

BRB No. 02-0738 BLA

MYRTLE BALL RAY)
(Widow of CLARENCE RAY))
)
 Claimant-Petitioner))
)
 v.)
)
)
 BIG OAK COAL CORPORATION) DATE ISSUED:
)
 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 Linda S. Chapman, Administrative Law Judge, United States
 Department of Labor.

W. Andrew Delph, Jr. (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (01-BLA-1218) of Administrative Law Judge Linda S. Chapman 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).² The instant case involves a survivor's claim filed on October 1, 1999.³ After crediting the miner with thirty-six

¹Claimant is the surviving spouse of the deceased miner who died on August 20, 1999. Director's Exhibit 8.

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The miner filed a claim for benefits on October 9, 1979. Director's Exhibit 28-1. The district director denied the claim on December 23, 1980 and May 5,

years and ten months of coal mine employment, the administrative law judge found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). However, the administrative law judge found that the evidence was insufficient to 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 argues that the administrative law judge erred in finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis

1981. Director's Exhibits 28-16, 28-22. There is no indication that the miner took any further action in regard to his 1979 claim.

The miner filed a second claim on October 31, 1986. Director's Exhibit 29-1. By Decision and Order dated November 21, 1990, Administrative Law Judge Charles W. Campbell found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 29-79. Judge Campbell, therefore, considered the miner's 1986 claim on the merits. *Id.* Judge Campbell found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* Judge Campbell further found that the miner was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id.* Judge Campbell, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Accordingly, Judge Campbell denied benefits. *Id.* By Decision and Order dated March 11, 1993, the Board affirmed Judge Campbell's finding that the miner failed to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Ray v. Big Oak Coal Corp.*, BRB No. 91-0540 BLA (Mar. 11, 1993) (unpublished). The Board, therefore, affirmed Judge Campbell's denial of benefits. *Id.* There is no indication that the miner took any further action in regard to his 1986 claim.

The miner filed a third claim on January 3, 1995. Director's Exhibit 30-1. By Decision and Order dated May 1, 1998, Administrative Law Judge Alexander Karst found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 30-67. Accordingly, Judge Karst denied benefits. *Id.* By Decision and Order dated May 14, 1999, the Board affirmed Judge Karst's finding that the miner failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Ray v. Big Oak Coal Corp.*, BRB No. 98-1126 BLA (May 14, 1999) (unpublished). The Board, therefore, affirmed Judge Karst's denial of benefits. *Id.* There is no indication that the miner took any further action in regard to his 1995 claim.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Because the instant 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).⁴ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish 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); see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Claimant argues that the administrative law judge erred in finding the evidence

⁴Section 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 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).

insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2)⁵ based upon his consideration of Dr. Perper's opinion. Dr. Perper had reviewed the autopsy slides and medical evidence. In a report dated May 26, 2001, Dr. Perper opined, *inter alia*, that:

Coal workers' pneumoconiosis was a substantial contributory cause of [the miner's] death both directly and indirectly through moderately severe to severe simple coal workers' pneumoconiosis and associated centrilobular emphysema that either triggered or aggravated a fatal cardiac arrhythmia.

Director's Exhibit 19.

The administrative law judge discredited Dr. Perper's opinion in part because he found that the doctor did not have an accurate knowledge of claimant's cardiovascular status. The administrative law judge specifically found that Dr. Perper ignored medical evidence showing that the miner had severe cardiovascular disease, exercise-limiting angina, and untreated high blood pressure. Decision and Order at 14.

Contrary to the administrative law judge's characterization, Dr. Perper was aware of many of the miner's cardiovascular problems. For example, Dr. Perper was cognizant of the fact that the miner had a history of hypertension and had undergone a left carotid endarterectomy. See Director's Exhibit 19. Dr. Perper, quoting the clinical history from the miner's autopsy report, also noted that the miner's medical history was significant for, *inter alia*, transient ischemic attacks, several CVAs and hypertension. Director's Exhibit 19. Moreover, before discrediting Dr. Perper's opinion, based on his finding that the doctor ignored evidence of severe cardiovascular disease and exercise-limiting angina, the administrative law judge should have set out the evidence that he found supportive of such conditions.

The administrative law judge provided, however, several additional reasons for discrediting Dr. Perper's opinion that the miner's pneumoconiosis and associated centrilobular emphysema triggered or aggravated a fatal cardiac arrhythmia. The administrative law judge found that Dr. Perper failed to explain his basis for characterizing the miner's pneumoconiosis as "severe." The administrative law judge noted that while Dr. Perper cited to respiratory symptoms consistent with coal workers' pneumoconiosis, he did not identify the symptoms or explain how

⁵Because there is no evidence that the miner's pneumoconiosis was the direct cause of his death, claimant is precluded from establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1).

they translated to a pulmonary impairment. See Decision and Order at 13-14. The administrative law judge further noted that Dr. Perper acknowledged that the respiratory abnormalities found by Dr. Forehand in 1995 (which the administrative law judge found to be the only abnormalities in the record) could not be duplicated in a repeat test. *Id.* Moreover, although Dr. Perper stated that pulmonary deterioration due to pneumoconiosis could progress even after exposure to coal mine dust ceases, the administrative law judge found that there was no evidence in the instant case that the miner's pulmonary function had, in fact, deteriorated after his most recent objective testing (which revealed normal results). *Id.* The administrative law judge, therefore, properly found that Dr. Perper's opinion was insufficiently documented and reasoned. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge also found that Dr. Perper hedged his conclusions by stating that it was "most likely" that the miner's chronic lung disease resulted in a fatal arrhythmia.

⁶ The administrative law judge acted within his discretion in finding that Dr. Perper's opinion was too speculative to support a finding that the miner's death was due to pneumoconiosis. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); see also *United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 1-639 (4th Cir. 1999) (An administrative law judge has the affirmative duty to qualify evidence as *reliable probative, and substantial* before relying upon it to grant or deny a claim). Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's determination that Dr. Perper's opinion is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2).

The administrative law judge further found that Dr. Robinette's opinion was insufficient to support a finding that the miner's death was due to pneumoconiosis.

⁶In his May 26, 2001 report, Dr. Perper opined that:

The [miner] did not have clinical manifestations of heart failure, and the sudden death is *most likely* indicative of a cardiac arrhythmia, that *could have* been precipitated or aggravated by the [miner's] chronic obstructive pulmonary disease. *Most likely*, the chronic lung disease resulted in a fatal arrhythmia, because patients with chronic lung disease developing respiratory failure are particularly prone to fatal arrhythmia.

Director's Exhibit 19 (emphasis added).

⁷ Decision and Order at 13. The administrative law judge also credited Dr. Branscomb's opinion that the miner's coal workers' pneumoconiosis did not contribute to his death.

⁸ *Id.* at 14. Inasmuch as no party challenges these determinations, they are

⁷Dr. Robinette reviewed the medical evidence. In a report dated March 19, 2001, Dr. Robinette opined that:

[The miner] did have evidence of apparent complicated pneumoconiosis based on the fact that there were numerous 1 cm. nodules present. There was severe underlying pulmonary emphysema and there was moderately severe simple pneumoconiosis as a background. This condition was obviously chronic and occurred as a consequence of his total dust exposure. There is no specific relationship to [sic] an acute myocardial infarction to coal workers' pneumoconiosis unless the patient had an acute hypoxic event which occurred as a consequence of his intrinsic lung disease and exacerbated his underlying cardiovascular status. It must be stated, however, that there is clear evidence of complicated pneumoconiosis based on the information submitted and numerous pathologists clearly agreed that the patient had extensive damage to his lung and had a severe respiratory impairment.

Director's Exhibit 18.

⁸Dr. Branscomb reviewed the medical evidence. In his report dated January 21, 2002, Dr. Branscomb opined that:

I conclude that [the miner] did have coal workers' pneumoconiosis. It produced no pulmonary impairment, no pulmonary disability, and did not aggravate any other condition. The long duration, severity, and lack of treatment of the hypertension followed by many hypertensive-arteriosclerotic events with strokes and carotid artery obstruction convincingly establish the cause of death as cardiovascular. There is sufficient information available on [the miner] for me to conclude with a high level of certainty that his CWP neither influenced his cardiovascular disease adversely nor contributed in any way to his demise. There is no indication that he had either lack of oxygen or difficulty of breathing as a result of a pulmonary condition that could have contributed to the cardiovascular event.

Employer's Exhibit 1.

affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1993). We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2).

⁹ See also 20 C.F.R. §718.205(c)(5).

We similarly affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Skrack, supra*; Decision and Order at 14-16. Claimant, therefore, is precluded from establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3).

We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

⁹In his completion of the death certificate, Dr. Mitchell listed coal workers' pneumoconiosis as a significant condition contributing to death. See Director's Exhibit 8. Although the administrative law judge did not discuss this evidence in his consideration of whether the miner's death was due to pneumoconiosis, claimant does not contend that this evidence is sufficient to establish that the miner's death was due to pneumoconiosis.

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