

BRB No. 07-0735 BLA

E.C.)
(Widow of O.C.))
)
Claimant-Petitioner)
)
v.)
)
ROBERT COAL COMPANY)
)
and) DATE ISSUED: 05/27/2008
)
OLD REPUBLIC INSURANCE 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 Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-05985) of Administrative Law Judge Janice K. Bullard 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 determined that the miner had twenty years of qualifying coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that although the evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), it was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge failed to give proper weight to the amended death certificate, treatment notes, hospitalization records and the medical opinion of Dr. Booth, the miner's treating physician. Claimant also argues that the administrative law judge erred in finding that Dr. Booth's responses to a questionnaire constituted a medical report that exceeded the evidentiary limitations. In addition, claimant contends that the administrative law judge erred in failing to find that Dr. Dennis's pathology report established complicated pneumoconiosis and in treating the two medical reports authored by Dr. De Lara as two separate reports instead of one report for the purposes of the evidentiary limitations. Claimant further argues that the administrative law judge erred in according greatest weight to the opinion of Dr. Caffrey. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response 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.² 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).

¹ Claimant is the widow of the deceased miner, who died on March 11, 1996. Decision and Order at 3; Director's Exhibit 9. The administrative law judge noted that the miner's 1983 claim for benefits was dismissed by Administrative Law Judge W. Ralph Musgrove in an Order of Dismissal issued on May 6, 1986. Decision and Order at 2; Director's Exhibit 1.

² The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (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 suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). In addition, 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the original death certificate signed by Dr. Mercho, an amended death certificate signed by Dr. Booth, an autopsy report prepared by Dr. Bell, and the medical reports of Drs. Booth, De Lara, Dennis, Fino, Rosenberg and Caffrey, as well as Dr. Caffrey's deposition transcript. Director's Exhibits 9, 10, 33; Claimant's Exhibit 1; Employer's Exhibit 1. Dr. Mercho completed the miner's original death certificate and identified the causes of death as: (a) ventricular fibrillation; (b) squamous cell cancer of the lung; and (c) liver metastases due to lung cancer. Director's Exhibit 9. In an amended death certificate, Dr. Booth included chronic obstructive pulmonary disease (COPD) and coal workers' pneumoconiosis as "other significant conditions contributing to death but not resulting in the underlying cause." Director's Exhibit 33 at 331. Dr. Bell performed the autopsy and prepared a report in which he made no finding of the presence of pneumoconiosis. Director's Exhibit 10. Dr. Bell stated that the miner died due to "complications arising from an acute staphylococcal bacterial endocarditis...with complicating factors including congestion and edema of the lung and bilateral pleural effusions." Director's Exhibit 10.

In response to questionnaires submitted to them by claimant's counsel, Drs. Booth and De Lara indicated that the miner's occupational lung disease was caused by his coal mine employment and that pneumoconiosis contributed to, or played a hastening role, in the miner's death. Director's Exhibit 33 at 116, 332. In response to a question concerning the bases for his diagnosis of pneumoconiosis, Dr. Booth cited a statement made by "the patient's spouse that patient carried [a diagnosis] of '3rd stage black lung'."

Director's Exhibit 33 at 332. Dr. Booth further indicated that pneumoconiosis contributed to the miner's death, stating that he treated the miner during his last hospitalization, "which was precipitated by congestive heart failure, probably on [the] basis of coronary artery disease; 'COPD' also a discharge diagnosis; coal [workers'] pneumoconiosis probably contributed to patient's demise." Director's Exhibit 33 at 332.

Dr. De Lara stated in response to claimant's questionnaire that his diagnoses were based on autopsy slides, and the fact that the "patient had 'COPD' for a long time prior to death." Director's Exhibit 33 at 116. Dr. De Lara also authored letters dated February 12, 2004 and November 30, 2004 in which he diagnosed pneumoconiosis based on the autopsy slides. Director's Exhibit 33 at 215, 216.

Dr. Dennis reviewed the autopsy slides and noted that they showed anthracosilicosis with black pigment deposition in the miner's lungs and interstitial fibrosis. Decision and Order at 6; Claimant's Exhibit 1. Dr. Dennis further indicated that the miner's death was due to severe cardiovascular disease and that the miner had significant pulmonary pathology. *Id.* Dr. Dennis concluded that the miner had pneumoconiosis in the form of progressive massive fibrosis and that pneumoconiosis hastened the miner's death. *Id.*

Dr. Fino performed a record review and opined that there was no evidence of pneumoconiosis or respiratory impairment or pulmonary disability due to primary lung disease and no evidence that lung disease caused the miner's death. Director's Exhibit 33 at 102. Instead, Dr. Fino attributed the miner's death to "bacterial endocarditis." *Id.* Dr. Rosenberg also concluded that the miner did not have pneumoconiosis based upon his review of the miner's treatment records, autopsy report, death certificate, and Dr. Booth's report. Decision and Order at 6; Director's Exhibit 33 at 120. Dr. Rosenberg opined that the miner's death was not related to his coal dust exposure and found no evidence that the miner's death was due to pneumoconiosis. *Id.*

Dr. Caffrey reviewed the miner's autopsy slides and indicated that the heart showed diffuse areas of acute inflammation with necrosis and scarred areas consistent with old myocardial infarction, while the lungs showed areas of acute congestion with minimal edema and a mild to moderate amount of anthracotic pigment, though no specific lesions, nodules or fibrosis consistent with pneumoconiosis. Director's Exhibit 33 at 75; Employer's Exhibit 1. In addition, Dr. Caffrey did not find cancer and did not diagnose pneumoconiosis, despite the presence of anthracotic pigment. *Id.* Dr. Caffrey disagreed with the death certificate's identification of squamous cell cancer as a cause of death, which he found was inconsistent with the autopsy findings. *Id.* Dr. Caffrey opined that the anthracotic pigment present in the miner's lungs was not related in any way to his death, which was caused by a bacterial infection of his cardiovascular system. *Id.* In his deposition testimony, Dr. Caffrey disputed the findings by Drs. De Lara, Booth

and Dennis and maintained that, even if the miner had pneumoconiosis, it would have been minimal and would not have caused a disabling pulmonary condition. Employer's Exhibit 1. Dr. Caffrey also indicated that the miner's death was not caused by the presence of coal dust in his lungs. *Id.*

The administrative law judge found that the death certificate and the amended death certificate were entitled to little weight because the attribution of the miner's death to cancer was unsupported by the other evidence of record. Decision and Order at 12. The administrative law judge also discredited the opinions in which Drs. Booth, De Lara and Dennis identified pneumoconiosis as a contributing cause of death and accorded greatest weight to Dr. Caffrey's opinion that the miner's death was unrelated to coal dust exposure. *Id.* at 12-13. The administrative law judge further indicated that Dr. Booth's opinion was inadmissible because it exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(2)(i). *Id.* at 12. The administrative law judge concluded that claimant did not establish death due to pneumoconiosis in accordance with 20 C.F.R. §718.205(c). *Id.* at 13.

Claimant argues on appeal that the administrative law judge did not properly weigh the miner's treatment records, the amended death certificate, and the opinions of Drs. Booth, De Lara, and Dennis. Claimant further maintains that the administrative law judge should have treated Dr. De Lara's two reports as one and should have determined that Dr. Booth's report was admissible under 20 C.F.R. §725.414(a)(2)(i). Claimant also argues that the administrative law judge erred in giving greatest weight to Dr. Caffrey's opinion when Dr. Caffrey did not diagnose legal pneumoconiosis.

We hold that claimant has not alleged error requiring remand of this case. The treatment records of the miner's last hospitalization, signed by Dr. Downs, and approved by Dr. Booth, reflect diagnoses of COPD and pleural effusions by history, with symptoms of shortness of breath and decreased sleep. Director's Exhibit 10. The records also include a notation that on the second day of the miner's hospitalization, his shortness of breath increased and abruptly ceased. *Id.* Because the records do not contain any opinions regarding the cause of the miner's death and the administrative law judge acknowledged the fact that the miner suffered from COPD, the administrative law judge did not err in omitting a specific discussion of the treatment records from her analysis under 20 C.F.R. §718.205(c). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989)(*en banc*).

The administrative law judge rationally determined that the credibility of the amended death certificate was diminished, as the finding that the miner's death was due to cancer was not supported by Dr. Bell's autopsy findings or by the findings of any of the pathologists who reviewed the autopsy slides. *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Decision and Order at 12. The administrative law judge acted within her

discretion as fact-finder in according the opinion of Dr. Booth no weight as she found it brief, conclusory and lacking in supporting evidence and explanation. *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-130 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-151. In light of her permissible discrediting of Dr. Booth's opinion, the administrative law judge did not err in declining to accord it determinative weight based upon Dr. Booth's status as a treating physician.³ 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 22 BLR 2-320 (6th Cir. 2002).

The administrative law judge determined that Dr. Dennis's report, which was based on a review of autopsy slides, reached a "conclusion [that] is not consistent with the record," since Dr. Dennis diagnosed progressive massive fibrosis caused by coal dust exposure, which was not observed by the physician who conducted the autopsy. Decision and Order at 13. The administrative law judge rationally found, therefore, that because Dr. Dennis concluded that pneumoconiosis hastened the miner's death based on his diagnosis of massive fibrosis, his report was inconsistent with the record and entitled to little weight with respect to the issue of death due to pneumoconiosis. *Crisp*, 866 F.2d at 185, 12 BLR at 2-130; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 12. In evaluating Dr. De Lara's opinion, that pneumoconiosis was a contributory factor to the miner's death, the administrative law judge rationally found that the opinion was conclusory since it was unexplained, and was therefore entitled to little weight.⁴ Decision and Order at 13; see *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002).

³ We decline to address claimant's argument that the administrative law judge erred in determining that Dr. Booth's response to the questionnaire constituted a medical report in excess of the evidentiary limitations. Based upon the administrative law judge's rational decision to accord no weight to Dr. Booth's opinion, error, if any, in the administrative law judge's evidentiary ruling is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

⁴ Claimant is incorrect in asserting that the administrative law judge did not treat the separate submissions from Dr. De Lara as one medical report pursuant to 20 C.F.R. §725.414(a)(2). In her December 22, 2006 Order Overruling Employer's Objection and Denying Motion for Admission of Evidence, she indicated that claimant was allowed to "submit reports from two pathologists who examine autopsy records as [claimant's] two permissible medical reports, in addition to the actual report of the autopsy." In addition, in her Decision and Order, the administrative law judge summarized and considered all of the documentary evidence authored by Dr. De Lara. Decision and Order at 5-6, 12-13.

Because the administrative law judge properly discounted the only medical opinions of record that could support a finding that pneumoconiosis played a role in the miner's death, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death.⁵ 20 C.F.R. §718.205(c). In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in this survivor's claim, *Perry v. Director, OWCP*, 9 BLR 1-1 (1986), we affirm the administrative law judge's denial of benefits therein.

⁵ We need not address claimant's argument that the administrative law judge erred in crediting Dr. Caffrey's opinion, that the miner's death was unrelated to pneumoconiosis, in light of our affirmance of the administrative law judge's finding that the evidence supportive of claimant's burden at 20 C.F.R. §718.205(c) was insufficient to establish that pneumoconiosis caused, hastened, or contributed to the miner's death. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (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 Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge