

BRB No. 08-0339 BLA

F.C.)
(Widow of W.C.))
)
Claimant-Petitioner)
)
v.)
)
WESTMORELAND COAL COMPANY)
)
and)
) DATE ISSUED: 12/19/2008
ACORDIA EMPLOYERS SERVICE)
)
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 – Denying Benefits of Larry W. Price,
Administrative Law Judge, United States Department of Labor.

Renae R. Patrick (Legal Clinic, Washington and Lee University School of
Law), Lexington, Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia,
for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denying Benefits (07-BLA-5143) of Administrative Law Judge Larry W. Price 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). The administrative law judge credited the miner with thirty-one years of coal mine employment² based on the parties’ stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Because the miner established the existence of pneumoconiosis arising out of coal mine employment in his claim for lifetime benefits, the administrative law judge determined that employer was collaterally estopped from relitigating the issue in the instant survivor’s claim. The administrative law judge further found, however, that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to credit Dr. Koenig’s opinion that pneumoconiosis hastened the miner’s death pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs, has declined to participate in this appeal.³

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).

¹ Claimant is the widow of the miner, W.C., who died on December 22, 2005. Director’s Exhibits 8, 10. An administrative law judge awarded benefits in the living miner’s claim on November 30, 2001. [*W.C.*] *v. Westmoreland Coal Co.*, 00-BLA-0236 (Nov. 30, 2001). The Board affirmed the award on November 8, 2002. [*W.C.*] *v. Westmoreland Coal Co.*, BRB No. 02-0281 BLA (Nov. 8, 2002)(unpub.).

² The law of the United States Court of Appeals for the Fourth Circuit is applicable as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

³ We affirm, as unchallenged on appeal, the administrative law judge’s finding that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. §718.205(a)(1)-(3); *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 the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(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); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). 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, 1-27 (1987).

Relevant to Section 718.205, the record contains the opinions of Drs. Repsher, Hippensteel, and Koenig. The administrative law judge accurately noted that Drs. Repsher and Hippensteel opined that pneumoconiosis did not hasten the miner's death, while Dr. Koenig related the miner's death to pneumoconiosis.⁴ Decision and Order at 24, 26; Claimant's Exhibits 5, 12; Employer's Exhibits 2-7. Considering this evidence, the administrative law judge determined that Dr. Repsher's opinion was not well reasoned, that Dr. Koenig's opinion was inconsistent, equivocal, and not sufficiently reasoned, and that Dr. Hippensteel produced the most persuasive medical opinion. *Id.* at 25-26. Consequently, the administrative law judge determined that claimant did not establish that the miner's death was due to pneumoconiosis at Section 718.205(c).

Claimant contends that the administrative law judge's determination to discount Dr. Koenig's opinion pursuant to Section 718.205 is irrational. Specifically, claimant asserts that, in finding Dr. Koenig's opinion to be inconsistent and equivocal, the administrative law judge applied an incorrect legal standard for establishing death

⁴ In a May 30, 2007 report, Dr. Koenig opined that coal dust exposure hastened the miner's death. Decision and Order at 11; Claimant's Exhibit 5. In support of this position, Dr. Koenig explained that the miner's chronic obstructive pulmonary disease (COPD) was caused in part by coal dust exposure, and that numerous medical studies demonstrate a correlation between COPD and increased risk of cardiovascular morbidity. *Id.* Further, in a July 26, 2007 deposition, Dr. Koenig stated that the miner's primary cause of death was an infection, and additionally explained that the miner's COPD and Foley catheter predisposed him to infections. Claimant's Exhibit 12 at 18.

causation and mischaracterized Dr. Koenig's opinion. Claimant's Brief at 8-14. We disagree.

Contrary to claimant's assertion, the record reflects that the administrative law judge applied the proper standard in evaluating the evidence relevant to death causation. On page twenty-one of his decision, the administrative law judge stated:

Subsection 718.205(c) applies to survivor's claims filed on or after January 1, 1982 and provides that death will be due to pneumoconiosis if any of the following criteria are met: (1) competent medical evidence established that the miner's death was due to pneumoconiosis; or (2) pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or the death was caused by complications of pneumoconiosis; or (3) the presumption of §718.304 [complicated pneumoconiosis] is applicable. 20 C.F.R. §718.205(c) (2000) and (2001). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. §718.205(c)(5).

Decision and Order at 21.

Further, although claimant asserts that Dr. Koenig's May 30, 2007 report and July 26, 2007 deposition statements are consistent, Claimant's Brief at 12-13, and that it was Dr. Koenig's opinion that the miner's severe chronic obstructive pulmonary disease (COPD) "weakened" him so that he was unable to "fight off" the infection that killed him, Claimant's Brief at 7 -13, the record does not support claimant's characterization of Dr. Koenig's opinion.

As employer points out, Dr. Koenig made no mention of an infection in his May 30, 2007 report. Employer's Brief at 7; Claimant's Exhibit 5. Further, as the administrative law judge observed, "[Dr. Koenig] seemed to infer [in his report] that Miner's death was cardiovascular in nature; he connected COPD with cardiovascular death." Decision and Order at 24; Claimant's Exhibit 5. Substantial evidence supports this finding. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997).

By contrast, in his July 26, 2007 deposition, Dr. Koenig opined that the miner "likely died of sepsis." Claimant's Exhibit 12 at 17. When asked to elaborate, Dr. Koenig explained that:

Sepsis is likely an infection – I mean, he – an infection due to some source. We know he had COPD, which would predispose him to infections. We

know he had a Foley catheter inside, which would predispose [him] to urinary tract infections and so on.

Claimant's Exhibit 12 at 17-18. As the administrative law judge observed, however, Dr. Koenig did not unequivocally attribute COPD as a cause of the miner's sepsis, nor did he explain whether or not his new conclusion tied into his prior theory that the miner's death was cardiovascular in nature. Decision and Order at 24-25; Claimant's Exhibit 12. Contrary to claimant's assertion, therefore, the administrative law judge permissibly discounted Dr. Koenig's opinion as inconsistent. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-2-28 (4th Cir. 1997). Moreover, because the administrative law judge accurately observed that Dr. Koenig did not unequivocally attribute COPD as a cause of the miner's sepsis, the administrative law judge rationally discounted Dr. Koenig's opinion as equivocal and entitled to less weight. *See Mays v. Piney Mountain Coal Co.*, 21 BLR 1-59, 1-64 (1997).

Although claimant additionally asserts that the administrative law judge erred in his consideration of Dr. Hippensteel's opinion, Claimant's Brief at 14-17, because the administrative law judge permissibly discounted claimant's favorable evidence, any error that the administrative law judge may have made in assessing Dr. Hippensteel's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Consequently, we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge