

BRB No. 08-0543 BLA

A.K.)
(Widow of C.K.))
)
Claimant-Petitioner)
)
v.)
)
KANAWHA COAL COMPANY) DATE ISSUED: 03/26/2009
)
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

David L. Yaussy (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (07-BLA-5735) 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 July 20, 2006.

¹ Claimant is the surviving spouse of the deceased miner, who died on June 15, 2006. Director's Exhibit 9.

After crediting the miner with “at least” thirty-three years of coal mine employment,² the administrative law judge noted that the parties stipulated that the miner suffered from clinical pneumoconiosis. Decision and Order at 3, 10 n.15. The administrative law judge also found that claimant was entitled to the presumption that the miner’s pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). However, the administrative law judge found that the evidence did not establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). 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.

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).

Because this survivor’s claim was filed after January 1, 1982, claimant must establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).³ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

² The record reflects that the miner’s coal mine employment was in West Virginia. Hearing Transcript at 12. 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*).

³ Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner’s death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner’s death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence

OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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).

In considering whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge found that the opinions of Drs. Labus and Kahn, that the miner's pneumoconiosis contributed to his death, were not sufficiently reasoned. Decision and Order at 12. The administrative law judge, therefore, found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁴ *Id.*

Claimant argues that the administrative law judge erred in his consideration of Drs. Labus's opinion. Dr. Labus completed the miner's death certificate. Dr. Labus attributed the miner's death to chronic obstructive pulmonary disease (COPD) due to tobacco smoking. Director's Exhibit 9. However, in the section requesting a listing of "[o]ther significant conditions contributing to death but not resulting in the immediate cause," Dr. Labus listed "coal workers' pneumoconiosis." *Id.*

During a January 17, 2007 deposition, Dr. Labus testified that, at the time that he signed the miner's death certificate, he had never seen or treated the miner, but had reviewed the miner's office chart prepared by his colleagues. Director's Exhibit 11 at 7. Dr. Labus explained his basis for listing coal workers' pneumoconiosis on the miner's death certificate:

[I]t was the diagnosis I saw when he was admitted to the hospital at least one time and followed up here at the office. In general, you know, even though [the miner] may have . . . severe COPD, something such as coal

establishes that pneumoconiosis was a substantially contributing cause of death.

(5) 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).

⁴ The administrative law judge also found that Dr. Zaldivar's opinion, that the miner's death was not due to his pneumoconiosis, was not sufficiently reasoned. Decision and Order at 11-12.

workers' pneumoconiosis would certainly contribute to his breathing problems and would . . . contribute to shortening his life.

Director's Exhibit 11 at 11.

Dr. Labus, however, acknowledged that he did not have any medical tests upon which to base his opinion that the miner's coal workers' pneumoconiosis contributed to his breathing problems. *Id.* During his deposition, the following exchange further clarified Dr. Labus's basis for listing coal workers' pneumoconiosis as a contributing cause on the miner's death certificate:

Employer's Counsel: Could you tell me what part of the record you're referring to that led you to believe [coal workers' pneumoconiosis] contributed to death?

Dr. Labus: There was a diagnosis sheet from a hospitalization from December of 1999 to January 3rd of 2000 that lists it as a diagnosis there; then on his first visit here. Certainly, whoever - - Dr. Swain had him in the hospital at that time - must have felt that it had some significance on his hospitalization for his breathing at that time. So, I felt it would be significant enough to contribute, have some contribution, to his death.

Employer's Counsel: Is there anything else that you relied on?

Dr. Labus: No, there's not.

Employer's Counsel: So, what you relied upon was the fact that it was mentioned when [the miner] was admitted to the hospital seven years before he died - - six and a half years before he died?

Dr. Labus: That's correct.

Employer's Counsel: Doctor, at the time of that 1999 hospital admission, it was not even cited as the primary cause of his impairment, even then; was it?

Dr. Labus: No, it was not.

Employer's Counsel: It was just identified as another condition that [the miner] had?

Dr. Labus: Yes.

Employer's Counsel: There were no subsequent tests that were run on [the miner], to your knowledge, that would have allowed you or any other physician to quantify any further progression of his pneumoconiosis or its contribution to death, correct?

Dr. Labus: That is correct.

Director's Exhibit 11 at 15-16.

In his consideration of Dr. Labus's opinion, the administrative law judge found that the doctor "failed to explain how the underlying medical documentation and data support[ed] his conclusion that the miner's death was contributed to by [coal workers' pneumoconiosis], and . . . failed to set forth adequate facts upon which he based his determination." Decision and Order at 12. Substantial evidence supports this finding. The administrative law judge, therefore, permissibly determined that Dr. Labus's opinion regarding the cause of the miner's death, as expressed on both the miner's death certificate and during the doctor's deposition, was not sufficiently reasoned. *Id.*; see *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); *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).

Claimant also contends that the administrative law judge erred in his consideration of Dr. Kahn's opinion. Dr. Kahn provided the following basis for finding that the miner's coal workers' pneumoconiosis contributed to his death:

Every disease process that is present in the lung has an effect. [Coal workers' pneumoconiosis] coexisted with the effects of COPD and congestive heart failure as [the miner's] treating physicians knew. With multiple diseases present, the pathophysiologic effects of each disease process are synergistic with the effects of the others. That is, the combined effects are not just additive; but rather are multiplicative. Each process makes the effects of the others more ominous. The only reasonable conclusion I can make is that [the miner's] coal workers' pneumoconiosis did indeed contribute to his pulmonary disability and to his death.

Claimant's Exhibit 1.

The administrative law judge explained why he found that Dr. Kahn's opinion regarding the cause of the miner's death was not sufficiently reasoned:

Dr. Kahn has generally stated that in an individual with multiple disease processes, all of the disease processes will have an effect; all of the

processes will affect the lungs and the other present diseases. However, Dr. Kahn has failed to specifically explain both how he determined that the miner's three disease processes were affecting each other and how the disease processes were actually affecting each other in the miner's case. Moreover, he has failed to explain, with any amount of detail, how the miner's [coal workers' pneumoconiosis] contributed to the miner's death or how the miner's [coal workers' pneumoconiosis] interacted with or caused the medical implications arising from the miner's COPD and congestive heart failure [so] as to contribute to the miner's death. Dr. Kahn has failed to explain how the underlying medical documentation and data support his conclusion that the miner's death was contributed to by [coal workers' pneumoconiosis], and he has failed to set forth the facts on which he reached his determination.

Decision and Order at 12.

The administrative law judge permissibly found that Dr. Kahn's opinion, that the miner's coal workers' pneumoconiosis contributed to his death, was inadequately explained and, therefore, was not sufficiently reasoned.⁵ *Id.*; see *Sparks*, 213 F.3d at 192, 22 BLR at 2-263; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

Dr. Zaldivar, the only other physician of record to address the cause of the miner's death, opined that the miner's death was not due to his pneumoconiosis. Employer's Exhibit 1.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We, therefore, affirm the denial of benefits.

⁵ Because the administrative law judge provided a proper basis for discrediting the opinions of Drs. Labus and Kahn, *i.e.*, that their opinions were not sufficiently reasoned, the administrative law judge's error, if any, in discrediting their opinions for other reasons, constitutes harmless error. See *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We, therefore, need not address claimant's remaining arguments regarding the weight accorded to the opinions of Drs. Labus and Kahn.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge