

BRB No. 08-0585 BLA

D. R.)
(Widow of C. R.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 03/16/2009
)
Mountaineer Coal Development d/b/a)
Marrowbone Development Company)
)
and)
)
Safeco Insurance Company of America)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

Henry C. Bowen (Steptoe & Johnson PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order-Denying Benefits (04-BLA-6840) of Administrative Law Judge Richard A. Morgan rendered on a survivor's 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).² The administrative law judge credited the miner with at least ten years of coal mine employment.³ Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found assuming *arguendo* that the evidence had established the existence of pneumoconiosis, 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 erred in his analysis of the medical opinion evidence in determining that claimant did not establish the existence of pneumoconiosis or death due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4),⁴ 718.205(c). Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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. 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant is the widow of the deceased miner, who died on June 14, 2000. Director's Exhibit 10.

² Claimant filed her claim for survivor's benefits on November 14, 2003. Director's Exhibit 1. The district director awarded benefits in a Proposed Decision and Order issued on July 15, 2004. Director's Exhibit 29. Employer requested a formal hearing before the Office of Administrative Law Judges, which was held on July 20, 2007. Director's Exhibit 30.

³ The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. 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, 1-202 (1989)(*en banc*).

⁴ We affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), as it is unchallenged on appeal. *Skrack v. Island Creek Coal, Co.*, 7 BLR 1-710 (1983).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor’s benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his 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, 1-87-88 (1993). For survivors’ claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(2), (4). 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, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Tweel, Zaldivar, and Castle, the miner’s treatment records, and the miner’s death certificate. Dr. Tweel, who is Board-certified in Internal Medicine and Pulmonary Disease and who treated the miner, diagnosed the miner with alpha 1 antitrypsin deficiency⁵ with advanced emphysema and chronic obstructive pulmonary disease, and “[k]nown coal worker’s pneumoconiosis and welder’s exposure which may have significantly contributed to the [miner’s] advanced end stage chronic lung disease.” Director’s Exhibit 11. The miner’s death certificate, signed by Dr. Tweel on August 21, 2000, listed the immediate cause of death as respiratory failure due to alpha 1 antitrypsin deficiency with emphysema. Director’s Exhibit 10. Dr. Tweel listed a ruptured hernia as a significant condition contributing to death; no other causes or conditions were listed. *Id.* Subsequently, in a December 18, 2006 report, Dr. Tweel opined that, although the miner had a mild alpha 1 antitrypsin deficiency, he also had coal workers’ pneumoconiosis that “contributed significantly to his end-stage chronic lung disease . . . along with his smoking.” Claimant’s Exhibit 1 at 2. Dr. Tweel explained that, although he lacked some of his earlier treatment records or any treatment records at the time of the miner’s death, he believed that, “per my vague memory of [the miner’s] history,” the miner’s coal mine employment significantly contributed to his disease process. Claimant’s Exhibit 1 at 1.

Drs. Castle and Zaldivar, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and concluded that the

⁵ As summarized by the administrative law judge and described by the physicians of record, alpha 1 antitrypsin deficiency is a hereditary disorder that causes emphysema and chronic obstructive pulmonary disease. Decision and Order at 5-11.

miner did not have either clinical or legal pneumoconiosis,⁶ but suffered from a severe chronic respiratory impairment due to alpha 1 antitrypsin deficiency, a condition unrelated to coal mine employment. Director's Exhibits 16, 18.

The administrative law judge noted that Drs. Tweel, Zaldivar, and Castle were all pulmonary specialists and he considered that Dr. Tweel had been the miner's treating physician "for many years." Decision and Order at 12. The administrative law judge determined that despite Dr. Tweel's treating physician status, the opinions of Drs. Zaldivar and Castle were better reasoned and documented. *Id.* Specifically, the administrative law judge found that Dr. Tweel did not document the basis for his diagnosis of coal workers' pneumoconiosis. Further, the administrative law judge found Dr. Tweel's notation in the treatment records, that coal workers' pneumoconiosis may have contributed to the miner's impairment, to be equivocal. The administrative law judge noted further that Dr. Tweel did not mention pneumoconiosis on the miner's death certificate, but six years later, based on a "vague memory" of the miner's history, diagnosed him with pneumoconiosis. Decision and Order at 13. Based on these factors, the administrative law judge found that "Dr. Tweel's overall analysis [was] ambiguous, equivocal, and somewhat conflicting." *Id.* By contrast, the administrative law judge found that Drs. Castle and Zaldivar provided "lengthy" and "detailed" reports explaining that the miner suffered from advanced emphysema due to alpha 1 antitrypsin deficiency. *Id.* Finding the reports of Drs. Castle and Zaldivar to be more consistent with the medical evidence of record and the miner's coal mine employment history, the administrative law judge concluded that the medical opinion evidence did not establish the existence of pneumoconiosis.

Claimant contends that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Tweel, the miner's treating physician. Claimant's Brief at 8-9. We disagree.

An administrative law judge need not accord greater weight to the opinion of a treating physician. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 188, 22 BLR 2-564, 2-571 (4th Cir. 2002). Although an administrative law judge may find that the quality of the treatment relationship between the miner and a treating physician enhances the probative value of the treating physician's opinion, *see* 20 C.F.R. §718.104(d)(1)-(4), the regulations require that the weight accorded to the treating physician's opinion "shall

⁶ A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "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).

also 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).

In this case, the administrative law judge permissibly found that Dr. Tweel's opinion was not as well-documented or well-reasoned as were the contrary opinions of Drs. Castle and Zaldivar. See 20 C.F.R. §718.104(d)(5); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *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 acted within his discretion when he found Dr. Tweel's statement that coal workers' pneumoconiosis may have contributed to the miner's lung disease to be equivocal. See *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Substantial evidence supports the administrative law judge's credibility determination, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we reject claimant's allegation of error, and affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4).

Substantial evidence supports the administrative law judge's additional finding that all of the relevant evidence weighed together did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). See *Island Creek Coal Co. v. Compton v.* 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The finding is therefore affirmed. Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits. See *Trumbo*, 17 BLR at 1-85.

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

REGINA C. McGRANERY
Administrative Appeals Judge