

BRB No. 07-0666 BLA

B.C.)
(Widow of P.C.))
)
Claimant-Petitioner)
)
v.)
)
KENTUCKY CARBON CORPORATION)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 05/14/2008
)
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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2004-BLA-6732) of Administrative Law Judge Pamela Lakes Wood 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).¹ The administrative law judge issued a decision on the record upon claimant's motion, and found the claim timely filed. She found that the deceased was a miner employed in coal mine employment after 1969, and that employer was the responsible operator. After crediting the miner with six years of coal mine employment, the administrative law judge further found the evidence insufficient, pursuant to 20 C.F.R. §718.202(a)(1)-(4), to establish that the miner suffered from pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that the autopsy evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).² Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see 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). 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 also Griffith v. Director, OWCP*, 49 F.3d

¹ The miner died on March 18, 2003, and claimant filed her application for survivor's benefits on June 17, 2003. Director's Exhibit 2.

² We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment and her finding that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3), and (4). *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).³

Claimant contends that the autopsy report, if properly credited, would support a finding that the miner suffered from coal workers' pneumoconiosis, and that it contributed to his death. Claimant's Brief at 2. Specifically, claimant argues that the administrative law judge erred in not taking judicial notice of the qualifications of Dr. Dennis, the prosector, which can be found online. Decision and Order at 1. Claimant also maintains that the pathologist who actually performed the autopsy was in the best position to determine the presence or absence of coal workers' pneumoconiosis and its relationship to the miner's death, and the administrative law judge erred, therefore, in failing to give his opinion greater weight than the contrary opinions. Claimant's Brief at 2-3. Claimant further contends that the administrative law judge erred in finding the autopsy incomplete and not supportive of a diagnosis of pneumoconiosis. Rather, claimant asserts that the autopsy is consistent with the clinical picture of the miner's health, which shows a history of treatment for black lung. Claimant's Brief at 2-3. Contrary to claimant's arguments, however, we can discern no error in the administrative law judge's consideration of the autopsy evidence.

Regarding the evidence at Section 718.202(a)(2), the administrative law judge accurately reviewed the report of autopsy conducted by Dr. Dennis on March 19, 2003, indicating that the miner died a pulmonary death as a result of "extensive bronchopneumonia secondary to pulmonary embolus and organization and abscess formation...and that coal workers' pneumoconiosis contributed to [the miner's] death, however, minimal fibrosis is present." Director's Exhibit 14; Decision and Order at 12. Dr. Dennis's gross description of the miner's lungs noted that the pleural surface of the left lung was gray and enhanced by black pigment deposition, and the right lung had fibrotic adhesions on the surface of the lung and black pigment splotching in deeper sections. The microscopic examination revealed black granular pigment deposition on four of the thirteen slides, and Dr. Dennis diagnosed pulmonary congestion; bronchopneumonia; pulmonary embolus; minimal coal workers' pneumoconiosis; coronary artery disease moderate; satisfactory coronary muscle; and hypertensive cardiovascular disease. Director's Exhibit 14; Decision and Order at 11-12.

We note initially that claimant has the burden to provide evidence and establish her own entitlement to benefits, and therefore, the administrative law judge was not required to seek out Dr. Dennis's qualifications, which were not of record. *White v.*

³ The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 3, 8.

Director, OWCP, 6 BLR 1-368 (1983); *Kendrick v. Kentland-Elkhorn*, 5 BLR 1-730, 1-733 (1983). The mere fact that a pathologist performed the autopsy does not mandate assigning controlling weight to that medical diagnosis; rather, the administrative law judge must assess the credibility of the prosector along with the other medical experts. See *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-23 (1992); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178 (1984). In the present case, the administrative law judge considered the autopsy report and the lack of any supporting clarification,⁴ and determined that Dr. Dennis failed to provide any statement linking the fibrosis to coal dust exposure or anthracotic pigment, and failed to link his diagnosis of pneumonia or emphysema to coal dust exposure. 20 C.F.R. §§718.202(a)(2), 718.201(a); Decision and Order at 14; see *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Thus, the administrative law judge permissibly determined that Dr. Dennis's diagnosis was conclusory and inadequate to establish the existence of pneumoconiosis. Decision and Order at 14-15; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Because Dr. Dennis's qualifications were not of record, the administrative law judge also permissibly accorded greater weight to the contrary opinion of Dr. Oesterling, a Board-certified pathologist, who opined that the amount of anthracotic pigment present in the miner's lungs was insufficient to establish pneumoconiosis, and, furthermore, that the miner's emphysema was not the result of coal dust exposure. Decision and Order at 14-15; Employer's Exhibit 1, 2 at 19; Director's Exhibit 14; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge determined that Dr. Oesterling's opinion was supported by the death certificate, which attributed the miner's death solely to pancreatic cancer, and the treatment records, which did not demonstrate that the miner was suffering from pneumoconiosis. Decision and Order at 18; Director's Exhibits 11, 15, 17; see *Clark*, 12 BLR 1-149, 1-155; *Fields*, 10 BLR 1-19, 1-22. The administrative law judge, therefore, acted within her discretion as trier-of-fact in finding that the autopsy evidence failed to establish the existence of pneumoconiosis. Consequently, as claimant has failed to establish an essential element of entitlement, we affirm the administrative law judge's denial of survivor's benefits. *Trumbo*, 17 BLR at 1-87.

⁴ The administrative law judge noted that Dr. Dennis failed to respond to the district director's request to clarify and elaborate on his autopsy report findings. Decision and Order at 14; Director's Exhibit 16.

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

BETTY JEAN HALL
Administrative Appeals Judge