

BRB No. 11-0411 BLA

MARGARET SHISH)
(Widow of PAUL SHISH))
)
Claimant-Respondent)
)
v.)
)
CONSOLIDATED COAL COMPANY) DATE ISSUED: 03/05/2012
)
Employer-Petitioner)
)
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2010-BLA-05085) of Administrative Law Judge Michael P. Lesniak rendered on a survivor’s claim filed on November 20, 2008,¹ pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Initially, the administrative law judge accepted the parties’ stipulation to at least thirty-one years of

¹ Claimant filed her survivor’s claim after the miner’s death on October 2, 2008. The miner’s lifetime claim was denied. *See* Director’s Exhibit 40.

underground coal mine employment.² Decision and Order at 2; Hearing Transcript at 13. The administrative law judge also accepted the parties' stipulation to the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Next, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).³ The administrative law judge, accordingly, awarded benefits.

On appeal, employer contends that the administrative law judge erred in weighing the medical evidence and in finding that it established death causation pursuant to Section 718.205(c). In her response brief, claimant contends that the administrative law judge properly found death causation established. The Director, Office of Workers' Compensation Programs, is not participating in this 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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30

² The administrative law judge also stated that the parties stipulated to twenty-three years of coal mine employment and that at least fifteen of those years were in underground coal mine employment. Decision and Order at 8. Neither party, however, has challenged the discrepancy in the administrative law judge's findings concerning the length of the miner's coal mine employment and it does not affect the outcome of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

³ The administrative law judge also found that claimant did not establish invocation of the Sections 411(c)(3) or 411(c)(4) presumptions that the miner's death was due to pneumoconiosis under the Act. 30 U.S.C. §§921(c)(3) and 921(c)(4).

Because we affirm the administrative law judge's award of benefits in this case, we need not address the parties' arguments concerning the Section 411(c)(3) presumption. *See Larioni*, 6 BLR at 1-1278.

The administrative law judge's finding that the miner was not totally disabled pursuant to Section 718.204(b), which was unchallenged by the parties on appeal, precludes invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ Because the miner was employed in coal mining employment in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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. §§718.202(a), 718.203, 718.205(c); *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. 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In evaluating the medical evidence relevant to death causation pursuant to Section 718.205(c), the administrative law judge found that “Drs. Nichols, Bush and Oesterling all stated that they were incapable of determining a cause of death based on an autopsy that was limited to the lungs.”⁵ Decision and Order at 10. The administrative law judge specifically rejected the opinion of Dr. Bush, that the miner’s silicotic disease of the lungs was not extensive enough to cause his death, because Dr. Bush failed to provide any reasoning for his conclusion, and because the other pathologists described the miner’s coal workers’ pneumoconiosis as “moderately severe” to “severe” and “significant enough to diagnose it as progressive massive fibrosis.” *Id.* The administrative law judge rejected Dr. Oesterling’s opinion, that the miner’s coal workers’ pneumoconiosis was not sufficient to have been a factor in the miner’s death, as “equivocal and not probative,” because Dr. Oesterling also stated that he could not totally exclude coal workers’ pneumoconiosis as contributing to the miner’s death. *Id.* Instead, the administrative law judge relied on the opinion of Dr. Friedlander, who was a treating physician, and who stated that “the miner’s poor lung function contributed to his inability to be considered an operative candidate for his severe aortic valve disease.”⁶ *Id.* Specifically, the administrative law judge noted that, as “one of the miner’s treating

⁵ Dr. Nichols, the autopsy prosector, diagnosed coal workers’ pneumoconiosis, emphysema, multi-focal pulmonary calcification and ossification of the lungs. He also found black nodules measuring 1.3 centimeters in diameter diffusely distributed in the parenchyma. Director’s Exhibit 17.

⁶ The miner’s death certificate listed aortic stenosis as the immediate cause of death, with congestive heart failure, chronic renal failure and nodular interstitial lung disease listed as significant contributing causes of death. Director’s Exhibit 17.

[physicians] in the last year of his life, [Dr. Friedlander was] in the unique position of being privy to the miner's operative candidacy." *Id.* The administrative law judge, therefore, found that her opinion on death causation was particularly persuasive, and concluded:

Overall, I find that Dr. Friedlander is the only [physician] who provided a well-reasoned and probative opinion that [coal workers' pneumoconiosis] contributed to the miner's death based on her reasoning.

Id. The administrative law judge, therefore, found, after his considering of all the relevant medical evidence, that death causation was established pursuant to Section 718.205(c).

Employer first asserts that the administrative law judge erred in finding that the opinions of Drs. Bush and Oesterling, on death causation, were not well-reasoned. Although both doctors discussed how the miner's aortic valve disease was the primary cause of his death, the administrative law judge properly concluded that the opinion of Dr. Oesterling, who found both that coal workers' pneumoconiosis did not cause death and that he could not totally exclude coal workers' pneumoconiosis as a cause of death, was too equivocal to be persuasive. *See* 20 C.F.R. §718.205(c); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Regarding the opinion of Dr. Bush, the administrative law judge rationally concluded that it was unpersuasive because Dr. Bush's finding that the miner's "silicotic lung disease" was not extensive enough to cause death was contradicted by other evidence in the record showing that the miner's coal workers' pneumoconiosis was "moderate" to "severely moderate." *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Employer's argument is, therefore, rejected.

Employer next asserts that Dr. Friedlander's rationale, namely, that the miner's poor lung condition adversely affected his "operative candidacy" for aortic valve surgery, was *per se* inconsistent with the finding that the evidence failed to establish that the miner had a lifetime total respiratory disability. Contrary to employer's assertion, the absence of a finding of lifetime respiratory disability in the miner, and the fact that the sole pulmonary function study of record was non-qualifying, do not, in and of themselves, render the administrative law judge's reliance on Dr. Friedlander's opinion, regarding the cause of the miner's death irrational, as the doctor, who was a treating physician, explained how the miner's pneumoconiosis contributed to his death.⁷ *See*

⁷ Further, the fact that the reports of other pathologists stated that the miner had "moderately severe" to "severe" coal workers' pneumoconiosis would support the administrative law judge's reliance on Dr. Friedlander's death causation opinion. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985).

Mancia v. Director, OWCP, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997). This argument is, consequently, rejected.

Employer additionally asserts that the administrative law judge erred in relying on Dr. Friedlander's opinion because there is no evidence that Dr. Friedlander was aware of the miner's "autopsy or its findings." Employer's Brief at 13. Contrary to employer's contention, however, the administrative law judge acted within his discretion in crediting Dr. Friedlander's opinion, based on his treatment and awareness of the miner's respiratory condition. See 20 C.F.R. §718.104(d); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1985). Accordingly, employer's argument is rejected.

Employer also asserts that the administrative law judge erred in crediting Dr. Friedlander's opinion because Dr. Friedlander failed to explain how the fact that the miner's pneumoconiosis, which made him a non-candidate for surgery to treat his severe aortic valve disease, in turn, contributed to his death. Employer, citing decisions from the United States Court of Appeals for the Sixth Circuit in *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 24 BLR 2-257 (6th Cir. 2010), and *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), argues that Dr. Friedlander's opinion is insufficient to establish death causation because a physician must explicitly address how pneumoconiosis expedited death through a specifically defined process. Those cases, however, are not controlling in this case, which arises within the jurisdiction of the United States Court of Appeals for the Third Circuit.

The Third Circuit has held that claimant may show that pneumoconiosis is a "substantially contributing cause" of a miner's death by showing that it "hastens" the miner's death. See *Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-106. In this case, the administrative law judge permissibly found that the opinion of Dr. Friedlander satisfied the "hastening" standard set forth in *Lukosevicz*, 888 F.2d at 1006, 13 BLR at 106. Further, the administrative law judge acted properly in giving Dr. Friedlander's opinion "additional deference," as a "treating physician." 20 C.F.R. §718.104(d); *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004) (Roth, J., dissenting). Consequently, we reject employer's argument. Based on his evaluation of the relevant medical evidence, we affirm the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge