BRB No. 06-0750 BLA

SANDRA K. STIDHAM (Widow of JAMES STIDHAM)	)	
Claimant-Petitioner	)	
v.	)	
LEBO MINING COMPANY	)	DATE ISSUED: 03/26/2007
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Monica T. Monday (Gentry, Locke, Rakes & Moore, LLP), Roanoke, Virginia, for employer.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (05-BLA-5779 and 05-BLA-5780) of Administrative Law Judge Thomas M. Burke denying benefits on a miner's claim and a survivor's claim 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 administrative law judge found that the parties stipulated to thirty-four years of qualifying coal mine employment. Decision and Order at 3; Miner's Director's Exhibit 27; Survivor's Director's Exhibit 29. Based on the date of filing, the administrative law judge considered entitlement in both the miner's and the survivor's claims pursuant to 20

C.F.R. Part 718.[1] Decision and Order at 4. Considering all the relevant evidence, the administrative law judge concluded that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 5-17. Accordingly, benefits were denied on both claims.

On appeal, claimant contends that the administrative law judge should have found the existence of pneumoconiosis and death due to pneumoconiosis established based on Dr. Perper's opinion, 20 C.F.R. §§718.202(a)(4), 718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[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 supported by substantial evidence, are rational, and are consistent with 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to prove any of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed on or after January 1, 1982, claimant must establish

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[1] Claimant is the miner's widow. The miner filed a claim for benefits on April 30, 2002, which was finally denied by the district director on May 5, 2003, as the miner failed to prove any element of entitlement. Miner's Director's Exhibits 2, 14. Claimant, on the miner's behalf, subsequently requested a hearing before the Office of Administrative Law Judges. Miner's Director's Exhibit 25. The miner died on December 7, 2003. Survivor's Director's Exhibit 9. Claimant filed a survivor's claim on April 9, 2004. Survivor's Director's Exhibit 2. The claims have been consolidated.

[2] As the administrative law judge's finding of thirty-four years of coal mine employment and his finding that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3) are unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).[3]

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Contrary to claimant's contention, the administrative law judge was not required to apply the "true doubt" rule in assessing the evidence and determining whether claimant was entitled to benefits.[4] *See* Claimant's Brief at 5. The United States Supreme Court has held that the application of the true doubt rule violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), as it relieves claimants of their burden of proof in establishing entitlement to benefits. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Accordingly, contrary to claimant's contention, the administrative law judge did not apply an improper standard in considering whether claimant established entitlement to benefits. The submission of a medical report that satisfies all elements of entitlement does not automatically entitle claimant to an award of benefits. Rather, the administrative law judge must determine the credibility of the evidence of record and the weight to be accorded the evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *see also Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12.

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[3] The record indicates that the miner was last employed in the coal mine industry in Virginia. Decision and Order at 4; Miner's Director's Exhibits 3, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] "True doubt" was said to arise only when equally probative but contradictory evidence was presented in the record, where selection of one set of facts would have resolved the case against the claimant, but selection of the contradictory set of facts would have resolved the case for claimant. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Provance v. United States Steel Corp.*, 1 BLR 1-483 (1978).

In finding that the existence of pneumoconiosis was not established at Section 718.202(a)(4), the administrative law judge noted that Dr. Perper concluded that the miner suffered from simple coal workers' pneumoconiosis, as well as lung cancer, centrilobular emphysema, and chronic obstructive pulmonary disease as a result of the miner's exposure to coal dust,[5] while Drs. Forehand, Dahhan, and Naeye concluded that the miner did not suffer from any coal dust induced respiratory or pulmonary disease.

The administrative law judge accorded less weight to Dr. Perper's opinion because he found that while Dr. Perper's testing and medical data supported a finding of lung cancer and chronic obstructive pulmonary disease and the miner's treatment records occasionally referred to "emphysema," there was no medical data, testing, or treating physician's report diagnosing the presence of "centrilobular emphysema." Thus, the administrative law judge properly found, contrary to claimant's contention, that Dr. Perper's diagnosis of "centilobular emphysema" was not well-documented. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-533 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985)(it is within the discretion of the administrative law judge to determine whether a physician's conclusions are adequately supported by their underlying documentation); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984)(a physician's opinion may be accorded less weight where the basis for the opinion cannot be determined).

Likewise, contrary to claimant's contention, the administrative law judge properly found that Dr. Perper failed to provide a well-reasoned opinion demonstrating the causal nexus between the miner's lung cancer and coal mine employment. The administrative law judge noted that while Dr. Perper cited to numerous publications and to the comments underlying the revised regulations, as support for a causal nexus, Dr. Perper appeared to base his opinion of a causal nexus on his presumption that the miner suffered from simple coal workers' pneumoconiosis and significant silica exposure and that Dr. Naeye refuted Dr. Perper's assumptions. *Hicks*, 138 F.3d at 532-533 n.9, 21 BLR at 2-335 n.9; *see Clark*, 12 BLR at 1-155 (administrative law judge may reject an opinion where he finds that the doctor failed to adequately explain his diagnosis); *Lucostic*, 8 BLR at 1-47; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985) (a medical opinion

[5] The administrative law judge also noted that Drs. Smiddy, Miller, and Barongan diagnosed the presence of pneumoconiosis and/or chronic obstructive lung disease in addition to lung cancer. The administrative law judge found, however, that these physicians did not offer any reasoning for their findings on the etiology of these conditions and did not consider them further. Claimant has not challenged the administrative law judge's treatment of these physicians. *See* Decision and Order at 15-17. The administrative law judge's finding on these opinions is, therefore, affirmed. *Skrack*, 6 BLR at 1-711.

based on generalities, rather than focusing on the miner's specific condition, may be accorded less weight).

Finally, contrary to claimant's assertion, the administrative law judge properly found that Dr. Perper did not adequately explain the basis of his diagnosis of coal workers' pneumoconiosis, which was based, in part, on positive x-ray and CT scan evidence, since the preponderance of x-ray and CT scan evidence in this case did not support a finding of coal workers' pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Clark*, 12 BLR at 1-155.

Instead, the administrative law judge properly found that Dr. Naeye's opinion, which was supported by the opinions of Drs. Forehand and Dahhan, were the most well-reasoned and well-documented as Dr. Naeye had conducted the most thorough review of the miner's medical data and the data supported Dr. Naeye's finding. *See Hicks*, 138 F.3d at 522-533 n.9, 21 BLR at -335 n.9; *Lucostic*, 8 BLR at 1-47; *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984)(greater weight may be accorded an opinion that is supported by more extensive documentation over the opinions supported by limited medical data). Accordingly, the administrative law judge properly concluded that the medical opinion evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4). Further, the administrative law judge properly found that, on weighing all the relevant evidence together, pursuant to *Compton*, 211 F.3d at 209, 22 BLR at 2-172, the preponderance of the evidence did not establish the existence of pneumoconiosis. Further, as claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement in both the miner's and the survivor's claims, entitlement is precluded on both claims. *Trumbo*, 17 BLR at 1-88; *Trent*, 11 BLR at 1-27.

Moreover, we note that, other than asserting that Dr. Perper's opinion was sufficient to establish the existence of pneumoconiosis, *see* Claimant's Brief at 6-11, claimant failed to identify any other errors made by the administrative law judge in his evaluation of the medical opinion evidence and applicable law pursuant to Part 718. Those findings are, therefore, affirmed. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *see also Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order denying benefits on the miner's and the survivor's claims is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge