BRB No. 08-0481 BLA

T.M. (Widow of E.M.) Claimant-Respondent v. PEABODY COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/26/2009 DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, 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 Award of Benefits (2006-BLA-05647) of Administrative Law Judge Daniel F. Solomon rendered on a survivor's claim filed on April 18, 2005, 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).[1] Accepting employer's stipulation that the miner had at least thirty-six years of coal mine employment, the administrative law judge found that legal pneumoconiosis was

[1] The miner died on December 2, 2000. Claimant's Exhibit 1 at 4; Decision and Order at 13.

established at 20 C.F.R. §718.202(a)(4),[2] and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding legal pneumoconiosis established at Section 718.202(a)(4) and in finding that the miner's death was due to pneumoconiosis at Section 718.205(c). Claimant responds in support of the award of benefits. Employer has filed a reply brief. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[3] 33 U.S.C. §921(b)(3), as incorporated 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 on a survivor's claim, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis.[4] 20 C.F.R. §§718.1, 718.202, 718.203, 718.205; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In a survivor's claim filed on or after January 1, 1982, death due to pneumoconiosis may be established by showing that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 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); *see also Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

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[2] The administrative law judge found that the existence of clinical pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1), (2) and (4), and that claimant was not entitled to any of the presumptions at 20 C.F.R. §718.202(a)(3), based on the evidence before him.

[3] We will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 2; Director's Exhibit 3 at 3; Hearing Transcript at 7.

[4] A finding that pneumoconiosis arose out of coal mine employment is subsumed in a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201.

At the outset, we affirm the administrative law judge's finding of legal pneumoconiosis. The administrative law judge properly found that Dr. Prunty was the miner's treating physician and that he found that the miner had legal pneumoconiosis, *i.e.*, a chronic obstructive lung disease aggravated by coal dust.[5] In crediting Dr. Prunty's opinion, the administrative law judge noted that he provided a well-reasoned and well-documented opinion, and that he had treated the miner for respiratory or pulmonary conditions from 1989 until the miner's death on December 2, 2000. The administrative law judge also noted that the length of Dr. Prunty's treatment of the miner, as well as the numerous tests and examinations he conducted, gave him a superior understanding of the miner's respiratory condition. *See* 20 C.F.R. §718.104(d)(1)-(5). Additionally, the administrative law judge noted that even though Dr. Prunty was a "family physician," his opinion diagnosing legal pneumoconiosis was entitled to greater weight, than the opinions of Dr. Caffrey, a Board-certified Pathologist, and Dr. Repsher, a Board-certified Pulmonologist, because they did not evaluate the record for the existence of legal pneumoconiosis.[6] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *Jericol Mining, Inc., v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). For the purposes of the regulations, a disease "arising out of coal mine employment" means a disease that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(b).

[6] We reject employer's argument that the fact that the miner was diagnosed with emphysema and coal worker's pneumoconiosis prior to the start of his treatment with Dr. Prunty, diminishes Dr. Prunty's opinion as a "treating physician." The administrative law judge noted that Dr. Prunty testified that the miner had already been diagnosed with emphysema due to coal mine employment when he first saw the miner, noting his review of the miner's medical records. Decision and Order at 5, 10. However, the administrative law judge noted that Dr. Prunty testified that he treated the miner from 1989 until his death in 2000, for pulmonary problems, eventually referring him to Dr. O'Bryan, a pulmonary specialist, for further evaluation, including a bronchoscopy. Further, the administrative law judge noted that Dr. Prunty explained that his treatment of the miner included "multiple pulmonary function tests over time," indicating a worsening of his breathing capacity from 1990 to 1999. Decision and Order at 8; Claimant's Exhibit 1 at 6-8. Accordingly, contrary to employer's argument, the administrative law judge permissibly found that Dr. Prunty's opinion was based on his own treatment of the miner, and not merely his acceptance of a previously made diagnosis of respiratory disease. 20 C.F.R. §718.104(d)(1)-(5); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, the administrative law judge properly found that Dr. Prunty diagnosed legal pneumoconiosis, as defined by the Act, as Dr. Prunty testified "that [the miner's] pneumoconiosis is based upon him having a chronic obstructive lung disease aggravated by coal dust."[7] *See* Claimant's Exhibit 1 at 24, 29-30; Decision and Order at 9; 20 C.F.R. §§718.201, 718.202(a)(4); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6. Accordingly, we affirm the administrative law judge's finding that the existence of legal pneumoconiosis was established at Section 718.202(a)(4).

Nonetheless, we agree with employer that the administrative law judge's award of benefits must be reversed because the opinions of Drs. Prunty and O'Bryan do not meet the standard for establishing that death was "hastened" by pneumoconiosis in accordance with Sixth Circuit law. Consequently, they cannot, as a matter of law, carry claimant's burden of establishing death due to pneumoconiosis at Section 718.205(c). In *Williams*, the Sixth Circuit held that pneumoconiosis only hastens death if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Williams*, 338 F.3d at 509, 22 BLR at 2-655. However, in finding that the miner's death was hastened by pneumoconiosis, the administrative law judge did not address the standard set forth in *Williams*.

Dr. Prunty opined that the miner's legal pneumoconiosis, *i.e.*, emphysema due to coal mine employment, made the miner's "breathing abilities, inhaling an[d] exhaling

[7] The administrative law judge noted that a review of Dr. Prunty's testimony indicates that while he agreed generally that emphysema "is commonly associated with long-term cigarette smoking," he did not affirm that the miner's emphysema "could have been due entirely to cigarette smoking," as employer asserts. Petition for Review at 10; Claimant's Exhibit 1 at 20. Nor, contrary to employer's contention, does Dr. Prunty's acknowledgement of the difficulty of apportioning the effects of coal mining and smoking upon the miner's pulmonary condition disqualify his opinion on the existence of legal pneumoconiosis, as a medical opinion need not quantify with specificity the impact that coal dust exposure had on a miner's condition. 20 C.F.R. §718.201(a)(2). Accordingly, the administrative law judge permissibly found that Dr. Prunty's observation that a degree of apportionment "would be tough for anyone to answer" did not render his opinion unacceptably equivocal, but instead constituted an acknowledgment that the effects of smoking versus coal dust exposure cannot necessarily be medically differentiated. Claimant's Exhibit 1 at 26; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 483-484 (6th Cir. 2007); s*ee generally Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-546 (4th Cir. 2006).

and functioning, oxygenating his blood stream, more difficult," Claimant's Exhibit 1 at 17-18, thereby hastening his death. Dr. Prunty further stated that patients with significant pulmonary diseases do not recover from infections, pneumonias, or bronchitis because of the disease: "basically [significant pulmonary disease] just hastens their death because they're unable to adequately oxygenate their blood, and they eventually just chronically decline in function." Decision and Order at 12; Claimant's Exhibit 1 at 26-27, 30. Similarly, Dr. O'Bryan's testimony that the miner's coal workers' pneumoconiosis played a role in his death because "his lungs were not functioning normally" due to the coal workers' pneumoconiosis, Claimant's Exhibit 2, is not sufficient to carry claimant's burden of showing that pneumoconiosis hastened the miner's death pursuant to *Williams*.[8] Consequently, claimant's evidence is not, as a matter of law, sufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[8] Drs. Caffrey and Repsher did not address the cause of the miner's death. Employer's Exhibits 1, 2.