

BRB No. 09-0181 BLA

M.N.)
(Widow of R.N.))
)
Claimant-Petitioner)
)
v.)
)
JET COAL COMPANY, INCORPORATED)
)
and)
)
AMERICAN MINING INSURANCE) DATE ISSUED: 08/26/2009
COMPANY)
)
Employer/Carrier-)
Respondents)
)
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 Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Katherine M. Banks (Riley & Allen, P.S.C.), Prestonsburg, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denial of Benefits (05-BLA-6318) of Administrative Law Judge Thomas F. Phalen, Jr. on a survivor's claim¹ 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that the miner worked in qualifying coal mine employment for twenty-six years and noted that the parties conceded the existence of pneumoconiosis. Hearing Transcript at 7. Next, the administrative law judge found that claimant established pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203(b), but failed 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 argues that the administrative law judge erred in failing to accord proper weight to the opinion of Dr. Johnson, the miner's treating physician, which was contained in the miner's treatment record, to find that pneumoconiosis substantially contributed to, or hastened, the miner's death pursuant to Section 718.205(c)(2), (5). Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in claimant's appeal.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 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R.

¹ Claimant is the surviving spouse of the miner, who died on March 29, 2004. Director's Exhibit 9. Claimant filed her application for survivor's benefits on August 17, 2004. Director's Exhibit 2.

² We affirm the administrative law judge's findings that the miner worked in qualifying coal mine employment for twenty-six years, that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and that claimant failed to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 15, 16-18.

§§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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).³

Claimant argues that the administrative law judge erred in discounting the opinion of Dr. Johnson, which is based on numerous hospitalization records and treatment notes, given that he treated the miner for a period exceeding twenty-four years. Claimant asserts, therefore, that the administrative law judge's determination that the opinion of Dr. Caffrey outweighed that of Dr. Johnson was not supported by substantial evidence and lacks any explanation. In support of this contention, claimant asserts that Dr. Caffrey's report contradicts the evidence of record diagnosing the presence of cor pulmonale and that Dr. Caffrey's conclusion, that pneumoconiosis played no role in the miner's death, is antithetical to the regulations.

A physician's status as the miner's treating physician is a relevant factor for the administrative law judge to consider in assessing the credibility of the opinion. The opinions of treating physicians are not, however, automatically entitled to greater weight because these opinions are rendered by treating physicians; rather, these opinions are only entitled to additional weight based on their power to persuade. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), *citing Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993).

In assessing the probative value of the narrative medical opinions, the administrative law judge found that the miner's hospital and treatment records included the discharge summary and physical examination report that was rendered by Dr. Johnson, who had treated the miner for twenty-four years. Consequently, the administrative law judge found Dr. Johnson's opinion, concerning the cause of the miner's death, entitled to "some weight," based on his twenty-four years of treating the miner and his completion of both the death certificate and discharge summary. Decision

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

and Order at 20. In so doing, the administrative law judge correctly noted that, in documenting the miner's last hospitalization upon his death, Dr. Johnson concluded that the miner "died postoperatively of apparent severe sepsis" and listed sixteen different final diagnoses, but properly found that Dr. Johnson did not mention pneumoconiosis in the final diagnoses section or physical examination section of the report. Decision and Order at 20; Director's Exhibit 14. Further, the administrative law judge found that while Dr. Johnson reported that the deceased was a "former coal miner" and listed chronic obstructive pulmonary disease under the "past medical history" section in the report, Dr. Johnson did not specify that the chronic obstructive pulmonary disease was the result of coal mine employment. See 20 C.F.R. §718.201; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999). Ultimately, the administrative law judge assigned greater weight to the opinion of Dr. Caffrey, that pneumoconiosis did not cause or hasten the miner's death, as Dr. Caffrey based his opinion on his review of the autopsy slides, multiple hospitalization and surgical records, and other physicians' medical reports, delineated his observations and findings, and supported his conclusions by adequate data. See *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 5, 19; Director's Exhibit 16; Employer's Exhibits 1, 4. The administrative law judge noted that Dr. Caffrey, who is a Board-certified pathologist, reviewed the medical reports of Drs. Dennis and DeLara diagnosing cor pulmonale, but disagreed with their conclusions not only because the miner's March 28, 2000 echocardiogram did not demonstrate a finding of cor pulmonale, but also because the evidence of record is devoid of any indication that the miner had right ventricular hypertrophy, a condition that is indicative of cor pulmonale. Decision and Order at 19. Accordingly, given that the administrative law judge properly found that the opinion of Dr. Caffrey constituted a well-reasoned and well-documented opinion, we affirm the administrative law judge's determination that Dr. Caffrey's opinion as to cause of the miner's death was entitled to determinative weight. See *Trumbo*, 17 BLR at 1-88-89; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 20-21. Lastly, we reject claimant's argument that Dr. Caffrey's opinion constitutes an opinion that is antithetical to the regulations inasmuch as Dr. Caffrey did not foreclose all possibility that pneumoconiosis can cause or contribute to a miner's death and, did not rely on this predisposed belief to form the primary basis for his conclusion that pneumoconiosis played no role in this miner's death. See *e.g.*, *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987). Further, claimant has not specifically identified, nor does a review of Dr. Caffrey's reports reveal, that Dr. Caffrey relied on a predisposed belief in ultimately opining that the miner's demise was not due to pneumoconiosis. Claimant has not otherwise challenged the administrative law judge's credibility determinations. We, therefore, affirm the administrative law judge's accordance of dispositive weight to Dr. Caffrey's opinion pursuant to Section 718.205(c)(2), (5).

Claimant asserts that Dr. Dennis, the autopsy prosector, opined that pneumoconiosis contributed to, or hastened, the miner's death:

In support of his opinion, he supplied this rationale: "The patient had other diseases, but the weakened condition of his lungs and the inability to exchange gases appropriately at the alveolar level, secondary to the progressive massive fibrosis, directly contributed to and hastened his death."

Claimant's Brief at 13. Claimant's assertion, however, does not identify any error in the administrative law judge's decision to accord less weight to Dr. Dennis's opinion in comparison to the opinion of Dr. Caffrey, which the administrative law judge found better reasoned, that the miner's death was not hastened by pneumoconiosis.⁴ See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). Thus, we consider claimant's argument on appeal to be tantamount to a request that the Board reweigh the evidence, which the Board is not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We affirm, therefore, the administrative law judge's weighing of the evidence and his resultant finding that claimant did not establish that pneumoconiosis substantially contributed to, or hastened, the miner's death pursuant to Section 718.205(c)(2), (5). See *Williams*, 338 F.3d at 518, 22 BLR at 2-655.

Based on the forgoing, therefore, we affirm the administrative law judge's determination that claimant failed to satisfy her burden of establishing that the miner's death was due to pneumoconiosis at Section 718.205(c). See 20 C.F.R. §718.205(c); *Brown*, 996 F.2d at 816, 17 BLR at 2-140; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Claimant's entitlement to benefits is, therefore, precluded.

⁴ Claimant also cites to the opinion of Dr. Baker, that the miner's pneumoconiosis "could" have contributed to the miner's death, as supportive of her claim, but does not allege any error in the administrative law judge's rejection of the opinion as equivocal. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge