BRB No. 05-0574 BLA

MARIE A. BEATTY (Widow of GENE BEATTY)	)	
Claimant-Petitioner	)	
v.	)	
TRIANGLE ENTERPRISES	)	DATE ISSUED: 01/30/2006
and	)	
ROCKWOOD INSURANCE COMPANY	)	
Employer/Carrier- 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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Gregory J. Fischer (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

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

PER CURIUM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-6084) of Administrative Law Judge Gerald M. Tierney 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 miner died on January 6, 2002, and

claimant filed her application for survivor's benefits on August 23, 2002.[1] Director's Exhibit 3. The district director awarded benefits and employer requested a hearing, which was held on May 14, 2004. Director's Exhibits 22, 24, 29.

In the ensuing Decision and Order – Denying Benefits, the administrative law judge credited the miner with sixteen years of coal mine employment and found the existence of pneumoconiosis established, as stipulated by the parties, but further found that claimant failed to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his evaluation of the medical opinion evidence pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief on appeal.[2]

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

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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 survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that

[1] The record reflects that on January 6, 2002, the miner was transported to the emergency room in cardiac arrest. Director's Exhibit 13. Efforts to resuscitate him were unsuccessful, and he was pronounced dead on arrival. Dr. Sine, the miner's treating physician, completed the miner's death certificate and listed the immediate causes of death as "ASCVD" [arteriosclerotic cardiovascular disease], due to "Hy TN" [hypertension], due to "A fib" [atrial fibrillation], due to "AAA?" [aortic abdominal aneurysm?]. Director's Exhibit 11.

[2] The administrative law judge's findings of sixteen years of coal mine employment and the existence of pneumoconiosis, arising out of coal mine employment, are hereby affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(2), (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); *Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989). 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).

In reviewing the medical evidence of record, the administrative law judge noted that the evidence supportive of a finding that pneumoconiosis hastened the miner's death consists of the opinions of Dr. Wecht, a Board-certified pathologist and the autopsy prosector, and Dr. Perper, also a Board-certified pathologist.[3] In addition, Dr. Sine, who is Board-certified in psychiatry and neurology and is the miner's treating physician, concurred with the opinion of Dr. Wecht. Claimant's Exhibit 5; Decision and Order at 6.

In weighing the medical evidence, the administrative law judge discredited the opinions of Drs. Perper and Wecht in part because they had relied on medical records which were not contained in the record before him, including a 1992 report by a Dr. Levine, and Dr. Sine's treatment notes dating from 1987 to 2001. Decision and Order at 4-6. The administrative law judge further discredited the opinions of Drs. Perper and Wecht because they had not reviewed certain medical evidence associated with the miner's lifetime claims, including three pulmonary function studies and two blood gas studies conducted in the mid-1980's, and the results of a medical examination and objective testing performed by Dr. Garson in 1995, which documented smoking histories and objective test results very different from those relied on by Drs. Perper and Wecht. Decision and Order at 4-6. The administrative law judge also discredited Dr. Sine's opinion as being insufficiently documented and reasoned, because he merely stated that he concurred with Dr. Wecht's opinion. Thus, the administrative law judge concluded that claimant had submitted insufficient credible evidence to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Decision and Order at

[3] The administrative law judge noted that Drs. Wecht and Perper opined that the miner suffered from coal workers' pneumoconiosis and cor pulmonale due to coal dust exposure, and chronic obstructive pulmonary disease (COPD) and emphysema due to coal dust exposure and smoking; they concluded that these conditions contributed to and hastened the miner's death. Claimant's Exhibits 3, 8; Director's Exhibit 12; Decision and Order at 3. In contrast, Drs. Oesterling and Bush, both Board-certified pathologists, opined that pneumoconiosis played no role in the miner's death. Employer's Exhibits 1-4; Decision and Order at 3.

6. Therefore, the administrative law judge declined to specifically evaluate the opinions of Drs. Bush and Oesterling. Decision and Order at 6.

Claimant specifically contends the administrative law judge impermissibly assumed the role of a medical expert when he discredited the opinions of Drs. Perper and Wecht. Claimant, relying on *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984) and *Jeffries v. Director, OWCP*, 6 BLR 1-1013 (1984), asserts that the question of whether a physician's opinion is reliable is a medical question, to be established by expert medical evidence, and that there are no medical opinions of record which establish that the opinions of Drs. Perper and Wecht are unreliable based on what evidence they did or did not review. Claimant's Brief at 4.

Initially, we note that claimant's reliance on *Vivian* and *Jeffries* is misplaced. In both cases, the Board held that the question of whether objective test results are reliable is a medical question to be resolved by medical evidence. *Vivian*, 7 BLR at 1-360; *Jeffries*, 6 BLR at 1-1013. The question of whether a medical opinion is reliable and credible remains a question for the administrative law judge, who must weigh the physician's opinion in light of the physician's qualifications and the documentation and reasoning provided. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

Nonetheless, we hold that that administrative law judge erred in his consideration of the medical opinions of record, as he improperly discredited the opinions of Drs. Perper and Wecht in part because they had not reviewed certain evidence associated with the miner's lifetime claims, including three pulmonary function studies and two blood gas studies conducted in the mid-1980's, and the results of a medical examination and objective testing performed by Dr. Garson in 1995. When a living miner files a subsequent claim, all the evidence from the first miner's claim is specifically made part of the record. *See* 20 C.F.R. §725.309(d). Such an inclusion is not automatically available in a survivor's claim filed pursuant to the revised regulations. As this case involves a survivor's claim, the medical evidence from the prior living miner's claim must have been designated as evidence by one of the parties in order for it to have been included in the record relevant to the survivor's claim. Furthermore, 20 C.F.R. §725.414(a)(2)(i) provides:

> Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible….

20 C.F.R. §725.414(a)(2)(i). Thus, if any of the medical reports is based on evidence in the record that was not properly admitted into the survivor's claim, the administrative law judge is required to address the implication of Section 725.414(a)(2)(i).[4]

In this case, the results of the three pulmonary function studies and two blood gas studies conducted in the mid-1980's, and the results of the medical examination and objective testing performed by Dr. Garson in 1995, were not designated as evidence by either of the parties, and, thus should not have been considered included in the record relevant to the survivor's claim.[5] Therefore, under the facts of this case, the administrative law judge erred in discrediting the opinions of Drs. Perper and Wecht in part because they had not considered this evidence. 20 C.F.R. §725.414(a)(2)(i); Decision and Order at 4-6. Because the administrative law judge's decision does not reflect the extent to which this invalid consideration persuaded him to reject the physicians' opinions, we cannot hold that the administrative law judge's error was harmless, and, therefore, must vacate the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.205(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). On remand, the administrative law judge must reconsider all of the medical opinions[6] of record in light of Section 725.414(a)(2)(i), (a)(3)(i),[7] and determine whether they rely in part on evidence which is not in the record in the survivor's claim. If he determines an opinion has relied on evidence outside of the record, the administrative law judge should consider whether to redact the objectionable content, ask the physician to submit new reports, factor in the physician's reliance upon

[4] We note that the regulations specifically provide that "[n]otwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

[5] A review of the record reveals that the three pulmonary function studies and two blood gas studies conducted in the mid-1980's, and the medical examination and objective testing performed by Dr. Garson in 1995, were not conducted as part of the miner's hospitalization or treatment for a respiratory or pulmonary or related disease, and, thus, do not fall within the exception to the limitations on evidence as set forth at 20 C.F.R. §725.414(a)(4).

[6] The administrative law judge specifically stated that there are also questions as to the extent of the evidence Drs. Oesterling and Bush reviewed. Decision and Order at 6.

[7] We note that 20 C.F.R. §725.414(a)(3)(i) contains an identical provision applicable to employer's evidence.

the inadmissible evidence when deciding the weight to which their opinion is entitled, or, as a last resort, exclude the report from the record. *See Harris v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (Jan. 27, 2006)(*en banc*)(McGranery and Hall, J.J., concurring and dissenting). In addition, on remand, the administrative law judge should reconsider the smoking histories contained in the evidence admitted into the record in the survivor's claim, resolve any inconsistencies contained therein, and make a determination as to the extent of the miner's cigarette smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1983); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge