BRB No. 97-1040 BLA

LOIS BRASHEAR (Widow of HENRY BRASHEAR)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
TARHEEL COALS, INCORPORATED	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Michael J. Pollack (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (95-BLA-2288) of Administrative Law Judge Michael P. Lesniak denying benefits on a miner's claim and 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 adjudicated the miner's claim pursuant to the regulations contained in 20 C.F.R. Parts 727 and 718. The administrative law judge also adjudicated the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found the evidence sufficient to establish rebuttal of the interim

[1]Claimant is the widow of the deceased miner, Henry Brashear, who died on April 15, 1993. Director's Exhibits 57, 61.

presumption pursuant to 20 C.F.R. §727.203(b)(3).[2] Hence, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310.[3] Further, the administrative law judge found the evidence insufficient to establish entitlement to benefits pursuant to 20 C.F.R. Part 718. With regard to the survivor's claim, the administrative law judge found the evidence insufficient to establish 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 both claims.

On appeal, claimant contends that the administrative law judge erred in finding the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's Decision and Order, and indicating that it continues to preserve its contentions that it is not the properly designated responsible operator and that the miner abandoned his claim. The Director, Office of Workers' Compensation Programs, filed a letter in reply to employer's brief, contending that employer is bound by its prior stipulation that it had been correctly designated as the responsible operator.

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[2]Employer concedes the existence of pneumoconiosis. Director's Exhibit 84. Further, the administrative law judge found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(1), (b)(2) and (b)(4).

[3]The miner filed his claim on April 8, 1976. Director's Exhibit 1. On October 19, 1989, Administrative Law Judge Bernard J. Gilday, Jr. issued a Decision and Order denying benefits. Director's Exhibit 38. The bases of Judge Gilday's denial were that employer established rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), and claimant failed to establish entitlement to benefits under 20 C.F.R. Part 718. *Id*. The Board affirmed Judge Gilday's denial of benefits. *Brashear v. Tarheel Coals, Inc.*, BRB No. 90-0328 BLA (June 3, 1992)(unpub.). On June 29, 1992, the miner filed another claim which the Department of Labor construed as a request for modification. Director's Exhibits 47, 48.

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

Initially, claimant contends that the administrative law judge erred in finding the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). We disagree. In *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), and *Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988), the United States Court of Appeals for the Sixth Circuit, wherein jurisdiction of this case arises,[4] held that the medical opinion evidence must establish that pneumoconiosis played no part in the miner's total disability in order to satisfy the requirements of 20 C.F.R. §727.203(b)(3).[5] The administrative law judge considered the newly submitted medical evidence along with the previously submitted evidence in determining whether the evidence is sufficient to establish a mistake in a determination of fact or a change in conditions.[6] Whereas Drs. Baker and Chaney opined that pneumoconiosis contributed to the miner's disability and death, Director's Exhibits 64, 70, 78; Claimant's Exhibit 1, Drs. Broudy and Dahhan opined that pneumoconiosis did not contribute to the miner's disability or death, Director's Exhibit 81; Employer's Exhibit 1. The death certificate lists multi-system failure due to chronic heart failure and renal failure as the immediate causes of the miner's death, and subdural hematoma as a significant condition contributing to the miner's death. Director's Exhibit

[4]Inasmuch as the miner performed his most recent coal mine employment in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5]The administrative law judge stated that "[e]mployer must affirmatively prove, by the preponderance of the evidence, that both the miner's total disability and the miner's death did not arise in whole or in part out of coal mine employment." Decision and Order at 3.

[6]Claimant contends that the administrative law judge erred by failing to consider the previously submitted evidence in determining whether the evidence is sufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. Contrary to claimant's contention, the administrative law judge properly found the evidence insufficient to establish a mistake in a determination of fact based "upon [his] review of the entire record." Decision and Order at 6; *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Moreover, the Board affirmed Judge Gilday's finding that the previously submitted evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). *Brashear v. Tarheel Coals, Inc.*, BRB No. 90-0328 BLA, slip op. at 2 (June 3, 1992)(unpub.).

61. The administrative law judge properly accorded determinative weight to the opinion of Dr. Dahhan over the contrary opinions of Drs. Baker and Chaney because the administrative law judge found Dr. Dahhan's opinion to be based on more extensive documentation,[7] *see Sabett v. Director, OWCP*, 7 BLR 1-299 (1984), and supported by Dr. Broudy's opinion, the medical records and the death certificate,[8] *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Further, the administrative law judge properly accorded greater weight to the opinion of Dr. Dahhan than to the contrary opinion of Dr. Chaney based on Dr. Dahhan's superior qualifications.[9] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v.*

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[7]In considering the comprehensive nature of Dr. Dahhan's report, the administrative law judge stated that Dr. Dahhan "evaluated [the miner] back in 1987 plus had the opportunity to review the evidence developed in the record since the prior denial." Decision and Order at 4. Moreover, the administrative law judge stated that Dr. Dahhan "is the **only** physician who had the opportunity to review the miner's terminal hospital records from St. Mary's plus the opinion of the other physicians including Drs. Chaney and Baker." *Id.* at 6 (emphasis added). Further, the administrative law judge stated that "Dr. Baker did not have the opportunity to review the opinions of [B]oard-certified pulmonary specialists Drs. Broudy or Dahhan." *Id.* at 5.

[8]The administrative law judge stated that "the opinion of Dr. Dahhan [is] supported by the opinion of Dr. Broudy and the hospital records and death certificate which do not attribute the miner's conditions to pneumoconiosis or coal mine employment." Decision and Order at 5.

Peabody Coal Co., 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

[9]The administrative law judge stated that Dr. Dahhan "is a [B]oard-certified pulmonary specialist." Decision and Order at 4; Employer's Exhibit 1. The administrative law judge also stated that "Dr. Chaney is not a [B]oard-certified pulmonary specialist." Decision and Order at 4.

In addition, the administrative law judge properly discounted the opinions of Drs. Baker and Chaney because they are equivocal.[10] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Moreover, the

[10]The administrative law judge stated that Dr. Chaney "testified that had the miner not had the heart attack, '**eventually**,' '**probably**' he would not have been able to work from a pulmonary standpoint." Decision and Order at 4 (emphasis added). The administrative law judge also stated that "Dr. Chaney testified that the miner's chronic lung disease was '**probably**' a combination of tobacco use and industrial exposure." *Id*. (emphasis added). Further, the administrative law judge stated that Dr. Baker's "opinion carries an equivocal tone stating that '**apparently**,' '**it appears**,' and '**may or may [sic] not**.'" *Id.* at 5 (emphasis added). Contrary to claimant's assertion that the administrative law judge mischaracterized Dr. Baker's opinion, the administrative law judge properly found that Dr. Baker's opinion is equivocal. *See* Director's Exhibit 70; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

administrative law judge properly discounted Dr. Chaney's opinion because the administrative law judge found it to be based on an inaccurate smoking history.[11] *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, we reject claimant's assertion that the administrative law judge erred by failing to accord determinative weight to Dr. Chaney's opinion because he treated the miner.[12] Moreover, we affirm the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3).[13] Furthermore, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact or a change in conditions at 20 C.F.R. §725.310.

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[11]The administrative law judge observed that Dr. Chaney "noted that the miner had been a smoker at one time and did not know whether the miner quit." Decision and Order at 4. The administrative law judge also stated that "the most recent 1993 hospital records document that the miner smoked 2½ packs per day for 40-50 years." *Id*.

[12]While the administrative law judge acknowledged that Dr. Chaney was the miner's treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); Decision and Order at 4, he nonetheless properly discounted Dr. Chaney's opinion because he found it to be equivocal, *see Justice, supra*; *Campbell, supra*.

[13]Claimant, citing *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989), contends that the administrative law judge erred by failing to consider whether the evidence is sufficient to establish entitlement to benefits under 20 C.F.R. Part 718. Contrary to claimant's contention, the administrative law judge rationally applied his analysis at 20 C.F.R. §727.203(b)(3) to 20 C.F.R. §718.204 in finding that pneumoconiosis did not contribute to the miner's total disability. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); 20 C.F.R. §718.204(b).

Finally, claimant contends that the administrative law judge erred in finding the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[14] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Sixth Circuit, wherein appellate jurisdiction in the instant case arises, has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). The administrative law judge stated that "Dr. Chaney is the only physician finding that the miner's death was due to pneumoconiosis."[15] Decision and Order at 6; Director's Exhibits 64, 78. Drs. Broudy and Dahhan opined that pneumoconiosis did not contribute to or hasten the miner's death. Director's Exhibit 81; Employer's Exhibit 1. The administrative law judge properly accorded determinative weight to the opinion of Dr. Dahhan over the contrary opinion of Dr. Chaney based on Dr. Dahhan's superior qualifications, *see Martinez, supra*; *Dillon, supra*; *Wetzel, supra*, and because Dr. Dahhan's opinion is based on more extensive documentation, *see Sabett, supra*. Therefore, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), as supported by substantial evidence. *See Brown, supra*.

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[14]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

[15]The administrative law judge stated that "Dr. Baker's opinion is inconclusive." Decision and Order at 6; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). The administrative law judge observed that Dr. Baker "found the miner's totally disabling respiratory impairment, that was partly due to coal worker[s]' pneumoconiosis, '**may or may [sic] not**' have contributed substantially to his death." Decision and Order at 5 (emphasis added).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge