

BRB No. 07-0311 BLA

B.J.W.)
(Widow of E.T.W.))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 12/20/2007
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2005-BLA-5095) of Administrative Law Judge Richard A. Morgan 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).¹ The administrative law judge credited the miner with 38.96 years of qualifying coal mine employment based on the

¹ The miner died on July 30, 2003 and claimant filed her application for survivor's benefits on August 18, 2003. Director's Exhibits 3, 8.

parties' stipulation. The parties further stipulated that the miner had simple pneumoconiosis that arose from his coal mine employment. However, the administrative law judge found that the weight of the evidence was insufficient to establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(1)-(c)(5). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the evidence and the adequacy of his rationale in finding that the medical opinion evidence was insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see 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). 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); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-107-8 (3d Cir. 1989).²

Claimant contends that the administrative law judge failed to provide a rational explanation that comports with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), for his weighing of the conflicting medical opinions of record. Claimant maintains that the autopsy report and supplemental opinions of Dr. Rizkalla, the autopsy prosector, supported by the opinion of Dr. Perper, are well-reasoned and sufficient to establish that the miner's pneumoconiosis was a substantially contributing

² The law of the United States Court of Appeals for the Third Circuit is applicable, as the miner was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

cause or factor and/or hastened the miner's death at Section 718.205(c), and that the administrative law judge erred in failing to accord greater weight to this evidence. Claimant essentially seeks a reweighing of the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

The administrative law judge accurately reviewed the report of the autopsy conducted by Dr. Rizkalla, finding that the miner died primarily from a hemorrhage in plaque and thrombosis of the left anterior descending coronary artery, with a final diagnosis of moderately severe simple coal worker's [sic] pneumoconiosis; severe atherosclerotic coronary artery disease; and focal and centrilobular emphysema. Decision and Order at 6; Director's Exhibit 9. The administrative law judge further noted that at deposition, Dr. Rizkalla opined that coal workers' pneumoconiosis played a substantial and significant role in the miner's death and suggested that the miner had progressive massive fibrosis that could be construed as complicated pneumoconiosis. Decision and Order at 6-7. The administrative law judge permissibly found that Dr. Rizkalla's opinion was insufficient to establish the existence of complicated pneumoconiosis at Section 718.304 because Dr. Rizkalla's autopsy protocol diagnosed only simple pneumoconiosis, and none of the other Board-certified pathologists found any nodules that were at least 1 cm in size, suggesting complicated pneumoconiosis. Decision and Order at 13; *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386, 394 (3d Cir. 2002), *citing Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 10 BLR 2-220, 2-238 (3d Cir. 1987); *see generally Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984). The administrative law judge also acted within his discretion in according little weight to Dr. Rizkalla's opinion regarding the cause of death, as the other pathologists and a cardiologist disagreed with his conclusions regarding the cause of death.

In evaluating Dr. Perper's opinion, that the miner's "coal workers' pneumoconiosis and causally associated centrilobular emphysema was [sic] a substantial contributory cause and a hastening factor in the death of ...[the miner] directly and indirectly through pulmonary insufficiency and hypoxemia, that induced a fatal arrhythmia on the background of coronary heart disease," Director's Exhibit 13, the administrative law judge found the opinion reasoned and documented, and entitled to probative weight based on the physician's credentials as a Board-certified pathologist. Decision and Order at 13. The administrative law judge further found, however, that Dr. Hurwitz, who opined that there is no documentation to support a primary cardiac death or death related to hypoxemia, Employer's Exhibit 2, 7, was better qualified to render an opinion as to whether the miner suffered a cardiac death, *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and thus the underlying basis for Dr. Perper's conclusion was undermined. Decision and Order at 13; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge thus concluded that claimant failed to establish that

pneumoconiosis caused, substantially contributed to, or hastened the miner's death. Decision and Order at 13; *see* 20 C.F.R. §718.205 (c); *Lukosevicz*, 888 F.2d 1001, 13 BLR 2-100.

The administrative law judge addressed all relevant evidence, assigned the evidence appropriate weight, and provided valid reasons for his credibility determinations. Thus, his Decision and Order comports with the requirements of the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As his findings are supported by substantial evidence, we affirm the administrative law judge's finding that the weight of the evidence was insufficient to establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death at Section 718.205(c). Consequently, we affirm the administrative law judge's denial of survivor's benefits. *Trumbo*, 17 BLR at 1-88.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge