

BRB No. 04-0510 BLA

SHARON K. PECK)
(Widow of HASSELL PECK))
)
Claimant-Petitioner)
)
v.)
)
CONSOLIDATION COAL COMPANY)
) DATE ISSUED: 02/14/2005
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-Denying Benefits of Linda S. Chapman,
Administrative Law Judge, United States Department of Labor.

Sharon K. Peck, Rowe, Virginia, *pro se*.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant¹, without the assistance of counsel, appeals the Decision and Order-Denying Benefits (02-BLA-5377) of Administrative Law Judge Linda S. Chapman on a

¹Claimant is Sharon K. Peck, the surviving spouse of Hassell Peck, the miner, who died on June 6, 2000. Mr. Peck did not file a living miner's claim. On February 22, 2001, claimant filed the current application for black lung benefits. A formal hearing was held on October 23, 2003 at which claimant was represented by counsel.

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). After crediting the miner with at least thirty-four years of coal mine employment, the administrative law judge found that claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203, but failed to establish that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's finding pursuant to Section 718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers Compensation Programs, did not file a response brief.²

In an 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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 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 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's 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)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980, 16 BLR 2-90 (4th Cir. 1992).³

² We affirm the administrative law judge's findings of at least thirty-four years of coal mine employment and the existence of simple pneumoconiosis arising out of coal mine employment as they are not challenged on appeal and are not prejudicial to claimant. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

³This claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's most recent coal mine employment occurred in the

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish that pneumoconiosis caused, contributed to or hastened the miner's death under Section 718.205(c). The administrative law judge considered all of the relevant evidence under Section 718.205(c), consisting of: x-rays, pulmonary function reports, treatment notes provided by Dr. Kabaria from 1996 through 1998 and by Dr. Motos from 1998 through 2000, hospital records, the death certificate signed by Dr. Motos, a supplemental letter by Dr. Motos, Dr. Segen's autopsy report diagnosing complicated pneumoconiosis, his supplemental report concluding that "it was not unreasonable to say that Mr. Peck's life span was shortened by his exposure to coal and rock dust," and the opinion of Board-certified pathologist Dr. Perper that pneumoconiosis was a contributing cause of the miner's death. The administrative law judge also considered the contrary opinions of Board-certified pathologists Drs. Crouch, Naeye and Oesterling, and Board-certified pulmonologist Dr. Castle, that claimant's simple pneumoconiosis did not contribute to or hasten the miner's death and that the evidence did not support a diagnosis of complicated pneumoconiosis.

The administrative law judge found that notwithstanding the negative x-ray evidence, the pathology evidence and medical opinion evidence established the presence of simple pneumoconiosis. Decision and Order-Denying Benefits at 4, 13. Under Section 718.205(c)(1), however, the administrative law judge rationally found that there is no medical evidence that pneumoconiosis was the immediate or primary cause of the miner's death. Decision and Order-Denying Benefits at 14. The administrative law judge properly found that Dr. Kabaria did not diagnose pneumoconiosis and did not treat the miner during the last two years of his life. Decision and Order-Denying Benefits at 5; Director's Exhibit 18. Similarly, the administrative law judge properly found that Dr. Motos, who treated the miner for more than two years before his death, reported numerous non-pulmonary conditions, but did not diagnose pneumoconiosis or any significant pulmonary or respiratory condition until the date of the miner's death and did not indicate that pneumoconiosis was a direct cause of the miner's death.⁴ Decision and Order-Denying Benefits at 5; Director's Exhibit 17. Moreover, the administrative law

Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 7.

⁴ The administrative law judge noted that Dr. Motos reported on June 6, 2000, the date of the miner's death, that the miner had pneumonia or acute bronchitis and also suffered from hypertension and gastritis. Decision and Order-Denying Benefits at 6; Director's Exhibits 14, 17.

judge properly found that all of the physicians of record agreed with Dr. Motos's determination on the death certificate that the immediate cause of death was cardiac arrest, acute myocardial infarction and coronary artery disease while hypertension being identified as a significant condition contributing to death. Decision and Order Denying-Benefits at 7-12; Director's Exhibits 14, 31, 41; Employer's Exhibits 2, 3, 5, 8-12.

Under Section 718.205(c)(3), the administrative law judge rationally found that the diagnosis of complicated pneumoconiosis by the prosector Dr. Segen, whose qualifications are not part of the record, was outweighed by the diagnosis of simple pneumoconiosis by Board-certified pathologists Drs. Crouch, Naeye, Oesterling and Perper. Decision and Order-Denying Benefits at 14; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge further noted that Dr. Segen did not specify the size of the lesions that he observed and that Drs. Crouch, Naeye, Osterling and Perper agreed that the anthracotic micronodular lesions were not even close to one centimeter, with most measuring 1-3 millimeters, nor did they observe massive lesions. Decision and Order Denying-Benefits at 7-9, 12, 14. Director's Exhibits 15, 41; Claimant's Exhibit 1; Employer's Exhibits 2, 3, 9, 12; 20 C.F.R. §§718.205(c)(3); 718.304(c); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Under Section 718.205(c)(2) and (c)(5), the administrative law judge found that while Drs. Motos, Segen and Perper opined that pneumoconiosis hastened the miner's death, Drs. Crouch, Naeye, Oesterling and Castle concluded that pneumoconiosis played no role in the miner's demise. Decision and Order-Denying Benefits at 15. Notwithstanding Dr. Motos's status as the miner's treating physician, the administrative law judge reasonably found that his opinion that pneumoconiosis "probably played a role" and "might have contributed to" the miner's death was equivocal and was neither reasoned nor documented as it was not supported by his own treatment notes, and was mostly based on Dr. Segen's autopsy findings which were outweighed by the contrary pathologic evidence. See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251 (4th Cir. 2000)(Bald conclusion that pneumoconiosis contributed to miner's death without some reasoning is insufficient to establish that pneumoconiosis hastened death); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987).

Furthermore, the administrative law judge properly found that Dr. Perper did not explain how the miner's pulmonary conditions could have triggered his fatal arrhythmia. Decision and Order-Denying Benefits at 15; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335 ; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative

law judge also noted Dr. Segen's one page letter stating that "it is not unreasonable" to conclude that the miner's "life span was shortened by his occupational exposure" because the "lungs had prominent involvement by fibrosis, focal emphysema and macules, findings which are typical of complicated and uncomplicated CWP." Decision and Order-Denying Benefits at 7; Director's Exhibit 15. However, the administrative law judge reasonably found that the medical opinions of Drs. Crouch, Naeye, Oesterling and Castle were more consistent with the negative x-ray evidence, the pulmonary function studies showing a mild, nondisabling impairment, and the absence of a diagnosis of pneumoconiosis by the treating physician until after a postmortem finding of the disease. Decision and Order-Denying Benefits at 15; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; *Wetzel*, 8 BLR at 1-141.

Because the administrative law judge has discretion to resolve conflicts in the medical evidence, her findings will not be disturbed if supported by substantial evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). We affirm the administrative law judge's finding that claimant failed to establish that the miner's death was hastened by pneumoconiosis since she properly discredited the opinions of Drs. Motos, Perper, and Segen and properly found that the opinions of Drs. Crouch, Naeye, Oesterling, and Castle are entitled to controlling weight as to the cause of the miner's death. Therefore, we affirm the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order-Denying benefits is hereby affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge