BRB No. 98-0806 BLA

OMIELEEN STROUTH (WIDOW OF RAY STROUTH)	)	
Claimant-Petitioner	)	
v.	)	
C & D COAL COMPANY	)	DATE ISSUED: 7/27/99
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 on Remand--Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Daniel Sachs (UMWA Legal Department), Castlewood, Virginia, for claimant.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand--Denying Benefits (95-BLA-2443) of Administrative Law Judge Daniel F. Sutton 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). This survivor's claim is before the Board for the second time. Initially, the miner filed a living miner's claim for benefits on June 10, 1980. Director's Exhibit 1. In a

Decision and Order dated June 10, 1987, Administrative Law Judge Victor J. Chao found that the miner established fifteen years of coal mine employment, but denied benefits pursuant to 20 C.F.R. Part 718, based on his findings that the miner failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and (b). This determination was affirmed by the Board in *Strouth v. C & D Coal Co.*, BRB No. 87-1561 BLA (May 25, 1989)(unpub.). The miner filed a motion for modification on December 15, 1989. Administrative Law Judge Clement J. Kichuk reviewed the miner's motion, determining that the miner established a change in conditions pursuant to 20 C.F.R. §725.310, based on his medical records indicating that he suffered with Alzheimer's disease, but denied the claim, finding that the miner again failed to establish the existence of pneumoconiosis at Section 718.202(a) or total disability due to pneumoconiosis at Section 718.204(c) and (b). The miner died on January 27, 1993, and claimant, his widow, filed another motion for modification in the miner's claim, and a survivor's claim, on February 23, 1993. Administrative Law Judge Charles P. Rippey reviewed both claims, and, in his Decision and Order dated March 6, 1996, found that, in the miner's claim, a mistake in fact had been established pursuant to Section 725.310 as the autopsy evidence indicated that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(2). However, Judge Rippey denied the miner's claim on its merits, finding that claimant again failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). Regarding the survivor's claim, Judge Rippey found that claimant failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c); consequently, benefits were denied in the survivor's claim as well.

Claimant appealed Judge Rippey's denial of benefits in both claims. In *Strouth v. C & D Coal Company*, BRB No. 96-0848 BLA (May 27, 1997)(unpub.), the Board affirmed Judge Rippey's denial of benefits in the miner's claim, affirming Judge Rippey's finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(c). However, the Board vacated Judge Rippey's denial of benefits in the survivor's claim and remanded for further consideration, holding that Judge Rippey did not consider all the relevant evidence of record in reaching his conclusion that claimant failed to established death due to pneumoconiosis pursuant to Section 718.205(c). On remand, the case was transferred to Administrative Law Judge Daniel F. Sutton (hereinafter, the administrative law judge), who determined that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c) by crediting the medical opinion of Dr. Kleinerman, that the miner's death was not caused or hastened by pneumoconiosis, over the contrary medical opinions of record. Employer's Exhibit 1. Thus, survivor's benefits were denied. On appeal, claimant

asserts that the administrative law judge erred in crediting the opinion of Dr. Kleinerman in reaching his determination under Section 718.205(c). Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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 survivor's claim filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. Pneumoconiosis is considered a substantially contributing cause of a miner's death if it actually hastened the miner's death. *See Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); *Neeley v. Director, OWCP,* 11 BLR 1-85 (1988); 20 C.F.R. §718.205(c).

In this case, the administrative law judge concluded that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c) by relying upon the opinion of Dr. Kleinerman, who opined that, although the miner suffered with simple coal workers' pneumoconiosis, it played no part in his death. Employer's Exhibit 1 at 38. Dr. Kleinerman found that the miner's death was due to infection, stasis, old age and Alzheimer's disease, and that all of the causes of death were unrelated to the miner's inhalation of coal dust. Employer's Exhibit 1 at 38.

Claimant contends that the administrative law judge erred in relying upon the opinion of Dr. Kleinerman because his opinion is hostile to the Act. Claimant points to the deposition testimony of Dr. Kleinerman which indicates that the physician does not believe that the legal definition of pneumoconiosis found at Section 718.201 is a good medical definition of the disease.[1] In connection with her

[1]At Dr. Kleinerman's deposition, the physician was read the definition of pneumoconiosis under the Act at Section 718.201, and was questioned if he agreed that it was a good definition of coal worker's pneumoconiosis. Dr. Kleinerman responded "No sir, I do not agree that it is a good and definite or acceptable definition of coalworkers (sic) pneumoconiosis. I do accept it as the reading of the law. However, I have to tell you that this law was written in 1969 or prior to that time. I don't think that it has been revised since that time. The new criteria of the pathologist were written in 1979, and I think that the law simply is suffering from a lack of being brought up to date in modern medical technology." Employer's Exhibit 1 at 54 - 55. Earlier, Dr. Kleinerman had testified that the term

contention, claimant relies on the language in *Thorn v. Itman Coal Co.*, 3 F. 3d 713, 18 BLR 2-16 (4th Cir. 1993), which states:

> It is perfectly reasonable to discredit an expert's conclusion with regard to whether a condition defined by statute and regulation does or does not exist when that expert bases his conclusion on a premise fundamentally at odds with the statutory and regulatory scheme.

See Thorn, 3 F.3d at 719, 18 BLR at 2-24.

Contrary to claimant's contention, Dr. Kleinerman did not provide an opinion which was based on a premise fundamentally at odds with the statutory and regulatory scheme of the Act. Although Dr. Kleinerman indicated his belief that the legal definition of pneumoconiosis is not in accord with the current accepted medical definition of the disease, he agreed that the definition found at Section 718.201 was the legal standard, and that his opinion did not exclude the legal definition of pneumoconiosis. Employer's Exhibit 1 at 55. Moreover, the premise offered by Dr. Kleinerman, *i.e.* that the legal definition of pneumoconiosis at Section 718.201 is not identical to the medical definition, has been embraced by the courts, which have held that the determination of the existence of legal pneumoconiosis is a factual finding to be made by the administrative law judge, and not by a physician, who provides a medical opinion based on medical terminology. *See generally Barber v. U.S. Steel Mining Co., Inc.,* 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995)(pneumoconiosis is a legal term defined by the Act, while physicians understand pneumoconiosis as a medical term); *Nance v. Benefits Review Board,* 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988)(the legal definition of pneumoconiosis is broader than the medical definition of coal workers' pneumoconiosis; the determination of whether the legal definition has been satisfied is a matter of fact). Thus, since Dr. Kleinerman's premise that the legal definition of pneumoconiosis is not a good medical definition is not at odds with the statutory and regulatory scheme, and since the physician did not opine that simple pneumoconiosis is never disabling or otherwise rely on medical assumptions which are contrary to the Act, we reject claimant's contention. *See Searls v. Southern Ohio Coal Co.,* 11 BLR 1-161 (1988).

Claimant further contends that Dr. Kleinerman's testimony regarding his disagreement with the legal definition of pneumoconiosis at Section 718.201 renders

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"anthracosilicosis", which is included in the definition of pneumoconiosis at Section 718.201, is an antiquated term. Employer's Exhibit 1 at 51.

his opinion legally insufficient to be probative at Section 718.205(c) because he did not consider the legal definition of pneumoconiosis in rendering his opinion that pneumoconiosis played no part in the miner's death. Thus, claimant argues, the administrative law judge irrationally credited Dr. Kleinerman's opinion over the contrary opinions of Drs. Tholpady and Westerfield, who found that the miner's simple coal workers' pneumoconiosis contributed to his demise. Director's Exhibits 27, 50; Claimant's Exhibit 1. Claimant's contention is unsupported by the record. Dr. Kleinerman specifically testified that he accepted that the definition of pneumoconiosis at Section 718.201 was the legal definition of the disease, and that his opinion that the miner's death was unrelated to pneumoconiosis did not exclude the legal definition of pneumoconiosis found at Section 718.201. Employer's Exhibit 1 at 55. Consequently, we reject claimant's contention in this regard. *See generally Shuff, supra.*

Claimant also contends that the administrative law judge erred in weighing the medical opinions pursuant to Section 718.205(c), because he failed to distinguish the testimony of the examining and non-examining physicians, and failed to provide a valid rationale for crediting Dr. Kleinerman's opinion. Claimant further asserts that Dr. Kleinerman's opinion should have been given diminished weight because he was not provided with the autopsy prosector's final anatomic diagnosis. Claimant's arguments are without merit. Although Dr. Kleinerman did not indicate that he was provided with the autopsy prosector's final diagnosis, the administrative law judge was not bound to find the opinion incredible on this basis. The administrative law judge provided a valid rationale for his weighing of medical opinions relevant at Section 718.205(c) as he rationally credited Dr. Kleinerman's opinion as best reasoned and documented. *See Clark v. Karst Robbins Coal Co.,* 12 BLR 1-149 (1989)(en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge's finding is supported by the record, since Dr. Kleinerman demonstrated familiarity with the miner's condition by considering voluminous medical opinions, x-ray readings, and autopsy slides regarding the miner's condition prior to rendering his opinion, Director's Exhibit 31, and provided a thorough explanation for his finding that the miner's Alzheimer's disease ultimately caused his demise, by causing an inability to cleanse his upper airways, which led to the development of bronchopneumonia, which includes aspiration and stasis. Employer's Exhibit 1 at 32. Furthermore, the administrative law judge was not bound to disregard the opinion of Dr. Kleinerman because he was not an examining physician. An administrative law judge may, within his discretion, credit the opinion of a non-examining physician where he has provided a valid reason for doing so. *See Wetzel v. Director, OWCP,* 8 BLR 1-146 (1985); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1984). In fact, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has recently held in *Sterling Smokeless Coal Company v. Akers*, 131 F.3d

438, 21 BLR 2-269 (4th Cir. 1998), and *Milburn Colliery Company v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), that an administrative law judge may not mechanically credit the opinions of examining and treating physicians to the exclusion of other competent medical opinions solely because the doctor personally examined the miner. *See Hicks*, 138 F.3d at 533, 21 BLR at 335. Consequently, we reject claimant's allegation of error in this regard. Inasmuch as claimant has failed to identify reversible error regarding the administrative law judge's finding that death was not due to pneumoconiosis pursuant to Section 718.205(c), we affirm the administrative law judge's denial of survivor's benefits under 20 C.F.R. Part 718 as rational and supported by substantial evidence.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge