

BRB No. 09-0112 BLA

D.W.)
(Widow of F.W.))
)
Claimant-Respondent)
)
v.)
)
SOUTHERN OHIO COAL COMPANY)
)
and)
)
AMERICAN ELECTRIC POWER) DATE ISSUED: 08/26/2009
CORPORATION)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (06-BLA-5452) of Administrative Law Judge Pamela Lakes Wood rendered on a survivor's 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). In a Decision and Order dated September 4, 2008, the administrative law judge credited the miner with thirty-four years

of coal mine employment¹ and accepted the parties' stipulation that the miner suffered from clinical pneumoconiosis arising out of his coal mine employment. The administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in evaluating the pathology and medical opinion evidence in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Neither claimant² nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). 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 (1987).

¹ The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² Claimant is the widow of the deceased miner, who died on March 26, 2004. Director's Exhibit 17.

In evaluating the medical evidence relevant to the cause of the miner's death, the administrative law judge noted that hospital records and treatment notes dating from 1995 through 2003 indicated that the miner was hospitalized on numerous occasions for, *inter alia*: chronic obstructive pulmonary disease (COPD) with hypoxia; acute hypoxic respiratory failure secondary to exacerbation of severe COPD with bronchitis and asthma; COPD with pneumonia, pneumonitis, and hypoxic respiratory failure; right upper lobe pneumonia and right pleural effusion; hypoxic respiratory failure, COPD exacerbation, serrataria pneumonia, pleural effusion, and congestive heart failure; and hypoxic hypercapnic respiratory failure, sleep apnea, cor pulmonale, abdominal aortic aneurysm, pulmonary embolism, pancreatic cancer, and diabetes. Decision and Order at 6-7; Director's Exhibits 19, 20.

The record relating to the miner's terminal hospitalization indicated that the miner presented at the emergency room in shock, and hypotensive, and that he was "hypoxic and had to be urgently intubated." Director's Exhibit 20. The miner expired within four hours of being admitted. Director's Exhibit 20. Dr. Datta performed an autopsy, limited to the lungs, on March 27, 2004, and listed his final anatomic diagnoses as "bilateral pulmonary moderate to severe anthracosis, fibrosis, fibrotic nodules, giant cell granulomas, focal bronchopneumonia and focal emphysema." Director's Exhibit 18. Dr. Datta stated that due to the limited nature of the autopsy, he could not offer an opinion as to the cause of the miner's death. Decision and Order at 8; Director's Exhibit 18.

The miner's death certificate, signed by Dr. Harman, his treating physician, listed the immediate cause of death as hypotension, due to sepsis, due to pneumonia, due to multistage organ failure. Director's Exhibit 15. Dr. Harman listed end-stage COPD and pancreatic cancer as other significant conditions contributing to death but not resulting in the underlying cause of death. Decision and Order at 7; Director's Exhibit 17. In a report dated March 31, 2005, Dr. Harman stated that the miner died of respiratory failure "which no doubt was worsened by his black lung." Director's Exhibit 21. At a deposition taken on July 22, 2005, Dr. Harman explained that she uses the term "COPD" broadly, to include various conditions, including "black lung," and she noted that the autopsy report confirmed a diagnosis of anthracosis with extensive fibrosis. *See* 20 C.F.R. §718.201(a)(1); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 791 n.1, 15 BLR 2-225, 2-226 n.1 (4th Cir. 1990)(recognizing that clinical pneumoconiosis refers to lung diseases caused by the fibrotic reaction of the lung tissue to inhaled dust); Decision and Order at 7-8; Director's Exhibit 31 at 11-13. Dr. Harman further explained that coal dust exposure resulted in fibrosis, or scarring of the lung tissue, which contributed to the miner's death by inhibiting his ability "to exchange gases properly," which in turn "inhibit[ed] his ability to recover from anything." Director's Exhibit 31 at 13-14, 16. Dr. Harman further opined that the fibrotic scarring rendered the miner more susceptible to pneumonia by hampering his ability to clear mucus and "foreign substances" from his lungs. Director's Exhibit 31 at 22.

By contrast, Drs. Oesterling and Naeye, both pathologists who reviewed lung tissue slides, opined that the degree of coal workers' pneumoconiosis was too minimal to have had any effect in hastening, contributing to, or causing the miner's death. Decision and Order at 8-10; Employer's Exhibits 2, 3. Finally, Dr. Bellotte reviewed the pathologists' reports, and agreed that, while the miner had coal workers' pneumoconiosis, it was not significant enough to have caused any impairment or to have contributed to the miner's death. Decision and Order at 11-12; Employer's Exhibits 5, 7.

The administrative law judge considered the conflicting medical opinions and credited Dr. Harman's opinion. Decision and Order at 18-21. The administrative law judge initially determined that Dr. Harman "had articulated the basis for her opinion in some detail" and had "provided a reasoned, documented opinion as to why she believed the miner's death resulted from respiratory failure caused in part by his black lung or coal workers' pneumoconiosis." Decision and Order at 10, 20-21. The administrative law judge found that, by contrast, the opinions of Drs. Oesterling, Naeye, and Bellotte were "fatally flawed" by the physicians' reliance, in significant part, upon an apparently incomplete set of autopsy slides when they concluded that the miner's pneumoconiosis was minimal in degree.³ The administrative law judge concluded, therefore, that Dr.

³ The administrative law judge noted, correctly, that in his initial report dated October 14, 2005, Dr. Oesterling, who is Board-certified in Anatomical and Clinical Pathology, and Nuclear Medicine, reviewed the autopsy prosector's report and five tissue slides, numbered 1, 6, 8, 10, and 11. Decision and Order at 8-9; Director's Exhibit 32. Based on these slides, Dr. Oesterling concluded that the miner had pleural-based, mild micronodular coal workers' pneumoconiosis, chronic panlobular emphysema attributable to smoking, and significant thromboembolic disease leading to extensive areas of pulmonary atelectasis. Director's Exhibit 32. Dr. Oesterling further stated that the miner's emphysema, combined with his thromboembolic disease, would have "in all probabilities" produced significant hypoxemia, and thus the miner's death was "at least partially attributable to lung disease." Director's Exhibit 32. Dr. Oesterling explained, however, that because the pleura is not involved in gas exchange, the miner's mild, pleural-based pneumoconiosis would not have had any effect in hastening, contributing to, or causing the miner's death. Director's Exhibit 32. During his May 4, 2006 deposition, in addition to reiterating his earlier conclusions, Dr. Oesterling explained that because the autopsy prosector's report contained relatively limited gross descriptions, he was more dependent on the microscopic slides for his conclusions. Employer's Exhibit 1 at 11. Dr. Oesterling noted, however, that he had received "just those five slides," numbered 1, 6, 8, 10, and 11, and he questioned the whereabouts of the other slides. Decision and Order at 18; Employer's Exhibit 1 at 11.

The administrative law judge noted, correctly, that subsequently, Dr. Oesterling was sent additional slides, numbered 2 and 7, as well as a copy of slide number 11. Thus,

in all, Dr. Oesterling reviewed slides numbered 1, 2, 6, 7, 10, and 11. Decision and Order at 9; Employer's Exhibit 2. In a supplemental report dated July 22, 2006, Dr. Oesterling opined that slide 2 indicated the presence of focal emphysema and that slide 7 revealed the presence of "focal interstitial micronodular coal workers' pneumoconiosis." Employer's Exhibit 2. Dr. Oesterling opined, however, that, while located in the gas-exchanging tissue of the lungs, the "single interstitial micronodule of coal worker's pneumoconiosis" was insufficient to have produced any alterations in lung function or to have in any way contributed to, hastened, or caused the miner's death. Employer's Exhibit 2.

The administrative law judge further found that Dr. Naeye, who is Board-certified in Anatomic and Clinical Pathology, also reviewed the autopsy prosector's report, together with tissue slides numbered 1, 6, 8, 10, and 11, but apparently did not review slide number 2, on which Dr. Oesterling saw evidence of focal emphysema. Decision and Order at 10; Employer's Exhibit 3. Dr. Naeye opined that the slides supported diagnoses of centrilobular emphysema and mild, simple coal worker's pneumoconiosis. Dr. Naeye questioned why, given the presence of pneumoconiosis, the autopsy prosector had concluded that pneumoconiosis was not present. Employer's Exhibit 3. However, like Dr. Oesterling, Dr. Naeye concluded that the lesions of coal workers' pneumoconiosis "occupy far too little lung tissue to have had any measureable effect on lung function," and thus played no role in contributing to the miner's death. Decision and Order at 10; Employer's Exhibit 3.

Finally, the administrative law judge noted that Dr. Bellotte, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record, including the pathology reports of Drs. Oesterling and Naeye, and agreed with them that the miner had simple coal workers' pneumoconiosis but that it did not contribute to his death. Decision and Order at 11-12; Employer's Exhibit 5. During his June 20, 2007 deposition, Dr. Bellotte explained that "the gold standard of all medicine is the autopsy," and stated that, based on the autopsy reports of Drs. Oesterling and Datta, the miner "did not have enough evidence of coal mine workers' pneumoconiosis at the autopsy that would cause him any significant pulmonary impairment." Employer's Exhibit 7 at 8. Dr. Bellotte further explained that "[s]ince this man was only diagnosed as having mild simple coal workers' pneumoconiosis and then on pathology wasn't found to have anything significant enough to cause him to have pulmonary function impairment, I think we can readily state that his coal mining exposure didn't contribute to his ultimate demise." Employer's Exhibit 7 at 10.

Harman's report constituted substantial, probative evidence sufficient to support claimant's burden to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 20-21.

Employer contends that, in finding the medical evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law judge erred in according greater weight to the opinion of Dr. Harman, than to the opinions of Drs. Oesterling, Naeye, and Bellotte. We disagree.

The administrative law judge initially accorded little weight to the opinions of Drs. Drs. Oesterling and Naeye, finding:

The major problem is that the opinions of Drs. Oesterling and Naeye are based upon a review of an incomplete set of autopsy slides. As their opinions are premised upon their assessment of the degree of simple coal workers' pneumoconiosis presented on the autopsy slides, and the type of emphysema reflected on the autopsy slides, the opinions are fatally flawed. How can one make an assessment as to the degree of the disease without knowing what was on the missing slides? The missing slides may well have shown extensive findings of coal workers' pneumoconiosis; they also may not have. . . . The opinions of Drs. Oesterling and Naeye as to the percentage of the lung involved with [coal workers' pneumoconiosis] are therefore entitled to little weight, and their assessments as to the probable effects of such limited [coal workers' pneumoconiosis] on the Miner's breathing are also entitled to diminished weight.

Decision and Order at 19-20. The administrative law judge similarly discounted the opinion of Dr. Bellotte:

Likewise, Dr. Bellotte based his opinion that the coal workers' pneumoconiosis did not contribute to the Miner's death on the autopsy findings by Dr. Oesterling, and specifically the degree of coal workers' pneumoconiosis found and the type of emphysema that predominated. As Dr. Oesterling's opinion is flawed[,] based upon an incomplete set of slides, so too is Dr. Bellotte's.

Decision and Order at 20.

We reject employer's argument that the administrative law judge engaged in impermissible speculation as to the existence and contents of any additional slides. Employer's Brief at 16-17. Rather, based on the numbering of the slides, and Dr. Oesterling's comments during his deposition, the administrative law judge reasonably

concluded that both Drs. Oesterling and Naeye had reviewed an incomplete set of autopsy slides when they determined the severity of the miner's pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); Decision and Order at 20.

In addition, there is no merit to employer's contentions that "the opinions of Drs. Oesterling and Naeye do not contradict the autopsy prosector's report," or that Dr. Datta "diagnosed anthracosis only in the right lung." Employer's Brief at 15. A review of Dr. Datta's autopsy report reveals that his final anatomic diagnosis included "bilateral pulmonary moderate to severe anthracosis," in direct contrast to the opinions of Drs. Oesterling and Naeye that the miner's lungs contained only a single nodule of coal workers' pneumoconiosis. Director's Exhibit 18; see 20 C.F.R. §718.201(a). As the administrative law judge noted, the autopsy prosector's diagnosis of anthracosis is also in direct contrast to Dr. Naeye's opinion that the autopsy prosector "conclude[ed] that [coal workers' pneumoconiosis] was not present." 20 C.F.R. §718.201(a)(1); Decision and Order at 10 n.13; Director's Exhibit 18.

We further reject employer's contention that the administrative law judge mischaracterized the opinion of Dr. Bellotte as also being based on his review of an incomplete set of autopsy slides. Employer's Brief at 18. Rather, the administrative law judge properly found that Dr. Bellotte did not personally review the tissue slides, but instead based his opinion on a review of the medical records. Decision and Order at 11. Contrary to employer's argument, the administrative law judge permissibly found that, as Dr. Bellotte based his opinion, "in significant part," on the flawed pathology evidence of Drs. Oesterling, his opinion was also flawed, and entitled to little weight. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274; Decision and Order at 13, 20. Thus, we affirm the administrative law judge's determination to discount the opinions of Drs. Oesterling, Naeye, and Bellotte.⁴

We further reject employer's argument that the administrative law judge erred in relying on the opinion of Dr. Harman. Employer contends that Dr. Harman is not qualified to address the issues presented in this claim, and that her opinion is equivocal and not sufficiently reasoned to carry claimant's burden of proof. Employer's Brief at 8-

⁴ As the administrative law judge provided a valid reason for discounting the opinions of Drs. Oesterling, Naeye, and Bellotte, we need not address employer's additional allegations of error regarding the administrative law judge's evaluation of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

11. Employer is asking the Board to undertake a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson*, 12 BLR at 1-113.

In evaluating Dr. Harman's opinion, the administrative law judge fully considered that Dr. Harman is not a pulmonary specialist, but reasonably found that, as the miner's treating physician, Dr. Harman was very familiar with the miner's respiratory condition. *See* 20 C.F.R. §718.104(d); Decision and Order at 20. In addition, the administrative law judge found, correctly, that Dr. Harman based her conclusions as to the cause of the miner's death on both the miner's treatment history, and on the findings of the autopsy prosector, Dr. Datta. Decision and Order at 19. Moreover, contrary to employer's contention, the administrative law judge properly considered Dr. Harman's qualified statements that she could not specify the degree to which coal workers' pneumoconiosis contributed to the miner's death. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 391, 21 BLR 2-639, 2-653 (4th Cir. 1999); Employer's Brief at 11; Director's Exhibit 31 at 20, 23-4. However, recognizing that a diagnosis of anthracosis constitutes clinical pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(1), *see Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661-62 (4th Cir. 1999); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104, 1-114-15 (2001), the administrative law judge also found that Dr. Harman offered a reasoned, documented opinion that adequately explained how the autopsy prosector's findings, including "bilateral pulmonary moderate to severe anthracosis," fibrosis, fibrotic nodules, and focal bronchopneumonia, supported her conclusion that pneumoconiosis hastened the miner's death, both by impeding the miner's ability to exchange gases, and by rendering him more susceptible to developing pneumonia. *See* 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992); *Mays*, 176 F.3d at 762-63, 21 BLR at 2-604; Decision and Order at 20-21. Thus, the administrative law judge permissibly concluded that, despite the qualified nature of some of Dr. Harman's statements, her deposition testimony as a whole "nevertheless supports a finding that pneumoconiosis caused, substantially contributed to, or hastened the miner's death." *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274; Decision and Order at 21.

As the administrative law judge correctly analyzed the medical evidence and explained her reasons for crediting the opinion of Dr. Harman over the opinions of Drs. Oesterling, Naeye, and Bellotte, we affirm the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274. We therefore affirm the award of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge