BRB No. 01-0349 BLA

MARY ANN PERRY (Widow of OWEN T. PERRY) Claimant-Petitioner v. ISLAND CREEK COAL COMPANY	))))))))	DATE ISSUED:
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 Benefits of Robert L. Hillyard, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley), Madisonville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Decision and Order-Denial of Benefits (00-BLA-0572) of

[1] Claimant, Mary Ann Perry, is the widow of the miner, Owen T. Perry, who died on March 27, 1990. The death certificate lists the immediate cause of death as acute myocardial infarction due to arteriosclerotic heart disease. Pneumoconiosis was listed as a factor contributing to death, but not resulting in the underlying cause. Director's Exhibit 9. The miner filed a claim during his lifetime which was ultimately denied by the Board in a Decision and Order issued on February 28, 1986. *Perry v. Island Creek Coal Co.*, BRB No. 83-2306 BLA (Feb. 28, 1986)(unpub.). Claimant filed a survivor's claim on April 8, 1998.

Administrative Law Judge Robert L. Hillyard 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).[2] The administrative law judge found that the x-ray evidence of record established that the miner suffered from pneumoconiosis. Decision and Order at 4, 10-11. The administrative law judge concluded that the miner's forty-six year coal mine employment history established entitlement to the rebuttable presumption, available when miners are employed more than ten years, that the miner's pneumoconiosis arose out of coal mine employment and found that the presumption was unrebutted. Decision and Order at 11. The administrative law judge further found, however, that the evidence failed to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that pneumoconiosis hastened the miner's death in any way. Decision and Order at 11-16. Accordingly, survivor's benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find

---

Director's Exhibit 1. The instant appeal encompasses only the denial of benefits on the survivor's claim.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

that pneumoconiosis contributed to the miner's death. Employer, in response, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has not filed a brief in this appeal.[3]

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. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 1-39 (1988). For survivors' 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 death if it hasten's the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of simple pneumoconiosis as well as the finding that claimant was entitled to the rebuttable presumption that the miner's pneumoconiosis arose out of coal mine employment. 20 C.F.R. §§718.202(a)(1); 718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Likewise, we affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is not entitled to the irrebutable presumption that the miner's death was due to pneumoconiosis based on evidence establishing the existence of complicated pneumoconiosis. Decision and Order at 15-16; 20 C.F.R. §§718.205(c)(3); 718.304. 30 U.S.C. §921(c)(3).

135 (6th Cir. 1993).

Claimant contends that the administrative law judge applied an improper standard for determining death due to pneumoconiosis at Section 718.205(c) as the administrative law judge improperly required claimant to establish a pulmonary impairment due to pneumoconiosis before she could establish death due to pneumoconiosis and therefore improperly relied on the opinions of physicians regarding impairment which were based on evidence obtained prior to the miner's death. By doing this, claimant contends that the administrative law judge disregarded the fact that pneumoconiosis was a progressive disease and that the pulmonary function of the miner at the time of his death was significantly worse than when the pulmonary function testing was done in the early 1980's. We reject claimant's argument. A review of the administrative law judge's decision demonstrates that the administrative law judge specifically recognized and applied the standard for establishing death due to pneumoconiosis set forth in the regulations. 20 C.F.R. §§718.202, 718.203, 718.205; *see Trumbo*, *supra*; *Neeley*, *supra*; *Boyd*, *supra*. The administrative law judge recognized that once claimant established the existence of pneumoconiosis, claimant must then establish that pneumoconiosis was a contributing cause of the miner's death. *Trumbo*, *supra*; *see Brown*, *supra*. In reviewing the relevant medical evidence, the administrative law judge properly applied this standard in determining whether the miner's death was due to pneumoconiosis. Contrary to claimant's argument, rather than requiring claimant to establish that the miner had a respiratory impairment, the administrative law judge only considered the evidence regarding the miner's respiratory impairment during his life insofar as it reflected on the credibility of the opinions that the miner's death was due to pneumoconiosis. This was rational. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Claimant further asserts that the administrative law judge mischaracterized the evidence of record as he erroneously concluded that the death certificate was signed by Dr. Hurst when the death certificate was actually signed by the miner's treating physician, Dr. Givens. Thus, claimant contends that the administrative law judge erred in concluding that the death certificate was unreliable because it provided no indication that the individual signing the certificate possessed any relevant qualifications or personal knowledge of the miner to shed light on the issue of the cause of death, when, in fact, the individual signing the death certificate was the long-term treating physician of the miner, Dr. Givens, who possessed relevant qualifications and personal knowledge of the miner. Claimant contends, therefore, that the death certificate should be accorded substantial weight. Likewise, claimant argues that the administrative law judge erred in according less weight to the opinions of Dr. Givens, as the miner's treating physician.

Claimant correctly contends that the administrative law judge erred in determining that the death certificate was signed by Dr. Hurst, when the death certificate was actually

completed and signed by Dr. Givens. Director's Exhibit 9.[4] However, inasmuch as the administrative law judge thoroughly considered the opinions of Dr. Givens, the miner's treating physician, and gave valid reasons for according them little weight, his error in according little weight to the death certificate signed by Dr. Givens does not constitute reversible error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[4] As claimant points out, the death certificate reveals that Robert N. Hurst, III is the Kentucky Registrar of Vital Statistics and signed the death certificate in his capacity as the state registrar, Director's Exhibit 9.

Claimant also contends that the administrative law judge erred in according less weight to the opinions of Dr. Givens because it was "unclear from the record how Dr. Givens diagnosed coal workers' pneumoconiosis," Decision and Order at 13, when Dr. Givens's opinion of pneumoconiosis was based on the totality of the medical evidence before him. The administrative law judge found that while Dr. Givens was the miner's treating physician, he failed to provide any basis for his opinion as to the presence of pneumoconiosis or his conclusion that pneumoconiosis hastened the miner's death.[5] The administrative law judge determined that although Dr. Givens was the miner's treating physician, he failed to specifically discuss the presence of pneumoconiosis in any of his treatment records, other than to write that the miner had a "history" of pneumoconiosis, or indicate upon what basis he found the miner to have been suffering from chronic obstructive pulmonary disease at the time of death. Decision and Order at 13; Director's Exhibits 22, 43. Specifically, the administrative law judge determined that while x-ray evidence established the existence of pneumoconiosis, the record did not show that Dr. Givens ever interpreted any x-rays for the existence of pneumoconiosis.[6] Nor, the administrative law judge found, was there evidence in the record of pulmonary function studies or blood gas studies showing a respiratory impairment or that the miner was ever treated with medication for any respiratory impairment. Decision and Order at 13. Accordingly, the administrative law judge rationally concluded that Dr. Given's opinion of death due to pneumoconiosis was "conclusory, unreasoned, undocumented and unsupported by the evidence." Decision and Order at 13; *see Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). The determination as to whether an opinion is sufficiently reasoned to support claimant's burden is soundly within the administrative law judge's discretion and will not be disturbed by the Board absent a showing of abuse of that discretion. *Clark, supra*; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, because the administrative law judge has provided an affirmable basis for according little weight to the opinion of Dr. Givens, we are unable to say that the administrative law judge's determination constitutes an abuse of that discretion. Further, we reject claimant's assertion that Dr. Givens's status as a treating

[5] The administrative law judge noted that Dr. Givens stated in a letter dated October 21, 1998 that he had treated the miner from October 21, 1971 until his death in 1990 and that the miner was "known to have and was treated for pneumoconiosis," that the miner had frequent respiratory infections, and increasing dyspnea with exertion, as well as severe cardiac disease. Decision and Order at 9; Director's Exhibit 22.

[6] The administrative law judge noted on page 10 of his Decision and Order that Dr. Givens interpreted x-rays taken when the miner was admitted to Muhlenberg Community Hospital on March 21, 1990 for chest pain as showing congestive heart failure. Director's Exhibit 22.

physician automatically entitles his opinion to greater weight. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Additionally, contrary to claimant's argument, the administrative law judge did not err in considering evidence relevant to the existence of a respiratory impairment during the miner's life in assessing the credibility of Dr. Givens's opinion. *See Clark, supra*; *Stark, supra*.

Claimant next contends that the administrative law judge erred in finding that the miner's death was not due to pneumoconiosis because "the record must contain reasoned and documented, substantial medical evidence that [the miner's] coal workers' pneumoconiosis did not have a tangible effect on [the miner's] death. Claimant's Brief at 13-14. Contrary to claimant's contention, however, the burden rests with claimant to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205; *Neeley, supra*; *see Director, OWCP v. Greenwich Collieries*, 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). Thus, because the medical opinions supportive of claimant's burden were not found to be credible, claimant is precluded from establishing that the miner's death was due to pneumoconiosis, and we need not address claimant's allegations of error pertaining to the remaining opinions of record.[7] *See Larioni, supra.*

Finally, claimant contends that the amended regulations not only significantly impact the outcome of this claim, but direct an outcome different from that reached by the administrative law judge when he denied benefits. Specifically, claimant asserts that the opinion of employer's physicians that the miner had no pulmonary impairment at the time of his death were based on the results of pulmonary function studies done several years prior to the miner's death and failed to recognize that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine employment pursuant to 20 C.F.R. §718.201(c). In the instant case, however, because the administrative law judge found that the opinions relied on by claimant to support death due to pneumoconiosis were not credible, we need not consider claimant's argument concerning employer's physicians. Further, contrary to claimant's contentions, the amended regulations at Section 718.104(d) regarding the treatment of treating physicians' opinions and Section 725.414 limiting the amount of evidence which shall be obtained and submitted are not applicable to the instant case. 20 C.F.R. §§718.101, 725.2.

[7] Specifically, the opinions were those of Dr. Jarboe, Employer's Exhibits 6, 9; Dr. Morgan, Employer's Exhibits 2, 11, Dr. Dahhan, Director's Exhibit 39; Employer's Exhibit 1, Dr. Branscomb, Employer's Exhibits 3, 10, and Dr. Zaldivar, Employer's Exhibit 8. All of these physicians specifically concluded that pneumoconiosis played no role in the death of the miner.

We, therefore, affirm the administrative law judge's finding that the medical evidence failed to establish that pneumoconiosis caused, contributed to or hastened the miner's death. 20 C.F.R. §718.205(c); *see Brown*, *supra*. Because claimant, has failed to establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in a survivor's claim, we must affirm the denial of benefits. 20 C.F.R. §718.205(c); *see, Trumbo, supra*; *Neeley, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge