

BRB No. 07-0813 BLA

M. A.)
(Widow of A. A.))
)
Claimant-Petitioner)
)
v.)
)
WELLMORE COAL CORPORATION) DATE ISSUED: 06/20/2008
)
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 Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification Denying Benefits (06-BLA-5142) of Administrative Law Judge Jeffrey Tureck (the administrative law judge) on a survivor's claim¹ filed pursuant to the provisions of Title IV of the Federal Coal

¹ Claimant is the surviving spouse of the miner, who died on February 17, 2001. Director's Exhibit 11. Claimant filed her application for survivor's benefits on June 4, 2001. Director's Exhibit 5.

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). In the initial Decision and Order in this case, Administrative Law Judge Edward Terhune Miller, adjudicating the claim pursuant to 20 C.F.R. Part 718, found that the evidence of record established that the miner² worked in qualifying coal mine employment for twenty-eight years. Next, Judge Miller found that claimant failed to establish both the existence of pneumoconiosis³ by a preponderance of the evidence and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(c). Accordingly, benefits were denied. Director's Exhibit 51.

Claimant, without the assistance of counsel, appealed the denial of benefits and the Board affirmed, as unchallenged, Judge Miller's determination that the miner worked in qualifying coal mine employment for twenty-eight years. With respect to the issue of death due to pneumoconiosis, the Board affirmed Judge Miller's determination that the opinions of Drs. Castle and Naeye were entitled to determinative weight on the cause of the miner's death. The Board, therefore, affirmed Judge Miller's findings that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) and that claimant's entitlement to benefits was precluded. *[M.A.] v. Wellmore Coal Corp.*, BRB No. 03-0858 BLA (July 29, 2004) (unpub.); Director's Exhibit 58. Claimant requested reconsideration and the Board denied claimant's request. *[M.A.] v. Wellmore Coal Corp.*, BRB No. 03-0858 BLA (Oct. 4, 2004) (unpub. Order); Director's Exhibit 62.

Subsequently, claimant filed a petition for modification on March 4, 2005 and both claimant and employer submitted additional medical evidence. Adjudicating claimant's request for modification pursuant to 20 C.F.R. §725.310, the administrative law judge found that employer no longer contested the issue of pneumoconiosis;

² The miner filed two applications for benefits on June 30, 1973 and February 7, 2001. Director's Exhibits 1, 2. The procedural posture of both claims, which were each adjudicated and finally denied, is set forth in the Board's most recent Decision and Order dated July 29, 2004 that was rendered in this survivor's claim. *[M. A.] v. Wellmore Coal Corp.*, BRB No. 03-0858 BLA, *slip op.* at 1-2 n.1 (July 29, 2004) (unpub.); Director's Exhibit 58.

³ Administrative Law Judge Edward Terhune Miller also found that, because claimant established that the miner worked in qualifying coal mine employment for at least twenty-eight years, claimant was entitled to invocation of the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Notwithstanding this determination, however, Judge Miller found that because claimant failed to establish the existence of pneumoconiosis, the issue of causality under Section 718.203(b) was moot. Director's Exhibit 51.

therefore, claimant demonstrated a mistake in a determination of fact in the prior denial. Because claimant established a basis for modification, the administrative law judge reviewed all the evidence of record and determined that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c)(2). Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.⁴

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

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if 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 Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).⁵

⁴ We affirm the administrative law judge's findings that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and therefore, that a mistake in a determination of fact was established pursuant to 20 C.F.R. §725.310 since these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order on Modification at 3.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

Challenging the administrative law judge's weighing of the conflicting medical opinions of record at Section 718.205(c)(2), claimant argues that the administrative law judge erred in discrediting the opinions of Drs. Briggs and Perper and erred in assigning greater weight to the contrary opinion of Dr. Crouch. Relying on *Manning Coal Corp. v. Wright*, No. 05-4637 (6th Cir. July 20, 2007) (unpub.), for the proposition that a medical report need only be "sufficiently reasoned ...not perfection" in order to be credible, and that it is within the administrative law judge's discretion to "draw reasonable inferences from the evidence before him," claimant avers that the death certificate and Dr. Briggs's report, dated May 15, 2002, constituted sufficient probative evidence upon which the administrative law judge could infer that the miner's death was hastened by pneumoconiosis. Brief for Claimant at 10. Claimant further argues that the opinion of Dr. Briggs was entitled to great weight because Dr. Briggs treated the miner and, therefore, was familiar with the miner's history and the nature of his disease over a period of time.

In assessing the credibility of the medical opinion evidence pursuant to Section 718.205(c)(2), the administrative law judge permissibly found that while Dr. Briggs completed the death certificate listing coal workers' pneumoconiosis as an underlying cause of the miner's demise, the death certificate, in and of itself, was insufficient to establish death due to pneumoconiosis since it lacked any explanation.⁶ See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order on Modification at 4; Director's Exhibit 11. Likewise, the administrative law judge cited several factors that detracted from the probative value of Dr. Briggs's opinion, contained in his May 15, 2002 narrative report. Dr. Briggs opined that because coal workers' pneumoconiosis complicated the treatment of the miner's liver carcinoma, it contributed to the miner's demise. Director's Exhibit 23. The administrative law judge determined that Dr. Briggs's opinion, that the miner's "severe" coal workers' pneumoconiosis precluded the development of a "much more detailed and comprehensive plan of treatment" for his liver cancer, was undermined not only because Dr. Briggs failed to "explain what could have been done differently to prolong the miner's life it [sic] he did not have pneumoconiosis," but also because the record demonstrated that the miner's pneumoconiosis was mild. Decision and Order on Modification at 4; Director's Exhibit 23. The administrative law judge also accorded less weight to the opinion of Dr. Briggs, the miner's treating physician, because, even though Dr. Briggs diagnosed chronic obstructive pulmonary disease, he had not diagnosed pneumoconiosis during the miner's lifetime and his report was silent as to the change in his diagnosis subsequent to the

⁶ The death certificate listed the immediate cause of the miner's death as hepatocellular carcinoma. Listed as other significant conditions contributing to death were hepatic disease and coal workers' pneumoconiosis. Director's Exhibit 11.

miner's death. *See Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20 (3d Cir. 1997) ("the administrative law judge may permissibly require the treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to miner's death."); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 188, 22 BLR 2-564, 2-571-572 (4th Cir. 2002); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We, therefore, affirm the administrative law judge's determination that Dr. Briggs's opinion was not entitled to preferential weight because the doctor's conclusion lacked a sufficient rationale. 20 C.F.R. §§718.104(d)(5), 718.205(c)(2); *Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order on Modification at 4.

Claimant argues that the administrative law judge erred in failing to credit the opinion of Dr. Perper because Dr. Perper, in a thirty-five page narrative report, provided a well-reasoned and thorough opinion containing a comprehensive review and analysis of the miner's treatment records, death certificate, autopsy slides, and additional pertinent records. Claimant further avers that Dr. Perper's opinion is entitled to great weight due to his comprehensive discussion of the supportive underlying research and studies. Citing to *Helton v. P & R Coal, Inc.*, 05-0374 BLA (Jan. 5, 2006) (unpub.), claimant argues that the administrative law judge may rationally give greater weight to the opinion of a pathologist/physician based on his superior expertise, *i.e.*, greater pathological expertise and extensive Board certifications, over the reports of other pathologists or physicians with less extensive expertise and fewer Board certifications. Thus, claimant contends that in *Helton*, the Board endorsed the adoption of Dr. Perper's report based on Dr. Perper's superior pathological expertise compared to the other pathologists of record, and his extensive and descriptive report detailing his opinion that coal workers' pneumoconiosis hastened the death of Mr. Helton.

In his May 9, 2005 report, Dr. Perper⁷ opined that his pulmonary pathological findings revealed "significant and substantial coal workers' pneumoconiosis" that was a substantial cause of the miner's death and a hastening factor in his demise and thereafter, listed several grounds substantiating his diagnosis of coal workers' pneumoconiosis based on the occupational, smoking, and clinical documentation he reviewed. However, a review of the record reveals that this report contains no discussion explaining his conclusion that pneumoconiosis contributed to the miner's death. Director's Exhibit 71. The administrative law judge acknowledged that Dr. Perper conducted a thorough review of the miner's medical records consisting of "hundreds of pages of the decedent's

⁷ The administrative law judge noted that Dr. Perper was Board-certified in anatomic surgical and forensic pathology and taught epidemiology at the University of Pittsburgh Graduate School of Public Health and pathology and psychiatry at the University of Pittsburgh Medical School. Decision and Order on Modification at 3.

medical records including reports by Drs. Castle, Naeye, Briggs and Lapis” as well as the fifteen autopsy slides and the autopsy prosector’s report. Decision and Order on Modification at 4; Director’s Exhibit 71. After noting that Dr. Perper listed several pulmonary afflictions from which the miner suffered, namely, coal workers’ pneumoconiosis and associated centrilobular emphysema caused by pneumoconiosis and smoking, the administrative law judge reasonably found that Dr. Perper’s opinion possessed “no probative value” because his opinion was devoid of a reasoned explanation that coal workers’ pneumoconiosis *actually* contributed to the miner’s death, as opposed to listing ways in which it *could have* contributed to death. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-262 (physician’s failure to offer some reasoning for his opinion renders his bald conclusion insufficient to support a finding of death due to pneumoconiosis); *Clark*, 12 BLR at 1-155; Decision and Order on Modification at 4. Because the administrative law judge’s finding that Dr. Perper’s opinion was deficient as it lacked an adequate rationale or explanation is rational and supported by substantial evidence, we reject claimant’s contention. Further, contrary to claimant’s initial suggestion, *Helton* is not binding precedent in the case at bar since it is an unpublished decision and its conclusions of law are based on the specific credibility determinations rendered in that case.⁸

Lastly, claimant challenges the administrative law judge’s weighing of the opinion of Dr. Crouch, who opined that the miner’s simple coal workers’ pneumoconiosis was too mild to have caused, contributed to, or otherwise hastened the miner’s demise. Claimant contends that the administrative law judge erred in relying on the opinion of Dr. Crouch because, during her deposition, Dr. Crouch admitted that only one percent of her practice was devoted to cases involving coal miners. Claimant also contends that Dr. Crouch failed to adequately discuss her opinion that neither pneumoconiosis nor emphysema, due in part to coal dust exposure, hastened the miner’s death.

While claimant is correct that, during her deposition, Dr. Crouch testified that typically only a small percentage of her practice is dedicated to reviewing cases of coal miners, the administrative law judge permissibly found her opinion worthy of great weight as she was Board-certified in anatomic pathology, was a Professor of Pathology and Immunology at the School of Medicine at Washington University since 1983, and specialized in the research and clinical teaching of pulmonary pathology. *See Milburn*

⁸ In any case, we note that the administrative law judge’s findings in this case are not necessarily inconsistent with the Board’s holding in *Helton v. P & R Coal, Inc.*, 05-0374 BLA (Jan. 5, 2006) (unpub.), as the administrative law judge considered the physicians’ credentials, *i.e.*, the pathological experience and Board certifications of both Drs. Perper and Crouch, and permissibly gave greater weight, in part, to Dr. Crouch’s opinion because she, unlike Dr. Perper, specializes in pulmonary pathology. Decision and Order on Modification at 5.

Colliery Co. v. Hicks, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Employer's Exhibit 5.⁹ The administrative law judge was persuaded by Dr. Crouch's opinion that the miner's lungs contained some depositions of coal dust associated with emphysema, but that his pneumoconiosis was very mild, would have resulted in little impairment of his lung function, and would not have contributed to his death. Employer's Exhibit 3. Hence, the administrative law judge, within a rational exercise of his discretion, credited Dr. Crouch's opinion, contained in both her December 19, 2005 and April 20, 2006 reports, because her opinion, that all of the miner's abnormalities were attributable to either mild pneumoconiosis or emphysema but did not significantly contribute to the miner's death, was better reasoned and sufficiently explained. See *Trumbo*, 17 BLR at 1-88-89; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Modification at 6; Employer's Exhibit 3. Because the administrative law judge's determination that claimant failed to establish that pneumoconiosis substantially contributed to the miner's death is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's Section 718.205(c)(2) determination.

Based on the forgoing, we affirm the administrative law judge's determination that claimant failed to satisfy her burden of establishing that pneumoconiosis contributed to the miner's death pursuant to Section 718.205(c). See 20 C.F.R. §718.205(c); *Shuff*, 967 F.2d at 980, 16 BLR at 2-93; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Claimant's entitlement to benefits is, therefore, precluded.

⁹ The transcript of Dr. Crouch's deposition, taken on May 4, 2006, was labeled as Claimant's Exhibit 5. However, the administrative law judge incorrectly referred to this transcript as Employer's Exhibit 5. Decision and Order on Modification at 5.

Accordingly, the Decision and Order on Modification Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge