BRB No. 01-0521 BLA

| | | |
|---|---|---|
| VIRGINIA G. DILLON<br>(Widow of HERSHEL DILLON) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order - Rejection of Claims of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Virginia G. Dillon, Dunlap, Tennessee, *pro se*.

Dorothy L. Page (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, the widow of the miner, appeals, without the assistance of counsel, the Decision and Order - Rejection of Claims (98-BLA-1368) of Administrative Law Judge Edward Terhune Miller denying benefits on both the miner=s claim and the 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

[1] 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

found, among other things, that the Director, Office of Workers= Compensation Programs (the Director), conceded and the parties stipulated to seven years of coal mine employment, the existence of pneumoconiosis arising out of coal mine employment, and that the elements of modification and a material change in conditions were established. Considering all the evidence of record on the miner=s claim, the administrative law judge concluded that it failed to establish a totally disabling respiratory impairment and that even if that element had been established, the evidence nonetheless failed to establish causation. Accordingly, benefits on the miner=s claim were denied. Turning to the survivor=s claim, the administrative law judge found that the evidence of record failed to establish that the miner=s death was due to pneumoconiosis. Accordingly, benefits were denied on the survivor=s claim.[2]

---

noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, inter alia, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Association v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court=s decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] The miner filed his initial claim for benefits on June 19, 1973, which was denied by the Social Security Administration on May 9, 1999. Director=s Exhibits 25- 1, 26-1. The district director denied the claim on September 12, 1980, finding that the miner failed to establish any of the elements of entitlement. Director=s Exhibit 26-14. The miner filed his next, duplicate claim on June 14, 1993, which was denied by Administrative Law Judge Sheldon Lipson on August 27, 1996. Director=s Exhibits 1, 30, 31. The Board affirmed that denial on June 26, 1997. Director=s Exhibit 38. The miner died on November 17, 1996. Director=s Exhibit 43.

Claimant filed a survivor=s claim on November 19, 1997, which was denied by the district director on March 19, 1998. Director=s Exhibits 1, 39, 54. In a Proposed Decision and Order dated August 7, 1998, the district director found claimant=s application and the submitted autopsy, a request for modification of the miner=s claim. Director=s Exhibit 39.

In appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge=s Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence and in accordance with law. 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).

In order to establish entitlement to benefits in a living miner=s claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. ''718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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. 20 C.F.R. ''718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor=s claims filed on or after January 1, 1982, death will be considered to be 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 the 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), cert. den. 506 U.S. 1050 (1993).

After consideration of the administrative law judge=s Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge=s Decision and Order is supported by substantial evidence and contains no reversible error. Pursuant to the miner=s claim, the administrative law judge rationally

---

The district director found the autopsy sufficient to establish the existence of pneumoconiosis at 718.202(a)(2), and thus, sufficient to establish modification and a material change in conditions pursuant to Section 725.309 and 725.310. Director=s Exhibit 62.

found that the evidence of record failed to establish a totally disabling respiratory impairment. *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge found that because none of the pulmonary function studies produced qualifying values, the preponderance of the gas studies was non-qualifying,[3] and there was no evidence of cor pulmonale with right-sided congestive heart failure, total disability was not established by these methods. This was correct. 20 C.F.R. '718.204(b)(2)(i)-(iii); Director=s Exhibits 10, 21, 25-5, 26-8; Decision and Order at 11; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). Turning to the medical opinion evidence, the administrative law judge permissibly accorded little weight to the 1993 reports of Drs. Barnett and Turitto that the miner was Amost definitely a candidate for the Black Lung Disease Program,@ Director=s Exhibits 8, 9, because even if these opinions were sufficient to constitute a finding of total disability, they are poorly reasoned and undocumented. Decision and Order at 11; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Further, as the administrative law judge noted, none of the other evidence established a totally disabling respiratory impairment. Decision and Order at 11; Director=s Exhibits 10, 45, 47. Thus, the administrative law judge rationally found that the evidence failed to establish total disability. 20 C.F.R. '718.204(b)(2)(iv); *see Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994). We therefore affirm the administrative law judge=s finding that the evidence failed to establish a totally disabling respiratory impairment.[4] 20 C.F.R. '718.204(b)(2)(i)-(iv).

Likewise, pursuant to the survivor=s claim, the administrative law judge found the evidence failed to establish death due to pneumoconiosis. *See Piccin*, *supra*. The administrative law judge permissibly accorded little weight to the death certificate listing the immediate cause of death as cardiopulmonary arrest due to chronic obstructive pulmonary disease, Director=s Exhibit 43, as unreasoned, since Dr. Shepherd, the medical examiner who signed the death certificate, stated that her conclusions on the death certificate were reached without the benefit of any file information or information on the miner. Director=s Exhibit 48; Decision and Order at 9; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987);

[3] A Aqualifying@ pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, appendix B, C respectively. A Anon-qualifying@ study exceeds those values. *See* 20 C.F.R. 718.204(c)(1), (2).

[4] Because we affirm the administrative law judge=s finding that total disability is not established we need not address the administrative law judge=s finding with regard to causation. *See* 20 C.F.R. '718.204(c).

*Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *see Willis v. Birchfield Mining Co.*, 15 BLR 1-59 (1991). Further, the administrative law judge rationally found that the miner=s autopsy did not establish death due to pneumoconiosis based on Dr. Harlan=s autopsy finding that the miner, ADied as a result of poorly differentiated carcinoma of the pancreas, with metastases to regional lymph notes and spleen,@ Director=s Exhibit 44; Decision and Order at 1-3. The administrative law judge also rationally found that Dr. Crouch=s pathology report, which stated that occupational coal dust exposure Acould not have contributed to or otherwise hastened the patient=s death from complications of disseminated malignancy,@ Director=s Exhibit 58, could not establish death due to pneumoconiosis. Decision and Order at 13. Finally, the administrative law judge found that, although Dr. Barnett was the miner=s treating physician, his conclusion that lymphoma was not aggressive and was not the cause of death, but that the miner=s chronic obstructive lung disease and black lung was progressive and the primary cause of death, failed to establish to establish death due to pneumoconiosis as it was cursory, poorly reasoned, undocumented, and inconsistent with other evidence of record. Decision and Order at 13. This was proper. *Clark*, *supra*; *Fields*, *supra*; *Dillon*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). We therefore affirm the administrative law judge=s finding that the evidence failed to establish death due to pneumoconiosis as supported by substantial evidence and in accordance with law.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray*, *supra*, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge=s finding that the evidence of record failed to establish total disability in the miner=s claim or death due to pneumoconiosis in the survivor=s claim. *See Shuff*, *supra*; *Trent*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge=s Decision and Order Rejection of Claims denying benefits on both the miner=s and the survivor=s claims is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge