BRB No. 04-0313 BLA

CARLENE GENEVIEVE WHITE (Spouse of CHARLES EDWARD WHITE)	)	
Claimant-Respondent	)	
v.	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 12/22/2004
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Appeal of the Decision and Order - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (02-BLA-5321) of Administrative Law Judge Gerald M. Tierney issued on a 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). Claimant[1] filed this survivor's claim on

[1] Claimant is the surviving spouse of the miner, Charles Edward White, who died on July 28, 2001. Director's Exhibit 8.

August 15, 2001. Director's Exhibit 1. Employer conceded the existence of pneumoconiosis arising out of coal mine employment; thus the only issue before the administrative law judge was whether the miner's death was due to pneumoconiosis. Hrg. Tr. at 18. The administrative law judge found the evidence of record sufficient to meet claimant's burden to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge failed to follow controlling authority, ignored relevant evidence, and erred in relying on the opinions of Drs. Green and Rasmussen as they constitute no more than conjecture. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has not filed a response brief in this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis.[2] *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c)(2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Fourth Circuit has held that any condition that hastens the miner's death is a substantially contributing cause of death. 20 C.F.R. §718.205(c)(2); *see Shuff*, 967 F.2d at 980, 16 BLR at 2-93.

Employer argues that the administrative law judge failed to identify claimant's burden of proof. Employer argues that claimant's burden is a difficult one, and refers to the following quote from *National Mining Assn v. DOL*, 292 F.3d 849, BLR (D.C. Cir. 2002): "The fact that pneumoconiosis may, as NMA asserts, rarely or never hasten

[2] Since the miner's last coal mine employment took place in West Virginia, 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 (1989)(*en banc*).

death primarily caused by other diseases does not undermine the regulation; it merely means that few or no claimants will succeed on the theory that black lung disease hastened death from other causes." *National Mining Assn v. DOL*, 292 F.3d 849, 871, BLR (D.C. Cir. 2002). This is not a holding by the United States Court of Appeals for the D.C. Circuit, however, but merely a restatement of employer's argument therein. Moreover, in the instant case, the administrative law judge's statement that pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death, is correct. *See* 20 C.F.R. §718.205(c)(5); *Shuff*, 967 F.2d at 980, 16 BLR at 2-93; Decision and Order at 2. Therefore, we hold that the administrative law judge applied the correct burden of proof in this case.

Employer argues that the administrative law judge violated binding precedent by crediting the medical opinions of Drs. Rasmussen and Green, which, it asserts, are mere conjecture and general theories not tied to the miner's case, citing *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). In *Jarrell*, the miner died of lung cancer, and in that case Dr. Rasmussen opined that "it is possible that death could have occurred as a consequence of his pneumonia superimposed upon… his occupational pneumoconiosis." The Fourth Circuit found that this testimony was entirely speculative, and not expressed in terms of reasonable medical certainty. *Jarrell*, 187 F.3d at 390, 21 BLR at 2-650. In the instant case, the miner suffered from metastatic prostate cancer, and Dr. Rasmussen opined that the miner's immediate cause of death was lung failure due to pneumonia superimposed over his emphysema and pneumoconiosis. Dr. Rasmussen stated, "His coal workers' pneumoconiosis therefore hastened his death albeit for a short period." Director's Exhibit 22. Dr. Rasmussen also stated that coal mine employment and smoking both cause the kind of damage found in the miner's lungs. *Id*. Dr. Green opined that "pneumoconiosis and chronic obstructive pulmonary disease hastened [the miner's] death in two ways; firstly by predisposing him to respiratory infection (pneumonia) and secondly by compromising his lung function, making it harder to survive the effects of the pneumonia." Claimant's Exhibit 1. Dr. Green also found that coal mine dust was a major cause of the miner's chronic obstructive pulmonary disease, and that in the absence of pneumoconiosis, the miner would likely have lived for several more months. *Id*.

Employer's assertion that, since the medical literature referenced by Dr. Green is not in the record, his opinion should not be credited, lacks merit. Interpretation of the medical data is for the medical experts, and the administrative law judge permissibly found that "Dr. Green presented a persuasive opinion to support the conclusion that pneumoconiosis hastened the miner's death" and supplied an extensive list of references to support his findings. Decision and Order at 5. Dr. Rasmussen's opinion supported that of Dr. Green, the administrative law judge found, and he credited these opinions as better explained, and because of both doctors' extensive clinical experience in the specific area of treating pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d

524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004)(Roth, J., dissenting). The administrative law judge also permissibly found these opinions by Drs. Green and Rasmussen to be most persuasive in resolving the issue of what role the miner's pneumoconiosis played in his death. Decision and Order at 5. Further, both Drs. Rasmussen and Green offered definitive opinions. *See* Director's Exhibit 22; Claimant's Exhibit 1. We therefore hold that their opinions regarding the role the miner's pneumoconiosis played in his death are easily distinguished from the medical opinions considered speculative and thus inadequate by the Fourth Circuit in *Jarrell*.

Employer argues that the administrative law judge mischaracterized Dr. Weiss's testimony. Dr. Weiss, an oncologist, opined that the miner would have died because of his cancer, that the miner's demise exhibited the "typical natural history of cancer," and that coal workers' pneumoconiosis was not the cause of his death. Employer's Exhibit 6. The administrative law judge correctly noted that Dr. Weiss did not review the report of Dr. Green or the deposition testimony of Dr. Caffrey which, the administrative law judge found, "more fully discussed the origin of the miner's emphysema and specifically considered whether the miner's overall pulmonary condition hastened his death." Decision and Order at 4. The administrative law judge therefore permissibly found Dr. Weiss's opinion to be outweighed by the more credible opinions of record, including those of Drs. Green and Rasmussen. *Hicks*, 138 F.3d at 532-533; *Akers*, 131 F.3d at 441. The administrative law judge thereby provided a valid basis for according less weight to Dr. Weiss's opinion, and we need not further address employer's additional assertion of error in the administrative law judge's weighing of this evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 n.13, 22 BLR 2-162, 2-178 n.13.

Further, in its reply brief, employer also argues that when Dr. Weiss stated that the miner's cancer followed a typical course, the physician meant that death was not hastened. Employer asserts that the administrative law judge ignored this relevant expert testimony. Employer asks for a reweighing of the evidence, which this Board is not empowered to do. It is the province of the administrative law judge to weigh the medical evidence and to draw his own inferences therefrom, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We thus reject employer's argument that the administrative law judge ignored relevant evidence.

Employer next argues that the administrative law judge misrepresented Dr. Fino's opinion. The administrative law judge found that while Dr. Fino set forth a detailed summary of the evidence in his opinion, concluding that pneumoconiosis played no part in the miner's death, "his report ended short on rationale." Decision and Order at 3;

Employer's Exhibit 7. Conversely, the administrative law judge found that Drs. Green and Rasmussen, who opined that the miner's chronic obstructive pulmonary disease (as found by autopsy) was consistent with that caused by coal dust exposure, explained their reasoning thoroughly. Decision and Order at 4. Employer argues that Dr. Fino explained that he attributed any chronic obstructive pulmonary disease to smoking because the blood gas study results showed no significant impairment. Employer's argument lacks merit as it asks for a reweighing of the evidence. It is within the administrative law judge's discretion to credit the opinions which he finds are better explained. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993).

Employer argues that the administrative law judge mischaracterized Dr. Caffrey's testimony by indicating that Dr. Caffrey "left open the door to the possibility that the miner's pulmonary condition, including his pneumoconiosis and emphysema, may have hastened death." Decision and Order at 5; *see* Employer's Exhibit 2 at 21-22. Employer refers to Dr. Caffrey's testimony that the miner "did not need the other two diseases," referring to coal workers' pneumoconiosis and centrilobular emphysema, "to cause, contribute to, or hasten his death because of his vast carcinoma." Employer's Exhibit 2 at 31. Employer asserts that the administrative law judge discredited Dr. Caffrey's testimony solely because the physician admitted to the possibility of a link between the miner's coal workers' pneumoconiosis and his death. Employer argues that an award of survivor's benefits may not be predicated on a physician's failure to "rule out" such a link.

Employer's contention that the administrative law judge mischaracterized Dr. Caffrey's testimony, is refuted by the record. Dr. Caffrey stated that it was possible that the miner's "overall pulmonary condition," including coal workers' pneumoconiosis, "caused [the miner] to die quicker than he would have" otherwise. Employer's Exhibit 2 at 21-22. The administrative law judge correctly characterized Dr. Caffrey's opinion in this case, specifically referring to the physician's testimony upon which employer relies. *See* Decision and Order at 5. Moreover, contrary to employer's assertion, the administrative law judge did not discredit Dr. Caffrey's testimony or rely on his failure to foreclose a link between the miner's coal workers' pneumoconiosis and death, to award survivor's benefits in this case. *Id*.

Employer also argues that it conceded the existence of clinical pneumoconiosis but asserts that nothing in the record suggests that the miner had legal pneumoconiosis. Employer's assertion is refuted by the record. Both Dr. Green and Dr. Rasmussen opined that the miner's emphysema (chronic obstructive pulmonary disease) found by autopsy was consistent with that caused by coal dust exposure. These opinions support a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge