

BRB No. 09-0713 BLA

KATHRYN T. TWORZYDLO)	
(Widow of FRANK TWORZYDLO))	
)	
Claimant-Respondent)	
)	
v.)	
)	
VESTA MINING COMPANY)	DATE ISSUED: 07/29/2010
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of Decision and Order – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

James M. Poerio (Poerio, Walter & Mason, Inc.), Pittsburgh, Pennsylvania, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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:

Employer appeals the Decision and Order - Awarding Benefits (2007-BLA-5923) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a survivor's claim filed on June 1, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended* by Pub. L. No. 111-148, §1556, 124

Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The administrative law judge found, as the parties stipulated, that claimant was an eligible survivor, that the miner worked for forty years in coal mine employment, and that employer was the responsible operator.¹ The administrative law judge further found that the evidence established that the miner had both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge made numerous errors in his evaluation of the evidence and, therefore, erred in finding that the medical evidence established clinical and legal pneumoconiosis at Section 718.202(a) and death due to pneumoconiosis at Section 718.205(c).² Claimant responds, urging affirmance of the administrative law judge's Decision and Order - Awarding Benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive brief, but notes, in his letter to the Board, that employer's argument on appeal, which mainly concerns whether the administrative law judge properly found legal pneumoconiosis established, is moot, given the fact that the administrative law judge found that the miner had clinical pneumoconiosis, and that clinical pneumoconiosis caused his death. Director's Brief at 1-2.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law,³ 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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Previously filed claims by the miner were denied, and are not at issue in this appeal. The miner died on December 5, 1998. See Director's Exhibits 1, 11.

² Employer does not challenge the administrative law judge's finding that the miner's clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). That finding is, accordingly, affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant was employed in coal mine employment in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if the evidence establishes that 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 20 C.F.R. §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 hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, a presumption of death due to pneumoconiosis or that, at the time of death, the miner was totally disabled due to pneumoconiosis, if the miner had fifteen or more years of qualifying coal mine employment and had a totally disabling respiratory impairment.⁴ 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b).

By Order issued on April 7, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of the amendments. Employer, in pertinent part, contends that the amendments do not apply to this case because, although it stipulated that the miner had forty years of coal mine employment, it "contested the presence of coal workers' pneumoconiosis as well as whether coal workers' pneumoconiosis/occupational lung disease played any role in the death of the coal miner[.]" Employer's Brief at 1. Claimant contends that the amendments are applicable insofar as they revive the Section 411(c)(4) presumption. Claimant contends that she is entitled to the presumption based on the filing date of her claim, the miner's forty years of coal mine employment, and the fact that the miner's qualifying pulmonary function studies establish total disability. However, claimant contends that, if the Board affirms the award of benefits, the Section 411(c)(4) presumption need not be considered.

⁴ In addition, under Section 422(l), 30 U.S.C. §932(l), *as amended*, a qualified survivor of a miner, who filed a successful claim for benefits, is automatically entitled to survivor's benefits without the burden of establishing entitlement. There can be no automatic continuation of benefits to the widow (claimant) pursuant to Section 422(l) in this case, however, as there was never an award of lifetime benefits to the miner.

Likewise, the Director contends that the amendments, in pertinent part, are applicable, but that if the Board affirms the award of benefits, it need not consider the impact of the amendments. However, the Director contends that, if the Board does not affirm the award, he must determine whether claimant is entitled to the Section 411(c)(4) presumption, in view of the post-2005 filing date of the claim and employer's stipulation to forty years of coal mine employment.

Pneumoconiosis

In finding clinical pneumoconiosis established at Section 718.202(a), the administrative law judge credited the pathology and medical opinion evidence over the x-ray and treatment record evidence.⁵ The administrative law judge concluded that the x-

⁵ The evidence relevant to the issue of clinical pneumoconiosis is summarized as follows:

Pathology Evidence

Biopsy evidence, which is contained in the miner's treatment records, is based on the miner's December 1997 right middle and right lower lobectomy for lung cancer, and included a finding of anthracotic nodules. On reviewing this pathology report, Dr. Swedarsky described the nodules as suggestive of "old healed granulomas and noted that their location "[ran] counter to a diagnosis of coal workers' pneumoconiosis." Director's Exhibit 17. On his review of the pathology slides, Dr. Abraham found the nodules to be "silicotic" and diagnosed "silicosis," consistent with coal workers' pneumoconiosis. Director's Exhibits 14-16.

Dr. Pataki, the autopsy prosector, submitted an autopsy report, based on gross and microscopic findings. Dr. Pataki found evidence of lung cancer, bronchopneumonia, simple anthracosilicosis, emphysema, and chronic cor pulmonale. Director's Exhibit 12.

Medical Opinion Evidence

On review of the miner's medical records, the pathology evidence and the autopsy, Dr. Swedarsky found evidence of silicosis, but not coal workers' pneumoconiosis and explained that "anthracosis was not unique to coal miners, because it could also be found in 'urban dwellers.'" He attributed the miner's emphysema to smoking, in the absence of coal workers' pneumoconiosis. Director's Exhibit 17.

Dr. Abraham, on reviewing the miner's medical records, pathology report, and autopsy, found coal workers' pneumoconiosis. Claimant's Exhibit 1.

ray evidence was inconclusive on the presence or absence of pneumoconiosis because none of the x-ray readers found coal workers' pneumoconiosis. In weighing the pathology evidence, the administrative law judge credited the pathology report of Dr. Abraham, which resulted from a 1997 lobectomy performed on the miner for lung cancer, over the report of Dr. Swedarsky. The administrative law judge credited the report of Dr. Abraham, who diagnosed silicosis consistent with coal workers' pneumoconiosis, because it was based on the original surgical pathology report of the miner's lobectomy and Dr. Abraham's own review of the tissue evidence. The administrative law judge rejected Dr. Swedarsky's pathology report, that the nodules seen suggested "old healed granulomas," not coal workers' pneumoconiosis, because Dr. Swedarsky found a lack of nodules in the left lung or upper lung lobes, without addressing the fact that the lower portion of the miner's right lung had been removed, and no samples were taken of his left lung.⁶

Dr. Fox, the miner's treating physician, diagnosed coal workers' pneumoconiosis and emphysema due to coal mine employment. Director's Exhibit 13.

X-ray Evidence

Chest x-rays, which were included in the miner's treatment and hospitalization records, taken between 1959 and 1997, were either specifically read as negative for pneumoconiosis, or contained no diagnosis of coal workers' pneumoconiosis. Director's Exhibits 14, 15.

Treatment Record Evidence

The miner's treatment records, covering 1988 to 1997, did not contain a diagnosis of coal workers' pneumoconiosis, but included diagnoses of chronic obstructive pulmonary disease, chronic bronchitis, emphysema, hypertension, and obstructive and restrictive defect. Director's Exhibits 13-16.

⁶ The administrative law judge gave little weight to Dr. Pataki's autopsy report, finding evidence of lung carcinoma, bronchopneumonia, simple anthracosilicosis, emphysema and chronic cor pulmonale, as Dr. Pataki did not provide an etiology for the anthracosilicosis or emphysema he diagnosed. Decision and Order at 13.

The administrative law judge erred, however, in finding that Dr. Pataki's autopsy report failed to establish coal workers' pneumoconiosis at 20 C.F.R. §718.202(a)(2), because Dr. Pataki did not provide an etiology for anthracosilicosis under 20 C.F.R. §718.201(a)(1). A diagnosis of anthracosilicosis is sufficient to establish clinical pneumoconiosis. 20 C.F.R. §718.201(a)(1). An opinion that the etiology of the anthracosilicosis is coal mine employment is not required. However, since the

Turning to the medical opinion and treatment record evidence, the administrative law judge found that the miner's treatment records did not establish clinical pneumoconiosis because, although they contained a diagnosis of lung disease, none of them contained a diagnosis of coal workers' pneumoconiosis. The administrative law judge credited Dr. Abraham's medical opinion finding coal workers' pneumoconiosis, which was based on the surgical pathology report and autopsy evidence, as it was consistent with the miner's coal dust exposure, and was well-explained and reasoned. The administrative law judge further concluded that Dr. Abraham's finding of clinical pneumoconiosis was buttressed by the opinion of Dr. Fox, the miner's treating physician, who found that the miner had coal workers' pneumoconiosis. Regarding the opinion of Dr. Swedarsky, that the miner did not have coal workers' pneumoconiosis, the administrative law judge observed that Dr. Swedarsky opined that the anthracosis seen on autopsy was that found in "urban dwellers." The administrative law judge concluded, however, that the opinion was unconvincing "in light of the miner's [forty] years of coal mine dust exposure and no evidence that [the miner] was an 'urban dweller.'" Decision and Order at 13. The administrative law judge, therefore, accorded little weight to the opinion of Dr. Swedarsky on the issue of clinical pneumoconiosis. On weighing all of the evidence relevant to clinical pneumoconiosis together, the administrative law judge concluded that the better reasoned and documented evidence established that the miner suffered from clinical pneumoconiosis at Section 718.202(a).

Employer first asserts that, in finding clinical pneumoconiosis, the administrative law judge erred in failing to consider the 1985 opinion of Dr. Riegel, a pulmonologist, who found that the miner's x-ray revealed no evidence of coal workers' pneumoconiosis. Although the administrative law judge did not address Dr. Riegel's opinion by name, he considered and weighed the miner's 1985 negative x-ray and Dr. Riegel's opinion as part of the miner's treatment records, when he found that they did not establish clinical pneumoconiosis. Contrary to employer's argument, therefore, the administrative law judge properly considered Dr. Riegel's opinion as it was part of the miner's treatment records. Decision and Order at 12; *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*).

Employer also contends that the administrative law judge erred in finding that the x-ray evidence was inconclusive on the issue of pneumoconiosis, when the x-rays of record were read as negative for coal workers' pneumoconiosis. Although the administrative law judge stated that the x-ray evidence was inconclusive as to the presence or absence of pneumoconiosis, he also specifically stated that none of the x-rays

administrative law judge found clinical pneumoconiosis established based on other evidence, his error in analyzing the autopsy report is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

was read as positive for coal workers' pneumoconiosis. Decision and Order at 3. The administrative law judge, therefore, found that the x-ray evidence failed to establish clinical pneumoconiosis at Section 718.202(a)(1) and considered it as negative when weighing it with the other evidence.

Additionally, employer argues that the administrative law judge "misapprehended" the opinion of Dr. Pataki, the autopsy prosector, because Dr. Pataki's finding on internal examination, concerning the presence of cor pulmonale with right-sided congestive heart failure, was inconsistent with his final anatomic diagnosis regarding this condition. However, inasmuch as Dr. Pataki found evidence of anthracosilicosis on autopsy, a diagnosis which is included in the definition of coal workers' pneumoconiosis at 20 C.F.R. §718.201, we need not consider whether the administrative law judge made any error in his consideration of whether the report diagnosed cor pulmonale with right-sided congestive heart failure. The diagnosis of anthracosilicosis is sufficient to establish clinical pneumoconiosis and error, if any, as to whether Dr. Pataki properly found cor pulmonale with right-sided congestive heart failure would be harmless. 20 C.F.R. §718.201; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As employer raises no other contentions regarding the administrative law judge's findings on the issue of clinical pneumoconiosis, these findings are affirmed. *See* 20 C.F.R. §718.202(a)(2) and (4). Further, because we affirm the administrative law judge's finding of clinical pneumoconiosis, we need not address its argument regarding the administrative law judge's finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Larioni*, 6 BLR at 1-1278.

Death Causation

Next, the administrative law judge found that the miner's death was due to pneumoconiosis at Section 718.205(c). In considering the medical opinions, along with the death certificate,⁷ the administrative law judge found the opinions of Drs. Abraham

⁷ The evidence relevant to the issue of death causation is summarized as follows:

The miner's death certificate lists, as the immediate cause of death, acute bronchopneumonia. Other significant conditions contributing to death include congestive heart failure, non-small cell lung cancer in the right lung, and chronic obstructive lung disease. Director's Exhibit 11.

Dr. Pataki, the autopsy prosector, attributed the miner's death to "acute bronchopneumonia." Director's Exhibit 12.

and Fox to be the most persuasive on the issue of death causation because both doctors explained how the miner's coal workers' pneumoconiosis decreased the functional capacity of his lungs and made him more vulnerable to the pneumonia that killed him. The administrative law judge accorded less weight to the opinion of Dr. Swedarsky, that coal workers' pneumoconiosis did not contribute to the miner's death, because Dr. Swedarsky did not, contrary to the administrative law judge's finding, diagnose the existence of coal workers' pneumoconiosis. The administrative law judge also found it less well-reasoned because Dr. Swedarsky's opinion, that the miner's respiratory impairment did not begin until after the miner's lobectomy and radiation treatment for cancer, was not supported by the miner's qualifying pulmonary function studies, which were conducted prior to the miner's lobectomy. Accordingly, the administrative law judge found that the opinions of Drs. Abraham and Fox established death causation at Section 718.205(c).⁸

Employer contends, however, that the administrative law judge erred in crediting the opinions of Dr. Fox and Dr. Abraham on the issue of death causation. Employer contends that these opinions should not have been credited because they relied on an

Dr. Fox, the miner's treating physician, concluded that the miner's death from pneumonia was hastened by his underlying lung disease (coal workers' pneumoconiosis). Director's Exhibit 13.

Dr. Abraham opined that the miner's coal workers' pneumoconiosis, resulting from his lengthy coal dust exposure history, was a substantially contributing cause of the miner's death. Claimant's Exhibit 1.

Dr. Swedarsky opined that there was no evidence that the miner's death was caused or hastened by any "chronic disease arising out of coal mine employment." Director's Exhibit 17. Dr. Swedarsky opined that the miner's "death was due to his moderately differentiated adenocarcinoma and the cycle of events initiated by its treatment." Director's Exhibit 17.

⁸ The administrative law judge accorded little weight to the death certificate, listing chronic obstructive lung disease as a significant condition contributing to death, because it did not list an etiology of the chronic obstructive lung disease. Further, the administrative law judge accorded little weight to the autopsy report of Dr. Pataki, who attributed the miner's death to acute bronchopneumonia. The administrative law judge found that Dr. Pataki's autopsy report was entitled to little weight because, even though Dr. Pataki found evidence of carcinoma, simple anthracosilicosis, emphysema, and chronic cor pulmonale, Dr. Pataki did not offer an opinion as to whether any of these diseases contributed to, or hastened, the miner's death.

inaccurate smoking history in attributing the miner's emphysema to coal mine employment rather than smoking, and because they relied on inaccurate findings of cor pulmonale and pulmonary fibrosis. As the Director contends, however, employer's arguments address whether the miner's death was due to legal pneumoconiosis, and do not address the administrative law judge's specific finding that the miner's clinical pneumoconiosis, *i.e.*, coal workers' pneumoconiosis, contributed to his death. Accordingly, as employer has not raised any issue with the administrative law judge's finding that the miner had clinical pneumoconiosis that caused his death, we affirm the administrative law judge's finding that the medical opinion evidence established death causation at Section 718.205(c). *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

In light of our affirmance of the administrative law judge's findings that clinical pneumoconiosis and death causation were established at Sections 718.202(a) and 718.205(c), we agree with claimant and the Director that consideration of this case under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is unnecessary. Application of the recent amendments to the Act, which became effective on March 23, 2010, would not alter the outcome of this case.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge