BRB No. 08-0541 BLA

A.D. (Widow of J.D.) Claimant-Petitioner v. SNAP CREEK COAL COMPANY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/11/2009 DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

George L. Partain (Partain Law Office), Logan, West Virginia, for claimant.

Douglas A. Smoot and Seth P. Hayes (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (06-BLA-5089) of Administrative Law Judge Richard A. Morgan denying benefits on a 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). This case involves a survivor's claim filed on May 28, 2004.[2] After crediting the miner with "at least twenty-nine years" of coal mine employment,[3] Decision and Order at 3, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant also argues that the administrative law judge erred in denying her motion to compel discovery of information regarding the compensation of employer's medical experts. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

---

[1] Claimant is the surviving spouse of the deceased miner who died on June 21, 2003. Director's Exhibit 9.

[2] The miner filed a claim with the Social Security Administration (SSA) on May 21, 1973. Director's Exhibit 1. The SSA denied benefits on October 4, 1973. *Id.* The Department of Labor denied benefits on August 9, 1979. *Id.* There is no indication that the miner took any further action in regard to his 1973 claim.

[3] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 4. 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] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Benefits are payable on survivors' claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 CF.R §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis[5] pursuant to 20 C.F.R. §718.202(a)(4).[6] The administrative law judge considered the medical opinions of Drs. Sells, Bellam, Gosien, Renn, and Fino.

In his consideration of the conflicting evidence, the administrative law judge found that the opinions of Drs. Sells, Bellam, and Gosien, that the miner's chronic obstructive pulmonary disease was due to his coal mine employment, were not well-reasoned. Decision and Order at 18-20. The administrative law judge accorded less weight to Dr. Fino's opinion because he found that it was equivocal regarding whether the miner's chronic obstructive pulmonary disease was due to his coal mine employment. *Id.* at 20 n.32. The administrative law judge accorded the greatest weight to Dr. Renn's opinion, that the miner's obstructive lung disease did not arise out of his coal mine employment, because he found that Dr. Renn's opinion was well-reasoned and was based upon an extensive review of the medical evidence. *Id.* at 20. The administrative law judge also credited Dr. Renn's opinion over the contrary opinions of Drs. Sells, Bellam, and Gosien based upon Dr. Renn's superior qualifications. *Id.* Consequently, the administrative law judge found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant argues that the administrative law judge erred in not according greater weight to Dr. Sells' opinion based upon his status as the miner's treating physician. We disagree. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-

[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).

[6] Because no party challenges the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), this finding is affirmed. *Skrack*, 6 BLR at 1-711.

323, 2-340 (4th Cir. 1998). In this case, the administrative law judge found that Dr. Sells did not offer any explanation for his opinion that the miner's chronic obstructive pulmonary disease arose out of his coal mine employment.[7] Decision and Order at 19. Substantial evidence supports this finding. The administrative law judge, therefore, permissibly determined that Dr. Sells' opinion was not sufficiently reasoned. *Id.*; *see 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 (1985).

We also reject claimant's contention that the administrative law judge erred in his consideration of the opinions of Drs. Bellam and Gosien. The administrative law judge found that the opinions of Drs. Bellam and Gosien, like that of Dr. Sells, were not sufficiently reasoned.[8] Decision and Order at 19. This finding is supported by substantial evidence. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and

---

[7] Although Dr. Sells, in an affidavit dated October 19, 2007, opined that the miner suffered from a chronic pulmonary disease that was due to his coal mine employment, he did not provide any explanation for this opinion. Claimant's Exhibit 2.

The administrative law judge noted that Dr. Sells stated that it is impossible to tell the degree to which coal dust might contribute to chronic obstructive pulmonary disease in an individual who has smoked. Decision and Order at 19-20. Claimant accurately notes that a doctor is not required to apportion the amount of a miner's lung disease that is attributable to coal mine employment and the amount that is attributable to smoking. However, in this case, the administrative law judge provided a proper basis for according less weight to Dr. Sells' opinion, *i.e.*, Dr. Sells did not provide an explanation for why he attributed the miner's chronic pulmonary disease to his coal mine employment. *See* 20 C.F.R. §718.104(d)(5); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998).

[8] In a Questionnaire dated September 24, 2004, Dr. Bellam opined that the miner's chronic obstructive pulmonary disease was the result of a progression of his coal workers' pneumoconiosis. Director's Exhibit 15. During a November 15, 2006 deposition, Dr. Bellam opined that it was "possible" that the miner's chronic obstructive pulmonary disease was caused by his coal dust exposure. Employer's Exhibit 11 at 18. Dr. Bellam, however, provided no basis for these opinions.

Dr. Gosien treated the miner in the emergency room at Logan General Hospital on the day of his death, June 21, 2003. In an affidavit dated July 13, 2007, Dr. Gosien diagnosed "chronic obstructive pulmonary disease resulting from coal workers' pneumoconiosis." Claimant's Exhibit 1. Dr. Gosien did not provide any explanation for this opinion.

Order at 19; Director's Exhibit 15; Employer's Exhibit 11. Additionally, the administrative law judge permissibly accorded less weight to Dr. Bellam's opinion because the doctor did not have an accurate understanding of the miner's coal mine employment and smoking histories.[9] *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984) (holding that an administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate or incomplete picture of the miner's health); Decision and Order at 19.

Claimant also argues that the administrative law judge erred in his consideration of Dr. Renn's opinion. We disagree. In a report dated April 16, 2007, Dr. Renn diagnosed bullous pulmonary emphysema due to tobacco smoking. Employer's Exhibit 12. During a November 1, 2007 deposition, Dr. Renn explained that the miner suffered from bullous emphysema, a type of emphysema that does not occur in response to coal dust exposure. Employer's Exhibit 14 at 21. The administrative law judge permissibly determined that Dr. Renn's opinion regarding the cause of his emphysema was well-reasoned. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR 1-47. The administrative law judge also permissibly credited Dr. Renn's opinion, that claimant did not suffer from legal pneumoconiosis, over the contrary opinions of Drs. Sells, Bellam, and Gosien, based upon Dr. Renn's superior qualifications.[10] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 20 n.33; Employer's Exhibits 12, 14.

The administrative law judge also considered Dr. Fino's opinion. During a November 15, 2007 deposition, Dr. Fino opined that the miner's emphysema was due to smoking. Employer's Exhibit 15 at 9. However, Dr. Fino stated that he could not "rule

---

[9] During his November 15, 2006 deposition, Dr. Bellam indicated that he did not know how long the miner worked in the coal mines. Employer's Exhibit 11 at 13. Dr. Bellam also indicated that he was not aware of the miner's smoking history. *Id.* at 12. The administrative law judge noted that claimant stated that the miner smoked less than a pack of cigarettes per day for thirty years. Decision and Order at 4; Employer's Exhibit 10.

[10] Dr. Renn is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 13. The qualifications of Drs. Sells and Gosien are not found in the record. Dr. Bellam is Board-certified in Emergency Medicine. Employer's Exhibit 11 at 5. Dr. Bellam acknowledged that he would defer to a pulmonary doctor to assess whether a patient suffers from a lung disease caused by his coal dust exposure. Employer's Exhibit 11 at 19.

out coal mine dust as contributing somewhat to the emphysema." *Id.* at 10. The administrative law judge permissibly accorded less weight to Dr. Fino's opinion because he found that it was "unclear regarding the cause of [the miner's] emphysema." Decision and Order at 20 n.32; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Finally, the administrative law judge, within his discretion, determined that the finding by the West Virginia Occupational Pneumoconiosis Board, that the miner suffered from occupational pneumoconiosis, while relevant and entitled to some weight, was not binding. *See* 20 C.F.R. §718.206; *Schegan v. Waste Management & Processors, Inc.*, 18 BLR 1-41, 1-46 (1994); *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744, 1-748 n.5 (1985); Decision and Order at 21; Claimant's Exhibit 11. The administrative law judge permissibly found that the West Virginia Occupational Pneumoconiosis Board's finding was outweighed by the other medical evidence of record. *Id.*

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits in this survivor's claim under 20 C.F.R. Part 718. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Trumbo*, 17 BLR at 1-87-88.

Lastly, claimant contends that the administrative law judge erred in denying her motion to compel employer to produce W-9 forms reflecting the amounts that it paid Drs. Renn and Fino in 2004, 2005, and 2006. Claimant's contention has no merit. In his January 29, 2008 Order Denying Claimant's Motion to Compel Discovery (Order Denying Motion), the administrative law judge accurately noted that employer provided claimant with information regarding the amount of compensation that it paid Drs. Renn and Fino in 2004, 2005, and 2006.[11] Order Denying Motion at 5.

[11] In its response to claimant's interrogatories, employer indicated that it had not paid any amount of money to Dr. Renn in 2004, 2005, and 2006. Although Employer indicated that it paid Dr. Fino $1,452.00 for his work in the current claim, employer indicated that Dr. Fino had not performed any other work for employer in 2004, 2005, and 2006. *See* Employer's December 3, 2007 Response to Claimant's Third Set of Interrogatories.

Claimant also argues that the administrative law judge erred in denying her motion to compel Elkay Mining Company (Elkay) to disclose the amount of money that it paid Drs. Renn and Fino in 2004, 2005, and 2006. Because the administrative law judge properly found that Elkay is not a party in this case,[12] we hold that the administrative law judge properly denied claimant's motion to compel Elkay to respond to claimant's interrogatories. *See* 29 C.F.R. §18.18(a) ("Any party may serve upon any other *party* written interrogatories . . . ." (emphasis added)); *see also* 20 C.F.R. §725.360 (identifying the parties to the claim proceedings).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[12] The district director specifically determined that Elkay Mining Company was not the responsible operator. Director's Exhibit 17. Instead, the district director identified Snap Creek Coal Company as the responsible operator. Director's Exhibit 20. The identity of the responsible operator is not a contested issue in this case. Director's Exhibit 34.