

BRB No. 07-0638 BLA

I.G.)
(Widow of O.G.))
)
Claimant-Respondent)
)
v.)
)
HARMAN MINING CORPORATION) DATE ISSUED: 03/26/2008
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order -- Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order -- Awarding Benefits (06-BLA-5276) of Administrative Law Judge Joseph E. Kane on a survivor's claim¹ 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge initially credited the miner with forty years of qualifying coal mine employment. The administrative law judge determined that employer was collaterally estopped² from relitigating the issues of the existence of pneumoconiosis and whether the miner's pneumoconiosis arose out of coal mine employment in this survivor's claim, 20 C.F.R. §§718.202(a), 718.203(b), as those issues had been found established in the miner's claim.³ Next, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded, commencing as of May 2003.

On appeal, employer argues that the administrative law judge erred in relying on the death certificate, signed by Dr. Gibson, and Dr. Gibson's treatment records to find that claimant established that the miner's death was due to pneumoconiosis at Section 718.205(c). Employer also contends that the administrative law judge erred in applying the doctrine of collateral estoppel to bar the relitigation of the issues of pneumoconiosis and whether it arose out of coal mine employment in this survivor's claim pursuant to Sections 718.202(a) and 718.203(b). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating his intention not to participate in this appeal.

¹ Claimant is the surviving spouse of the miner, who died on May 13, 2003. Director's Exhibit 10. Claimant filed her survivor's claim for benefits on December 30, 2003. Director's Exhibit 2.

² Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have actually been determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (*en banc*), citing *Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994); see *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); see also *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006).

³ Although pneumoconiosis arising out of coal mine employment was found in the miner's previous claims, the claims were denied because the miner failed to establish that he was totally disabled. See 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b).

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,⁴ 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 20 C.F.R. §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).

Employer argues that the administrative law judge erred in relying on Dr. Gibson's treatment notes as support for her notation on the death certificate that coal workers' pneumoconiosis significantly contributed to the miner's death. Employer contends that the administrative law judge erred in relying on these treatment notes because there is nothing in them to support Dr. Gibson's finding on the death certificate.⁵

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

⁵ In support of this contention, employer asserts that the record does not support the administrative law judge's determination that Dr. Gibson treated the miner immediately preceding his demise because the treatment records signed by Dr. Gibson only chronicle six visits made by the miner ending in January 2003. Employer notes that while the record demonstrates that Dr. Gibson diagnosed pneumoconiosis during the miner's first visit, the physician did not provide any explanation for this diagnosis. Further, the administrative law judge notes that on subsequent visits, the doctor reported that the miner's lungs were clear. Employer also contends that Dr. Gibson's treatment notes reflect treatment for Alzheimer's disease and "feeling poorly." Brief in Support of Employer's Petition for Review at 9. Additionally, employer contends that the record contains nurses' tracking sheets between May 4 and May 13, 2003, which noted wheezing and rales, but did not mention pneumoconiosis or the source of the miner's wheezing and rales. Director's Exhibit 11 at 15-21. Further, employer notes that these

In addressing the relevant evidence under Section 718.205(c), the administrative law judge found that the only evidence of record that actually addressed the cause of the miner's death was the death certificate, signed by Dr. Gibson.⁶ Noting that the death certificate, in and of itself, was insufficient to establish death due to pneumoconiosis, the administrative law judge considered whether Dr. Gibson's treatment notes were supportive of the physician's notations on the death certificate. The administrative law judge concluded that since the treatment records indicated that Dr. Gibson treated the miner for severe shortness of breath, decreased breath sounds, wheezing, chronic obstructive pulmonary disease and pneumoconiosis, they supported Dr. Gibson's notations on the death certificate that pneumoconiosis was a significant condition contributing to the miner's death. The administrative law judge concluded, therefore, that the death certificate, together with the treatment records, established death due to pneumoconiosis at Section 718.205(c). The administrative law judge noted that even though he accorded less weight to Dr. Gibson's opinion because the treatment records did not "fully state what [the doctor] relied upon to formulate her conclusions," because there was no other evidence discussing the cause of the miner's death, death due to pneumoconiosis was established. Decision and Order at 9.

Because the administrative law judge discounted the treatment records of Dr. Gibson as unreasoned, found that the death certificate alone did not constitute a reasoned opinion, and found that there was no other evidence of record addressing the cause of the miner's death, claimant cannot satisfy her burden of establishing death due to pneumoconiosis pursuant to Section 718.205(c) and entitlement to benefits in this case. *See Shuff*, 967 F.2d at 980, 16 BLR at 2-93; *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-262 (4th Cir. 2000); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *see also Dillon v. Peabody Coal Co.*, 11 BLR 1-113

nurses' tracking notes were not signed by Dr. Gibson. Employer also avers that the nurses' tracking sheets from April 29 to May 13, 2003 did not contain any opinion from Dr. Gibson, any explanation from Dr. Gibson as to the source of the miner's problems, or any reason for his hospitalization. Director's Exhibit 11 at 22-31. Additionally, employer argues that Dr. Gibson was not attending the miner at the time of his death. Director's Exhibit 11 at 41.

⁶ The death certificate listed the immediate causes of the miner's death as "ASVD" and "CVA," which represent arteriosclerotic vessel disease and cardiovascular accident respectively. Other significant conditions contributing to death listed were chronic obstructive pulmonary disease, hypertension, and coal workers' pneumoconiosis. Director's Exhibit 10.

(1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). We must, therefore, reverse the administrative law judge's finding of death due to pneumoconiosis and the award of benefits.⁷

Accordingly, the Decision and Order -- Awarding Benefits of the administrative law judge is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁷ Our reversal of the administrative law judge's determination under 20 C.F.R. §718.205(c) obviates the need to address employer's argument that the administrative law judge erred in applying the doctrine of collateral estoppel to preclude employer from relitigating the issues of pneumoconiosis and whether it arose out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b). See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).