BRB No. 04-0811 BLA

BETTY L. SHERTZER (Widow of EDWARD L. SHERTZER) Claimant-Respondent v. McNALLY-PITTSBURGH MANUFACTURING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/25/2005 DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Thomas Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2003-BLA-5390) of Administrative Law Judge Robert L. Hillyard with respect to 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). The administrative law judge determined that the claim before him was an initial, rather than a subsequent, survivor's claim. The administrative law judge credited the miner with eight years of coal mine employment based upon his analysis of records from the Social Security Administration and found that claimant established that the miner was suffering from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(c). The administrative law judge also found that claimant established that pneumoconiosis was a contributing cause of the miner's death under 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

Employer argues on appeal that the administrative law judge erred in finding that the application for survivor's benefits filed on July 19, 2001 was not a subsequent survivor's claim. Employer also contends that the administrative law judge did not properly weigh the evidence relevant to the length of the miner's coal mine employment and Sections 718.202(a)(4), 718.203(c), and 718.205(c). Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and maintains that the administrative law judge did not err in determining that claimant withdrew her initial claim for survivor's benefits.[1]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

The first issue raised in employer's appeal concerns the administrative law judge's finding that the claim filed on July 19, 2001 was not barred under 20 C.F.R. §725.309(d)(3). The relevant procedural history of this case is as follows: The miner died on July 8, 1998. Director's Exhibit 4. Claimant filed an application for survivor's benefits on August 18, 1998. Employer's Exhibit 1 at 1. The district director issued a letter indicating his initial findings on December 15, 1998, in which he stated that claimant failed to prove that she is entitled to benefits. Claimant requested a hearing in a letter dated January 28, 1999. Subsequently, on February 17, 1999, the district director

[1] We affirm the administrative law judge's findings under 20 C.F.R. §718.202(a)(1), (a)(2), and (a)(3), as these determinations were not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

received claimant's request to withdraw her claim until adjudication of her husband's claim was completed.[2]

The district director held an informal conference via telephone on June 15, 1999. Employer informed the parties that it would not participate based upon claimant's request to withdraw her claim. On July 16, 1999, the district director issued a Memorandum of Informal Conference in which he indicated that claimant had not proven that the miner's pneumoconiosis arose out of coal mine employment. Employer's Exhibit 1 at 13. In the cover letter accompanying the Memorandum, the parties were informed that they had thirty days within which to respond to the recommendations by accepting or rejecting them, in whole or in part, or requesting a hearing. *Id*.

Claimant submitted a second request to withdraw her claim on August 8, 1999. The district director granted withdrawal of the claim for survivor's benefits in an Order dated October 29, 1999. Employer subsequently filed an objection to this Order. No further action was taken until claimant filed a second application for survivor's benefits on July 19, 2001. Employer contested this claim on the merits and on the ground that it must be denied under the terms of Section 725.309(d)(3), as it is a subsequent survivor's claim and there has been no change in an applicable condition of entitlement unrelated to the miner's physical condition.

In his Decision and Order, the administrative law judge reviewed the procedural history of this case in detail and decided that because claimant timely requested a hearing after the December 15, 1998 denial letter, there was no denial of benefits in effect at the time that she asked to withdraw her claim on August 8, 1999. Decision and Order at 3-4. Accordingly, the administrative law judge determined that pursuant to 20 C.F.R. §725.306, claimant was permitted to file a "new" survivor's claim on July 19, 2001. *Id*. The administrative law judge also relied upon his finding that because employer did not object to the Memorandum or to claimant's request to withdraw, and has not demonstrated that employer's due process rights were violated by allowing withdrawal, employer had suffered no prejudice.[3] *Id*.

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[2] An award of benefits in the miner's claim is currently on appeal to the Board. *Shertzer v. McNally Pittsburg Mfg. Co.*, BRB No. 05-0289 BLA.

[3] The administrative law judge stated that "by not objecting to the July 16, 1999 memorandum, the employer accepted the recommendation that [claimant] be given time to consider her request to withdraw." Decision and Order at 4. The record indicates, however, that the district director specifically noted that "[claimant] may consider withdrawing her husband's claim," but also stated that "I won't make any recommendation in that regard." Exhibit 1 at 13.

Employer contends on appeal that the July 16, 1999 Memorandum constituted a denial of benefits on the merits which barred adjudication of the subsequent survivor's claim, as claimant did not respond to the Memorandum by requesting revisions or a hearing within thirty days. Employer also contends that it objected to the district director's Order and that its right to due process has been violated because it should have been able to rely upon the July 16, 1999 denial of benefits as the end of the matter. The Director responds, arguing that under the interpretation of Section 725.306 in effect at the time that the district director granted claimant's request ***and*** under the holdings subsequently set forth in *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) and *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002), the administrative law judge rationally determined that the district director properly granted claimant's withdrawal request. Claimant has adopted the Director's response on this issue.

After considering the administrative law judge's findings, employer's allegations of error, and the Director's response, we affirm the administrative law judge's finding that the first survivor's claim was properly withdrawn pursuant to Section 725.306, as it is supported by substantial evidence and in accordance with law. Prior to the issuance of *Lester* and *Clevenger*, Section 725.306 was generally viewed as providing no limit as to when a claimant could withdraw an application for benefits. In *Lester* and *Clevenger*, the Board deferred to the Director's interpretation that "the date on which a decision on the merits becomes effective is a practical point for terminating authority to allow withdrawal because it is readily identifiable and marks the point beyond which allowing withdrawal would be unfair to opposing parties." *Lester*, 22 BLR at 191; *Clevenger*, 22 BLR at 1-200. The Board held that the Director's interpretation of Section 725.306 was reasonable because:

> [It] preserves the integrity of the black lung adjudicatory system by providing a mechanism for removing premature claims from the system without disturbing valid claim decisions made as the result of the adversarial process, [citation omitted]; and it balances a claimant's interest in foregoing further pointless litigation on a premature claim with an employer's interest in maintaining the advantages gained by successfully defending the claim.

Lester, 22 BLR at 191; *Clevenger*, 22 BLR at 1-200. Accordingly, the Board held that the provisions of Section 725.306 are applicable "up until such time as a decision on the merits issued by an adjudication officer becomes effective." *Lester*, 22 BLR at 191; *Clevenger*, 22 BLR at 1-200.

In this case, in accordance with the Board's holdings in *Lester* and *Clevenger*, claimant's submission of a request to withdraw her claim within thirty days of the issuance of the Memorandum of Informal Conference prevented the decision by the

district director from becoming effective. Thus, the administrative law judge rationally found that the application for survivor's benefits filed on July 19, 2001 was a new claim in accordance with Section 725.306(b).

Employer's contention that liability should be transferred to the Black Lung Disability Trust Fund due to the prejudice it has suffered as a consequence of the granting of claimant's request to withdraw her initial survivor's claim is also without merit. Contrary to employer's arguments, its litigation rights did not vest with the mere issuance of the Memorandum of Informal Conference. *See Lester*, 22 BLR at 1-191 (The effective date of a decision on the merits "marks the point beyond which allowing withdrawal would be unfair to opposing parties."). Finally, employer has set forth no evidence of actual harm resulting from the granting of claimant's request to withdraw the 1998 claim, particularly in light of the admission of all of the evidence developed by employer in conjunction with the 1998 claim into the record of the present claim.

We will now turn to employer's allegations of error regarding the administrative law judge's findings under Sections 718.202(a)(4), 718.203, and 718.205. Employer argues that the administrative law judge erred in determining that the opinions of Drs. Koenig, Green, and Heidingsfelder are sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). Employer maintains that the administrative law judge should have discredited these opinions because the physicians relied upon employment histories that were inaccurate as to both the length of the miner's coal mine employment and the extent to which the miner was exposed to coal mine dust. Employer also contends that the administrative law judge erred in finding that Dr. Tomashefski, who opined that the miner did not have pneumoconiosis, does not possess qualifications as a specialist, and in relying upon a presumption that pneumoconiosis is progressive. These contentions are without merit. The administrative law judge acted within his discretion in finding that the opinions of Drs. Koenig and Green, as corroborated by the opinions of Dr. Heidingsfelder and Katzman, are sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 24; Director's Exhibits 5, 6, 18.

The administrative law judge permissibly determined that the opinions of Drs. Koenig, Heidingsfelder, and Green are entitled to more weight than the contrary opinion of Dr. Tomashefski because they were more consistent with the objective evidence of record and include a detailed rationale of the physicians' findings. *Id*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge noted that Drs. Koenig, Heidingsfelder, and Green described the type of particles seen on microscopic examination of the miner's lungs, rationally linked them to the miner's coal mine employment, and ruled out other potential sources of dust exposure. Decision and Order at 23-24. The administrative law judge also reasonably

found that these opinions are supported by the medical report in which Dr. Katzman diagnosed pneumoconiosis based upon the results of the miner's autopsy. Decision and Order at 24; Director's Exhibit 18; *Clark*, 12 BLR at 1-150.

Moreover, the administrative law judge acted within his discretion in finding that Dr. Tomashefski's opinion is not as well reasoned as the opinions of Drs. Koenig, Heidingsfelder, Green, and Katzman, as Dr. Tomashefski did not adequately explain his conclusion that the source of the miner's interstitial fibrosis was unknown despite the absence of evidence of dust exposure from sources other than coal mine construction. Decision and Order at 22; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). In addition, in weighing all of the medical reports of record concerning the existence of pneumoconiosis, the administrative law judge rationally determined that the opinions based upon autopsy evidence were the most probative of this issue. Decision and Order at 25; *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985). Thus, the administrative law judge provided valid rationales for determining that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis while not relying upon the qualifications of the physicians, their knowledge of the length of the miner's coal mine employment, or the presumed progressivity of pneumoconiosis.[4] Error, if any, in the administrative law judge's consideration of these factors is, therefore, harmless. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378, 1-384 n.4 (1983).

Regarding Section 718.203(c), employer maintains that the administrative law judge did not properly allocate the burden of proof in determining whether claimant proved that the miner's pneumoconiosis arose out of coal mine employment. Employer's contention has merit to the extent that the administrative law judge relied upon an inference "that the miner's mixed dust pneumoconiosis arose out of coal mine employment" because the evidence in the present case does not establish an alternative source of dust exposure. Decision and Order at 25, citing *Wisniewski v. Director, OWCP*, 929 F.2d 952, 15 BLR 2-57 (3d Cir. 1991). The administrative law judge also found, however, that the preponderance of medical opinion evidence supported a finding that the miner's pneumoconiosis arose out of coal mine employment, as "the medical narratives that found pneumoconiosis, with the exception of Dr. Tomashefski, opined that the mixed dust pneumoconiosis was related to coal mine employment[.]" *Id.* This finding is rational and supported by substantial evidence. Thus, because the administrative law judge provided a valid alternative rationale for his determination,

[4] Employer does not cite any evidence in support of its assertion that the miner was not regularly exposed to coal mine dust in his job as a coal mine construction worker. Employer's Brief In Support of Petition for Review at 20; 20 C.F.R. §725.202(b)(1).

pursuant to Section 718.203(c), that the miner's pneumoconiosis arose out of coal mine employment, this finding is affirmed. *Searls*, 11 BLR 1-161, 1-164 n.5; *Kozele*, 6 BLR 1-378, 1-384 n.4.

With respect to the administrative law judge's findings under Section 718.205(c), employer argues that the administrative law judge should have accorded weight to the death certificate, on which congestive heart failure was identified as the sole cause of death. Employer also asserts that the administrative law judge did not provide a valid reason for giving less weight to Dr. Katzman's opinion and erred in crediting the opinions of Drs. Koenig and Green when they did not account for the miner's heart disease.

These contentions are without merit. Although employer asserts correctly that the administrative law judge erroneously indicated that Dr. Ridge, rather than Dr. Powers, certified that the cause of the miner's death was congestive heart failure, the administrative law judge rationally determined that the death certificate did not constitute reliable evidence that the miner's death was unrelated to pneumoconiosis. Decision and Order at 29; Director's Exhibit 4; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). The administrative law judge's finding is further supported by the subsequent letter in which Dr. Powers stated that the miner's death was caused in part and "maybe" in whole by pneumoconiosis. Employer's Exhibit 2 at 18.

In addition, the administrative law judge rationally determined that the opinion of Dr. Katzman was entitled to little weight on the ground that the doctor did not fully explain why the "spectrum of pulmonary problems," including pneumoconiosis, that he diagnosed, did not play any role in the miner's death. Decision and Order at 29; Director's Exhibit 18; *Clark*, 12 BLR 1-149, 1-151; *Anderson*, 12 BLR 1-111, 1-113. With respect to the opinions of Drs. Green, Heidingsfelder, and Koenig, contrary to employer's allegation, each of these physicians acknowledged that the miner had heart disease and stated that it was likely at least a contributing cause of death. Director's Exhibit 6 at 9, 66, 143. Thus, the administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Green, Koenig, and Heidingsfelder, as they were thorough, well-explained, and consistent with the objective evidence of record. Decision and Order at 27-28, 30; *Clark*, 12 BLR 1-149, 1-151; *Anderson*, 12 BLR 1-111, 1-113. We affirm, therefore, the administrative law judge's finding that pneumoconiosis was a contributing cause of the miner's death pursuant to Section 718.205(c). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge