

BRB No. 04-0932 BLA

ROSE F. DORKO)
(Widow of JOHN DORKO))
)
Claimant-Petitioner)
) DATE ISSUED: 06/21/2005
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2004-BLA-5628) of Administrative Law Judge Janice K. Bullard 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). Based on a concession by the Director,

¹ Claimant is the widow of the miner, John Dorko, who died on March 17, 2003. Director's Exhibit 7. Claimant filed her application for benefits on March 29, 2003. Director's Exhibit 3.

Office of Workers' Compensation Programs (the Director), the administrative law judge credited claimant with five years of coal mine employment, Decision and Order at 2, and adjudicated this survivor's claim pursuant to 20 C.F.R. Part 718. As the miner was receiving benefits at the time of his death based on a claim filed on June 13, 1983,² the Director did not contest the issue of the existence of pneumoconiosis arising out of coal mine employment, but controverted only the issue of the cause of the miner's death. Hearing Transcript at 6-7. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record 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 in this survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding the medical evidence of record insufficient to establish that the miner's death was due to pneumoconiosis. Claimant also contends that the administrative law judge erred in failing to accord determinative weight to the medical opinion of Dr. Chakrabarty, the miner's treating physician. In response, the Director urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.³

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

In order to establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis.⁴ 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10

² The miner was awarded benefits by Administrative Law Judge Robert D. Kaplan in a Decision and Order issued on January 14, 1988. Director's Exhibit 1.

³ The parties do not challenge the administrative law judge's decision to credit claimant with five years of coal mine employment, or that the existence of pneumoconiosis arising out of coal mine employment has been established. These findings are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The administrative law judge found that this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's most recent coal mine employment was in Pennsylvania. Director's Exhibit 1; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

BLR 2-220 (3d Cir. 1987); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). In survivors' claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if it was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if 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)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastened 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).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge properly set forth all of the medical evidence of record regarding the cause of the miner's death, including the death certificate signed by the miner's treating physician, Dr. Chakrabarty, which lists the immediate cause of the miner's death as acute myocardial infarction with pulmonary edema. The death certificate also lists acute renal failure as an "other significant conditions contributing to [the miner's] death, but not resulting in the underlying cause" of death. Decision and Order at 3; Director's Exhibit 7. In addition, the administrative law judge considered the medical opinions of Drs. Chakrabarty, Simelaro, and Sherman, as well as treatment notes and summaries from the miner's hospitalizations, finding that this evidence does not support a determination that the miner's death was due to pneumoconiosis. Decision and Order at 3-7, 10; Director's Exhibits 7, 9, 27; Claimant's Exhibits 1, 2; 20 C.F.R. §718.205(c); see *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

In challenging the denial of survivor's benefits, claimant contends that the administrative law judge erred in finding that pneumoconiosis was not a substantially contributing cause of the miner's death pursuant to Section 718.205(c). Specifically, claimant contends that the administrative law judge erred in failing to accord determinative weight to the opinion of Dr. Chakrabarty, the miner's treating physician. Claimant's Brief at 7-8. In addition, claimant contends that Dr. Chakrabarty's opinion is well reasoned and documented as it was supported by the additional medical notes and hospital records contained in the formal record. Claimant's Brief at 9. Claimant further contends that the administrative law judge erred in crediting the medical opinion of Dr. Sherman, that the miner's pneumoconiosis was not a contributing factor in his death, over the opinions of Drs. Chakrabarty and Simelaro. Claimant's Brief at 8-10. These contentions lack merit and are essentially a request to reweigh the evidence, which is beyond the Board's scope of review. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989)

The question of whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge. 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); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). While the United States Court of Appeals for the Third Circuit has held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician, *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); 20 C.F.R. §718.104(d), the court has also indicated that automatic preferences are disfavored. See *Mancia*, 130 F.3d 579, 21 BLR 2-114; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Thus, the opinions of treating and examining physicians should not be presumed to be correct, entitled to the greatest weight or considered to have the most probative value. The administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to the examining physicians' opinions, when warranted. See 20 C.F.R. §718.104(d); *Mancia*, 130 F.3d 579, 21 BLR 2-114; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Clark*, 12 BLR 1-149; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Herein, the administrative law judge acknowledged that Dr. Chakrabarty treated the miner for the six months prior to his death in March, 2003. Decision and Order at 8; Hearing Transcript at 12-13. However, the administrative law judge reasonably exercised her discretion as fact-finder in determining that this period of treatment did not make the physician's opinion inherently superior and therefore entitled to greater weight. Decision and Order at 8; 20 C.F.R. §718.104(d). Rather, the administrative law judge found that despite Dr. Chakrabarty's status as the miner's treating physician, his July, 2003 letter regarding the cause of the miner's death could not be given controlling weight because it was conclusory and lacked detail and analysis. Decision and Order at 8; Claimant's Exhibit 1; *Mancia*, 130 F.3d 579, 21 BLR 20114; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Clark*, 12 BLR 1-149. The administrative law judge determined that this opinion was not sufficiently documented or reasoned, that the physician's regular treatment notes were not in the record, and that she did not "adequately explain the conflict with the objective findings that she documented at the time of the miner's death." Decision and Order at 8; Director's Exhibit 9; Claimant's Exhibit 1; see *Lango*, 104 F.3d 573, 21 BLR 2-12; *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Clark*, 12 BLR 1-149; see generally *Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991). As the administrative law judge's determinations regarding Dr. Chakrabarty's opinion are not inherently unreasonable and are supported by the evidence of record, we affirm her finding that this opinion is insufficient to support claimant's burden under Section 718.205(c).

Similarly, we affirm the administrative law judge's finding that the medical opinion of Dr. Simelaro is insufficient to establish that the miner's death was due to

pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c). Acknowledging Dr. Simelaro's impressive professional qualifications, as well as the evidence he reviewed, the administrative law judge nonetheless found Dr. Simelaro's opinion entitled to little weight, because his opinion was overly conclusory and failed to take into consideration all of the evidence involving the miner's medical history and treatment. Decision and Order at 8-9. In particular, the administrative law judge found that the records from the miner's lifetime that Dr. Simelaro reviewed did not shed any light on the cause of the miner's death, but supported only the conclusion that the miner had suffered from pneumoconiosis, which had been proven in the prior adjudication. Decision and Order at 8. The administrative law judge found that the physician failed to adequately explain how the evidence establishing the presence of pneumoconiosis combined with the evidence that suggested that the miner suffered from lung failure before his death established that the miner's lung disease hastened his death. Decision and Order at 8-9. Thus, within a reasonable exercise of her discretion as fact-finder, the administrative law judge determined that Dr. Simelaro's opinion was unpersuasive, conclusory and inadequately addressed the relevant evidence. Decision and Order at 9; *see Lango*, 104 F.3d 573, 21 BLR 2-12; *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Clark*, 12 BLR 1-149.

The mere presence of pneumoconiosis is insufficient to establish entitlement to benefits in a survivor's claim; claimant has the burden of establishing that the miner's death was due to, or hastened by, pneumoconiosis. 20 C.F.R. §718.205(c). As the administrative law judge, within a reasonable exercise of her discretion as trier-of-fact, found that the only evidence supportive of claimant's burden was not credible, we affirm her finding that claimant failed to prove that pneumoconiosis caused or hastened the miner's death pursuant to Section 718.205(c).⁵ 20 C.F.R. §718.205(c); *see Lukosevicz*, 888 F.2d 1001, 13 BLR 2-100; *Neeley*, 11 BLR 1-85; *see also Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

⁵ In light of the affirmance of the administrative law judge's finding that the opinions of Drs. Chakrabarty and Simelaro, the only evidence supportive of claimant's burden, were insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death, we need not address claimant's further contentions regarding the contrary evidence of record because any error in the administrative law judge's consideration of those opinions would be harmless. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge