

BRB No. 07-0754 BLA

M.L.A.)
(Widow of R.A.))
)
Claimant-Respondent)
)
v.)
)
STANSBURY AND COMPANY,)
INCORPORATED)
)
and)
)
TRANSCO ENERGY COMPANY) DATE ISSUED: 05/23/2008
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order-Granting Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikesville,
Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order-Granting Benefits (2006-BLA-5623) of
Administrative Law Judge Joseph E. Kane 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 credited the miner with twenty-five years of coal mine employment based on the parties' agreement and employment records, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence establishes the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis. In response, claimant urges affirmance of the administrative law judge's award of benefits. Employer filed a reply brief. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a substantive response to this appeal.

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).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis.² 20 C.F.R. §§718.1; 718.202; 718.203; 718.205(c); 718.304. *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). For survivor's claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4).

¹ Claimant is the widow of a miner who died on February 19, 2001. Director's Exhibit 8. Claimant filed a survivor's claim on April 3, 2001. Director's Exhibit 1. The living miner's claim was denied by an administrative law judge in 1992. The denial was affirmed by the Board on appeal. *[R.A.] v. Stansbury & Co.*, BRB No. 93-1298 BLA (June 29, 1994) (unpub.). The miner's subsequent motion for modification was denied by the administrative law judge.

² The administrative law judge's findings that the miner had pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202, 718.203, are not challenged on appeal, and thus, are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pneumoconiosis is a substantially contributing cause of a miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).³ The United States Court of Appeals for the Sixth Circuit has stated that pneumoconiosis hastens death "if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

In this case, the death certificate states that the miner died due to metastatic lymphoma. Severe emphysema was noted as a secondary cause. Director's Exhibit 8. With regard to the medical opinions, the administrative law judge credited that of Dr. Baker. Dr. Baker reviewed the miner's treatment records, autopsy results and death certificate. Dr. Baker stated that the miner was admitted to the hospital in respiratory distress several days before his death. He opined that the miner's immediate cause of death was acute pneumonia, and that pneumoconiosis hastened the miner's death due to pneumonia. Claimant's Exhibit 1. The administrative law judge gave less weight to the opinion of Dr. Wilkens, the miner's treating physician, that coal dust exposure contributed to the miner's death. The administrative law judge found that Dr. Wilkens did not provide any reasons for this opinion. Decision and Order at 10; Claimant's Exhibit 2. The administrative law judge also gave less weight to the opinions of Drs. Fino and Dahhan that coal dust exposure played no role in the miner's death. Director's Exhibit 30; Employer's Exhibit 1. The administrative law judge found that they did not explain why the miner's pneumoconiosis did not contribute to the respiratory distress he experienced immediately before his death. The administrative law judge thus concluded that the well-reasoned and documented opinion of Dr. Baker outweighs the opinions of Drs. Fino and Dahhan, and that claimant therefore established that the miner's death was hastened by pneumoconiosis. Decision and Order at 10-11.

With regard to the opinion of Dr. Caffrey that the miner's simple coal workers' pneumoconiosis did not cause, contribute to, or hasten death, which employer offered as its affirmative autopsy report, *see* 20 C.F.R. §725.414(a)(3)(i), the administrative law judge found that Dr. Caffrey reviewed medical information beyond the autopsy slides and Dr. Wilson's autopsy report. *See* Director's Exhibit 29. The administrative law judge found that this makes Dr. Caffrey's opinion a "medical report." *See* 20 C.F.R. §725.414(a)(3)(i). As employer already had designated the reports of Drs. Fino and Dahhan as its "medical reports," the administrative law judge stated that, if possible, he would redact those portions of the opinion based on inadmissible considerations. The

³ The record indicates that the miner's coal mine employment occurred in Tennessee and Kentucky. Director's Exhibit 22. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable in this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

administrative law judge found, however, that Dr. Caffrey's opinion could not be segmented in this manner, as Dr. Caffrey "clearly relied upon evidence besides the autopsy slides to formulate his opinion." Decision and Order at 10. Thus, the administrative law judge declined to consider Dr. Caffrey's opinion. *Id.*

On appeal, employer specifically contends that the administrative law judge erred in failing to address the opinion of Dr. Caffrey. Employer also contends that the administrative law judge erred in giving greater weight to the opinion of Dr. Baker than to those of Drs. Fino and Dahhan.

The administrative law judge found that Dr. Caffrey's opinion, offered by employer as its affirmative autopsy report, instead constituted a medical report under Section 725.414(a)(3)(i). In his report, Dr. Caffrey stated he reviewed a 1998 pulmonary function study, x-ray reports from 1998 and 1999, a surgical pathology report related to a biopsy in which lymphoma was diagnosed, the death certificate, the autopsy report of Dr. Wilson, and 32 autopsy slides. Director's Exhibit 29. In offering his opinion as to the cause of death, Dr. Caffrey stated, "It is my opinion from a review of the documents I have listed, the autopsy report, and the autopsy slides," that pneumoconiosis did not cause, contribute to, or hasten the miner's death. *Id.* In view of Dr. Caffrey's recitation of the items he reviewed and his explicit reliance on them in forming his opinion, we cannot say, on the facts of this case, that the administrative law judge abused his discretion in finding that Dr. Caffrey's opinion exceeds the scope of an autopsy report. *See generally Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*);⁴ *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002), *cert. denied*, 538 U.S. 906 (2003). Moreover, the administrative law judge did not err in finding that it was not possible to ascertain Dr. Caffrey's opinion as to the relationship between pneumoconiosis and the miner's death with reference only to the autopsy evidence. *See generally Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting). Thus, we reject employer's contention that the administrative law judge erred in not addressing Dr. Caffrey's opinion, and the exclusion of this opinion is affirmed.

⁴ Employer offered, in addition, the reports of Drs. Dahhan and Fino as its two affirmative medical reports. 20 C.F.R. §725.414(a)(3)(i); *see* discussion, *infra*. Employer does not contend on appeal that Dr. Caffrey's opinion should be designated as a medical report instead of one of the other opinions, but only that the administrative law judge erred in not addressing the opinion of Dr. Caffrey. Employer also states that Dr. Caffrey's opinion was actually a rebuttal autopsy opinion, which it mistakenly identified as an affirmative opinion. For the reasons stated in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240 (2007) (*en banc*), we reject the implication that this designation would assist employer's defense of the claim.

We also reject employer's contention that the administrative law judge erred in crediting the opinion of Dr. Baker over those of Drs. Dahhan and Fino.⁵ The miner was admitted to the hospital several days prior to his death, with shortness of breath as the primary complaint. Director's Exhibit 11 at 115. Dr. Wilkens reported that the miner had complained of shortness of breath for three weeks and was experiencing respiratory failure. *Id.* Dr. Baker stated that the miner had coal workers' pneumoconiosis, chronic obstructive airway disease and chronic bronchitis, and that his overall condition was weakened due to radiation and chemotherapy for treatment of lymphoma. Dr. Baker stated that the pneumonia was the acute cause of death, notwithstanding the lymphoma, and that it was hastened by pneumoconiosis with associated obstructive airway disease and bronchitis. Dr. Baker stated that without these respiratory conditions, the miner may not have contracted pneumonia, or that the pneumonia would not have been as severe or have caused death. *Id.*

The administrative law judge found that the opinions of Drs. Fino and Dahhan are less well-reasoned than that of Dr. Baker, as they did not adequately explain why lymphoma was the only cause of death when the miner had been admitted to the hospital in respiratory distress. The administrative law judge also noted that Dr. Fino stated that the miner did not have a respiratory disability prior to his death when, in fact, the miner's pulmonary function studies established total disability as of 1990 and 1995. *See* Claimant's Exhibits 3, 4; Decision and Order at 10. The administrative law judge therefore declined to credit their opinions that pneumoconiosis played no part in causing or hastening the miner's death. Decision and Order at 10.

⁵ Employer also contends the administrative law judge erred in stating that Dr. Wilson, the autopsy prosector, did not offer an opinion as to the cause of the miner's death. Contrary to the administrative law judge's finding, Dr. Wilson reported "[i]t *appears* that the acute bronchopneumonia noted in the right, middle, and lower lobes *may have been* associated with the patient's reason for his last hospitalization and ultimate death." Director's Exhibit 9 (emphasis added). The administrative law judge's error in this regard, however, is harmless. Although the opinion might support the negative inference that the miner's death was not due to pneumoconiosis, Dr. Wilson's opinion is not definitively stated and thus is insufficient to support the legal conclusion that the miner's death was not due to pneumoconiosis. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

The administrative law judge is entitled to determine the weight to be accorded to the medical evidence of record, and the Board is not empowered to reweigh it. *See, e.g., Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003). In this case, the administrative law judge provided a rational basis for finding Dr. Baker's opinion to be the better reasoned one, and therefore, for giving it dispositive weight. *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997). As this opinion establishes that the miner's death was hastened by pneumoconiosis, we affirm the award of survivor's benefits as it is supported by substantial evidence and in accordance with law. *Williams*, 338 F.3d 501, 22 BLR 2-625; *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); 20 C.F.R. §718.205(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge