” *Id.* at 12.

his opinion, Dr. Perper stated that the miner had “significant coal workers’ pneumoconiosis, causally associated with centrilobular emphysema”, as a result of 40 years of “occupational exposure as a coal miner to coal dust,” and that the coal workers’ pneumoconiosis and the associated emphysema, “was a substantial contributory cause” of the miner’s death. *Id.* at 19. Dr. Perper indicated that he based his conclusion on “the autopsy report findings consistent with significant simple coal workers’ pneumoconiosis, in conjunction with other clinical and laboratory findings.” *Id.*

The administrative law judge found that although Dr. Perper’s opinion was well documented, it was not well reasoned and that his conclusions are “based on faulty assumptions and premises.” Decision and Order at 4. The administrative law judge found, however, that Dr. Perper’s opinion was not well reasoned because his finding of complicated pneumoconiosis is not supported by the preponderance of the evidence. The administrative law judge specifically found that although complicated pneumoconiosis is mentioned in Dr. Perper’s report, “the presumption set forth in 718.304 (evidence of complicated pneumoconiosis) is not proved. The full weight of the record shows that the miner had simple pneumoconiosis.” Decision and Order at 4. Therefore, the administrative law judge concluded that claimant’s evidence (Dr. Perper’s report) is not of sufficient quality or quantity for him to conclude that complicated pneumoconiosis is established by a preponderance of the evidence. Decision and Order at 5. Moreover, the administrative law judge, noting that a reasonable reading of Dr. Perper’s opinion leads to the conclusion that the miner has simple pneumoconiosis, found that because Dr. Perper “might have relied on a diagnosis of complicated pneumoconiosis, his rationale for determining causation is flawed”, and “it is difficult to ascertain the rationale for his conclusions.” *Id.* Further, the administrative law judge found that Dr. Perper’s determination that pneumoconiosis contributed to the miner’s death is not substantiated by the evidence of record, which indicates that the miner had a massive stroke and the immediate cause of death was sepsis due to cellulitis.⁴ Director’s Exhibits 10, 13.

⁴ Dr. Perper found that coal workers’ pneumoconiosis was a significant contributory cause of, and hastening factor of, the miner’s death, both directly and indirectly through:

- a. Direct pulmonary insufficiency due to replacement of normally breathing lung by non-breathing pneumoconiotic tissues and associated centrilobular emphysema, and resulting hypoxemia.
- b. Indirectly through a terminal cardiac arrhythmia precipitated by hypoxemia.

Director’s Exhibit 11 at 18.

We find no error in the administrative law judge's consideration of Dr. Perper's report.⁵ Contrary to claimant's contention, the administrative law judge did not reject Dr. Perper's opinion simply because he found the physician based his conclusions on complicated pneumoconiosis, instead of simple pneumoconiosis. Rather, the administrative law judge rationally found Dr. Perper's report is not well reasoned as it is internally inconsistent, outweighed by the preponderance of the contrary evidence that establishes that the miner had simple, not complicated, pneumoconiosis and as it is unsubstantiated by the record. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984); *Perry v. Director, OWCP*, 9 BLR 1- 1 (1986) (*en banc*) .

As the administrative law judge properly did not credit the opinion of Dr. Perper, the only physician whose findings support claimant's burden at 20 C.F.R. §718.205(c), he properly found that claimant did not establish death due to pneumoconiosis thereunder.

In light of the foregoing, we affirm the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

⁵ Drs. Bush, Caffrey, Zaldivar and Castle diagnosed simple pneumoconiosis, but opined that pneumoconiosis did not contribute to the miner's death. Director's Exhibit 12; Employer's Exhibits 1, 2, 4-6.

Accordingly, we affirm the administrative law judge's Decision and Order Denial of Claim.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge