

BRB No. 07-0681 BLA

M.M.M.)
(Spouse of D.M.))
)
Claimant-Petitioner)
)
v.)
)
KRISTI-ANN COAL, INCORPORATED) DATE ISSUED: 05/28/2008
)
and)
)
WV CWP FUND)
)
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 in Living Miner's and Survivor's Claims of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

M.M.M., Baisden, West Virginia, *pro se*.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Benefits in Living Miner's and Survivor's Claims (2005-BLA-5253) of Administrative Law Judge Linda S. Chapman (the administrative law judge) on claims 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). With respect to the miner's subsequent claim, the administrative law judge found that claimant had established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), and thus had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d)(1).² Decision and Order at 14. However, the administrative law judge found that the evidence of record was insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §§718.204(b), (c). Accordingly, benefits in the miner's claim were denied. With respect to the survivor's claim, the administrative law judge found that claimant had established pneumoconiosis arising from coal mine employment at 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), but failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits in the survivor's claim were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits in both claims. Employer has responded, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.³

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by

¹ Claimant is the widow of the miner, who died on May 19, 2002. Director's Exhibit 2. Claimant filed her survivor's claim for benefits on June 25, 2002. Director's Exhibit 3.

² The miner filed his initial claim for benefits on June 4, 1991, and benefits were denied on November 21, 1991, for failure to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1. The miner's current claim for benefits was filed on April 11, 2002. Director's Exhibit 2.

³ The administrative law judge's findings that the weight of the new evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), thus establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d)(1), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

substantial evidence and is in accordance with law.⁴ *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, the miner must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits in the miner's claim is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge properly found that the evidence was insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(i)-(iii), as the record contained no qualifying pulmonary function studies or blood gas studies,⁵ nor evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 14. Additionally, in evaluating the medical opinions of record at Section 718.204(b)(2)(iv), the administrative law judge accurately determined that none of the physicians of record indicated that the miner suffered from a respiratory or pulmonary impairment of any kind. Thus, claimant failed to establish total disability thereunder.⁶

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

⁵ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

⁶ Drs. Castle, Zaldivar, Racadag, and Crouch all found that, given the minimal extent and severity of the pneumoconiosis present in the miner's lungs on autopsy, pneumoconiosis would not have caused any clinically significant degree of respiratory impairment. Decision and Order at 15; Employer's Exhibits 2, 4, 5, 7, 8, 10; Director's Exhibit 6. Further, despite Dr. Perper's finding of significant pneumoconiosis on the miner's autopsy slides, the administrative law judge correctly noted that Dr. Perper did

Decision and Order at 15; *see generally* *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

Because claimant failed to establish total disability at Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, the administrative law judge's denial of benefits in the miner's claim is affirmed. *Anderson*, 12 BLR at 1-112.

Turning to the survivor's claim, in order to establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 718.205(a). In claims filed on or after January 1, 1982, death is considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if the presumption at 20 C.F.R. §718.304 is available, based on a finding of complicated pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

In assessing the survivor's claim, the administrative law judge rationally determined that the record does not support a finding of death due to pneumoconiosis at Section 718.205(c). Decision and Order at 7-9; *Mays*, 176 F.3d at 755, 21 BLR at 2-592; *Shuff*, 967 F.2d at 979, 16 BLR at 2-92. After reviewing the miner's hospital records, death certificate, autopsy findings and medical opinions of record, the administrative law judge concluded that Dr. Bush's opinion, that the miner most likely suffered a cardiac death unrelated to pneumoconiosis, was the most reasonable because it was most consistent with the medical evidence available.⁷ However, the administrative law judge

not address the question of whether it caused the miner to suffer from a disabling pulmonary impairment during his lifetime, but only whether it caused or hastened the miner's death. Decision and Order at 15; Claimant's Exhibit 1.

⁷ Dr. Bush diagnosed mild simple coal workers' pneumoconiosis and moderate centrilobular emphysema unrelated to coal dust exposure, and found that, due to the limited autopsy and scant clinical information, it was difficult to determine the specific cause of the miner's death. He opined that, while the miner had amyotrophic lateral

rationality found that none of the physicians of record agreed on the cause of the miner's death, and that each opinion was based on speculation to some degree in view of the limited autopsy and medical records.⁸ Decision and Order at 19. The administrative law judge accurately determined that the only evidence supportive of a finding of death due to pneumoconiosis at Section 718.205(c) was the miner's death certificate signed by Dr. Joseph, and the report of Dr. Perper. Decision and Order at 17. However, the administrative law judge acted within her discretion in discounting this evidence. In so doing, the administrative law judge noted that, even though Dr. Joseph was the miner's physician in connection with his treatment for amyotrophic lateral sclerosis (ALS), there were no underlying treatment notes, or statements from Dr. Joseph, to support or explain the basis for his conclusion that coal workers' pneumoconiosis was a factor in the miner's death from respiratory failure due to ALS. Decision and Order at 17; Director's Exhibit 5. As the record contained no information on the circumstances of the miner's death in his home, and as Dr. Joseph indicated that he was not aware of the autopsy results at the time he signed the miner's death certificate, the administrative law judge permissibly found that the death certificate alone was insufficient to establish that the miner's death was due to pneumoconiosis. See *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

Furthermore, the administrative law judge rationally found that Dr. Perper's opinion, that coal workers' pneumoconiosis was a significant contributing cause of, and a hastening factor in the miner's death, was not well-reasoned or supported by the objective medical evidence of record. Decision and Order at 19; see generally *Sparks*, 213 F.3d 186, 22 BLR 2-251; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Dr. Perper indicated that the miner died in respiratory failure; that ALS and acute bronchopneumonia were significant factors in the miner's respiratory failure; and that the effective mechanism of death associated with the miner's pneumoconiosis

sclerosis (ALS), it was in its early stages and would not have caused death. Rather, Dr. Bush believed that the miner most likely suffered a cardiac death, as death was sudden and unexpected. Dr. Bush noted that the miner had moderately severe chest congestion, and was a hypertensive diabetic, which raised his risk of coronary artery disease. Employer's Exhibits 5, 10.

⁸ Dr. Zaldivar attributed the miner's death to ALS, which weakened his respiratory muscles, causing the miner to asphyxiate. Employer's Exhibits 2, 4. The autopsy prosector, Dr. Racadag, ultimately concluded that, due to the limited autopsy, he did not have enough information to determine the precise cause of death, but he believed death was due to the miner's ALS with respiratory failure. Employer's Exhibits 7 at 9, 12-14. Dr. Crouch did not offer an opinion on what caused the miner's death. Employer's Exhibit 1.

was pulmonary dysfunction caused by the replacement of lung tissue by pneumoconiotic lesions and associated centrilobular emphysema. Claimant's Exhibit 1. The administrative law judge noted that Dr. Perper's characterization of the miner's simple pneumoconiosis and centrilobular emphysema as "significant," based on the autopsy slides, was at odds with the reports of the other pathologists, who found that only a very small portion of the miner's lungs was affected by black pigment. Decision and Order at 19; *see generally Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). The administrative law judge also found that Dr. Perper's conclusion, that the miner suffered from hypoxemia, was not supported, but rather was contradicted, by the medical records that revealed normal blood gases just two months before the miner's death. Decision and Order at 19; Director's Exhibit 7. Because Dr. Perper did not explain how the medical records documented any pulmonary dysfunction, the administrative law judge acted within her discretion in finding that the physician's conclusions were based purely on speculation and were not supported by the record. Decision and Order at 19; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge concluded that, even if she were to assume that the miner's death was due to a respiratory condition, Dr. Perper's opinion would still be insufficient to meet claimant's burden of establishing that pneumoconiosis caused, contributed to, or hastened death pursuant to Section 718.205(c). Decision and Order at 19; *see Shuff*, 967 F.2d at 979, 16 BLR at 2-92. The administrative law judge's findings at Section 718.205(c) are supported by substantial evidence, and are affirmed. Consequently, we affirm the administrative law judge's denial of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in Living Miner's and Survivor's Claims is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge