BRB No. 06-0630 BLA

BETTY NEUMEISTER (Widow of ROBERT W. NEUMEISTER)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 05/21/2007
HEGINS MINING COMPANY	)	
and	)	
LACKAWANNA CASUALTY COMPANY	)	
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 on Remand – Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Maureen E. Herron, Wilkes-Barre, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, the miner's widow,[1] appeals the Decision and Order on Remand - Denying Benefits (03-BLA-6147) of Administrative Law Judge Paul H. Teitler 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). This case has previously been before the Board. Initially, the administrative law judge accepted the parties' stipulations to thirty-four years of coal mine employment[2] and that the miner suffered from coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge found, however, that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and denied benefits.

Claimant appealed, and in *Neumeister v. Hegins Mining Co.*, BRB No. 04-0728 BLA (May 26, 2005)(unpub.), the Board held that the administrative law judge improperly required claimant to withdraw from the record statements by the miner's treating physician, Dr. Kraynak, because the administrative law judge mistakenly believed that the physician's reports exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414.[3] Accordingly, the Board vacated the administrative law judge's Decision and Order and remanded the case for him to reconsider the admissibility of Dr. Kraynak's reports pursuant to 20 C.F.R. §725.414, and claimant's entitlement to benefits pursuant to 20 C.F.R. §718.205(c). The Board rejected, however, claimant's additional contention that the administrative law judge erred in admitting into evidence hospital records that employer did not exchange with claimant before the hearing, in violation of 20 C.F.R. §725.456(b)(2), as the record reflected that claimant ultimately dropped her objection to the admission of these records. In addition, the Board found no abuse of discretion by the administrative law judge in discussing with claimant the potential advantage to her of consenting to the admission of the miner's hospital records, and declined to require that this case be reassigned to a new administrative law judge on remand. *Neumeister*, slip op. at 5.

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[1] Claimant is the surviving spouse of the deceased miner, who died on September 28, 1998. Decision and Order at 2; Director's Exhibit 3. Claimant filed her survivor's claim on September 5, 2002. Decision and Order at 2; Director's Exhibit 3.

[2] The record indicates that the miner's coal mine employment occurred in Pennsylvania. Director's Exhibit 1. Accordingly, 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, 1-202 (1989)(*en banc*).

[3] Revised 20 C.F.R. §725.414 applies to this claim because it was filed on September 5, 2002, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

On remand, the administrative law judge admitted into evidence all of Dr. Kraynak's written reports.[4] Reconsidering the merits of entitlement, the administrative law judge again found, however, that claimant 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 again argues that the administrative law judge abused his discretion in admitting into evidence hospital records that employer did not exchange with claimant before the hearing in violation of 20 C.F.R. §725.456(b)(2), and reasserts that the administrative law judge should have permitted her to fully respond to medical reports that employer submitted on the deadline for the timely submission of evidence. Claimant also contends that the administrative law judge erred in his analysis of the medical evidence when he found that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief 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. 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 Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

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, 718.203, 718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or 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)(1)-(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); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 205, 22 BLR 2-

[4] By Order dated August 18, 2005, the administrative law judge also allowed the parties thirty days to submit any requests to reopen the record, file briefs, or initiate any other proceedings on remand. No additional correspondence was submitted by any of the parties. Decision and Order on Remand at 1.

467, 2-471 (3d Cir. 2002); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989).

Claimant initially contends that the administrative law judge erred in admitting into evidence hospital records that employer did not exchange with claimant before the hearing, in violation of 20 C.F.R. §725.456(b)(2), and further erred in admonishing claimant for objecting to the admission of these records. Claimant's Brief at 2, 5-6. In addition, claimant asserts that the Board mischaracterized the hearing transcript in holding that claimant dropped her objection to admission of the hospital records. Claimant's Brief at 2, 5-6; Hearing Tr. at 41. The Board fully considered claimant's arguments in the prior appeal, and there has been no change in the underlying fact situation and no intervening controlling authority on this issue. Because claimant neither availed herself of the opportunity to request reconsideration, nor has demonstrated on appeal that the Board's initial determinations were clearly erroneous and would work a manifest injustice, we decline to depart from our prior holdings, as the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

Claimant next asserts that the administrative law judge should have permitted her to fully respond to the reports of Drs. Levinson and Hertz, which employer submitted on the deadline for the timely submission of evidence, and she asserts that the Board failed to address this issue when it was raised in the prior appeal. Claimant's Brief at 6-7. Specifically, claimant contends that Dr. Simelaro, who conducted a records review on behalf of claimant in response to the last-minute medical reports submitted by employer, was not allowed to comment on the opinions of Drs. Levinson and Hertz, leaving their opinions "unrebutted and unchallenged." Claimant's Brief at 6-7. Contrary to claimant's argument, a review of the hearing transcript reveals that the administrative law judge did not prevent Dr. Simelaro from commenting on the reports from employer's physicians, but simply explained to claimant that, depending on the nature of Dr. Simelaro's comments, employer could be entitled to submit rehabilitative evidence. *See* 20 C.F.R. §725.414(a)(3)(ii); Hearing Transcript at 29-31. Moreover, because the administrative law judge, on remand, admitted into evidence Dr. Kraynak's January 4, 2004 report, in which the physician reviewed and commented on the opinions of Drs. Levinson and Hertz, there is no merit to claimant's contention that the opinions of employer's experts were "unrebutted and unchallenged." Claimant's Brief at 7; Claimant's Exhibit 4.

Turning to the merits of entitlement, the record reflects that on September 13, 1998, the miner presented at the emergency room of Good Samaritan Medical Center complaining of shortness of breath, and was found to be in atrial fibrillation. Employer's Exhibit 4. The miner was admitted to the hospital with a primary provisional diagnosis of acute right and left-sided congestive heart failure, most likely due to a combination of atrial fibrillation, hypertensive heart disease, and anemia. While in the hospital, in

addition to treatment in the cardiac care unit, the miner received a consultation for gastrointestinal bleeding. The miner was discharged from the hospital on September 21, 1998, in stable condition. Employer's Exhibit 4. The primary discharge diagnosis was congestive heart failure.[5] Approximately one week later, on September 28, 1998, the miner went into cardiopulmonary arrest while at home, and was taken by ambulance to the emergency room at Ashland Regional Medical Center. Director's Exhibit 5. Efforts to resuscitate him were unsuccessful, and he was pronounced dead. Director's Exhibit 5. The miner's death certificate, signed by Deputy Coroner Debra Klinger, listed the causes of death as sudden respiratory failure, coal workers' pneumoconiosis, and valvular heart disease. Director's Exhibit 4.

The administrative law judge reviewed the medical evidence of record, including the hospital records, death certificate, treatment notes and medical opinions from Dr. Kraynak, the miner's treating physician, and consulting medical opinions from Drs. Simelaro, Levinson, and Hertz. Decision and Order on Remand at 2-4. The administrative law judge found that Dr. Kraynak, an osteopath, and Dr. Simelaro, a Board-certified pulmonary specialist, opined that the miner suffered from clinical pneumoconiosis that contributed to and hastened his death. Decision and Order on Remand at 2-4; Claimant's Exhibits 1, 3, 4; Director's Exhibit 6. By contrast, Drs. Levinson and Hertz, both Board-certified pulmonary specialists, opined that the miner died due to sudden cardiac or cardiopulmonary arrest, and that the miner's coal workers' pneumoconiosis did not contribute to his death in any way. Decision and Order on Remand at 4; Employer's Exhibits 1-3. The administrative law judge accorded greater weight to the opinions of Drs. Levinson and Hertz, than to the opinions of Drs. Kraynak and Simelaro. The administrative law judge found that their opinions were better supported by the medical record, including the hospital records which extensively documented the miner's treatment for cardiac problems, and did not indicate that the miner was treated for any pulmonary conditions, and were better supported by the prior findings that the miner was not disabled due to his pneumoconiosis.[6] Thus, the administrative law judge concluded that claimant failed to establish that the miner's death

[5] Additional diagnoses included: atrial fibrillation; hypertension; hypertensive heart disease; aortic stenosis; aortic and mitral regurgitation; asthma; and chronic obstructive pulmonary disease. Employer's Exhibit 4. As the administrative law judge noted, the hospital records did not contain a diagnosis of pneumoconiosis. Decision and Order at 4; Employer's Exhibit 4.

[6] The miner's claim for benefits was finally denied on January 11, 1999, because the miner did not establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order on Remand at 4.

Claimant contends that the administrative law judge erred in according determinative weight to the opinions of Drs. Levinson and Hertz, rather than to the opinions of Drs. Kraynak and Simelaro. Specifically, claimant contends that the administrative law judge erred in crediting the opinions of Drs. Levinson and Hertz as better supported by the "prior findings that the miner was not disabled by his coal workers' pneumoconiosis." Claimant's Brief at 12; Decision and Order on Remand at 4. Relying on *Mancia v. Director, OWCP*, 130 F.3d 579, 593, 21 BLR 2-214, 2-243 (3d Cir. 1997), claimant asserts that the miner's lifetime objective test results are not relevant to the issue of whether coal workers' pneumoconiosis was a factor in the miner's death. Claimant's Brief at 12-13. Claimant's reliance on *Mancia* is misplaced. In *Mancia*, where the parties conceded that the miner was totally disabled due to pneumoconiosis, the court held that pulmonary function studies would not be helpful in answering the critical question of whether the miner's pneumoconiosis contributed to his death. *Mancia*, 130 F.3d at 593, 21 BLR at 2-243. Thus, *Mancia* is distinguishable on its facts from the instant case, in which the miner's lifetime claim was denied because he was not found to be totally disabled, and, therefore, the miner's lifetime objective test results, performed shortly before his death in 1998, could shed light on the severity of the miner's pneumoconiosis and its possible impact on his lung function and death. *See Kramer*, 305 F.3d at 210; 22 BLR at 2-480. Therefore, the administrative law judge permissibly credited Dr. Levinson's opinion because Dr. Levinson's June 1998 pulmonary function study, which revealed no significant pulmonary functional limitations even with only fair effort, supported the physician's conclusion that the miner's coal workers' pneumoconiosis was not impairing the miner's lungs and did not hasten his death. *Kramer*, 305 F.3d at 210; 22 BLR at 2-480; Decision and Order on Remand at 4; Employer's Exhibit 1.

We also reject claimant's assertion that the administrative law judge erred in crediting the opinions of Drs. Levinson and Hertz, as their opinions are based in part on invalid pulmonary function studies. Claimant's Brief at 15-16. Contrary to claimant's arguments, a non-qualifying pulmonary function study which is non-conforming due to poor effort or poor cooperation, such as that performed by Dr. Levinson, and those reviewed by Drs. Levinson and Hertz, is not inherently unreliable, because better effort would only improve the test results. *See Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-479 (1983).

Claimant also contends that the administrative law judge erred in crediting the opinion of Dr. Hertz, asserting that Dr. Hertz's report is unsigned, and that the physician based his conclusions upon an erroneous assumption that the miner suffered from uncontrolled hypertension in the last years of life, and upon objective test results which

were three years old. Claimant's Brief at 14. Claimant essentially requests a reweighing of the evidence, and her contentions are unsupported by the record. First, the record contains a signed copy of Dr. Hertz's January 8, 2004 report. Employer's Exhibit 3. In addition, Dr. Hertz's medical opinion is fully supported by medical reports documenting high blood pressure beginning in 1995 and continuing through 1998. Employer's Exhibit 3; Director's Exhibit 1. Moreover, Dr. Hertz's report indicates that he reviewed objective test results from 1995, 1996, and 1998, the year of the miner's death, including electrocardiogram testing in 1998 that showed atrial fibrillation with a left bundle branch block, which Dr. Hertz explained is a major indicator of significant cardiac disease. Employer's Exhibit 3; Director's Exhibit 1. The weighing of medical opinions is for the administrative law judge, and the Board is not empowered to reweigh the evidence on appeal. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As there is no merit to claimant's contentions that Dr. Hertz's medical opinion is inadequately reasoned or documented, we affirm the administrative law judge's crediting of Dr. Hertz as within his discretion. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark*, 12 BLR at 1-155.

We also find no merit in claimant's contention that the administrative law judge failed to discuss the import of the death certificate, which includes coal workers' pneumoconiosis as a cause of death. Claimant's Brief at 8. Contrary to claimant's assertion, the administrative law judge fully discussed the miner's death certificate and permissibly accorded it little weight, because the record does not reflect that the deputy coroner who signed the certificate is a medical doctor. *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

Substantial evidence supports the administrative law judge's determination that the opinions of Drs. Levinson and Hertz are better supported by the medical record, including the hospital records generated shortly before the miner's death, and thus outweigh the contrary opinions of Drs. Simelaro and Kraynak, despite Dr. Kraynak's treatment of the miner. Decision and Order at 4; *see Trumbo*, 17 BLR at 1-87-88. Contrary to claimant's argument, while a treating physician's opinion may be due additional deference, there is no *per se* rule that a treating physician's opinion must always be accorded the greatest weight. *See Soubik v. Director, OWCP*, 366 F.3d 226, 236, 23 BLR 1-101 (3d Cir. 2004); *Kramer*, 305 F.3d at 207 n. 7, 22 BLR at 2-474 n.7. Here, the administrative law judge properly considered Dr. Kraynak's status as the miner's treating physician pursuant to the factors set forth at 20 C.F.R. §718.104(d), but permissibly found his opinion outweighed by the better supported opinions of Drs. Levinson and Hertz. Decision and Order on Remand at 3; 20 C.F.R. §718.104(d); *see Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR at 2-12, 2-20-21 (3d Cir. 1997); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Therefore, we reject claimant's contention that the administrative law judge erred in finding that the opinion of Dr. Kraynak and the

other evidence of record did not establish that pneumoconiosis contributed to the miner's death.

Because claimant did not establish that the miner's death was due to, or hastened by, pneumoconiosis pursuant to 20 C.F.R. §718.205(c), *see Kramer*, 305 F.3d at 205, 22 BLR at 2-471; *Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-108, an essential element of entitlement in a survivor's claim, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge