

BRB No. 08-0542 BLA

R.L.B.)
(Widow of H.B.,)
by her estate's administrator, G. B.))
)
Claimant-Petitioner)
)
v.)
)
TEDS COAL COMPANY,)
INCORPORATED)
)
and) DATE ISSUED: 05/27/2009
)
WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS 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 – Denial of Survivor Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Survivor Benefits (2006-BLA-5538) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a 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). The miner died on April 7, 2005,¹ and claimant, the miner’s widow, filed her application for survivor’s benefits on May 23, 2005.² Director’s Exhibit 4. The administrative law judge found that the miner had twenty years and ten months of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b). The administrative law judge found, however, that the evidence failed to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge further found that because the evidence was insufficient to establish that the miner had complicated pneumoconiosis, claimant was not entitled to the irrebuttable presumption that the miner’s death was due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish complicated pneumoconiosis at Section 718.304(b), and in failing to find that pneumoconiosis did not contribute to the miner’s death pursuant to Section 718.205(c). Employer responds, urging affirmance of the denial of benefits.

¹ The miner filed his first claim for benefits on September 16, 1986. Director’s Exhibit 1. This claim was finally denied by the district director on March 13, 1987, because the evidence failed to establish any element of entitlement. *Id.* The miner filed a duplicate claim on October 23, 1989, which was denied by Administrative Law Judge Edith Barnett because the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a material change in conditions pursuant to the prior version of 20 C.F.R. §725.309(d). Director’s Exhibit 2. The Board affirmed the denial of benefits. [*H.B.*] *v. Teds Coal Co.*, BRB No. 92-0365 BLA (Sept. 29, 1994)(unpub.). No further action was taken by the miner.

² On January 17, 2007, claimant, R.L.B., passed away. Administrative Law Judge’s Exhibit I. G.B., the administrator of her estate, is pursuing the claim on behalf of claimant’s estate. Administrative Law Judge’s Exhibit III.

The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.³

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.⁴ 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).

To establish entitlement to survivor's benefits, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if 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 Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy

³ The administrative law judge's findings that the miner had twenty years and ten months of coal mine employment, and that the evidence established that he had pneumoconiosis under 20 C.F.R. §718.202(a)(2), (4), are affirmed, as unchallenged by the parties on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a)-(c). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304, however. Rather, in determining whether claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Pursuant to Section 718.304(b), claimant asserts that the administrative law judge erred in not giving controlling weight to the opinion of Dr. Racadag, the autopsy prosector, that the miner's pulmonary mass was complicated pneumoconiosis, because Dr. Racadag was the only doctor who actually observed the miner's lungs. Claimant's Brief at 12, *citing Perry v. MYNU Coals, Inc.*, 469 F.3d 360, 23 BLR 2-376 (4th Cir. 2006). We disagree.

In considering the evidence pursuant to Section 718.304, the administrative law judge found that the CT scan and x-ray evidence was negative for complicated pneumoconiosis. Decision and Order at 10-11. The administrative law judge then evaluated the opinions of Drs. Racadag, Crouch, Kahn and Naeye. Director's Exhibits 14, 15; Claimant's Exhibits 4, 5; Employer's Exhibits 3, 6. The administrative law judge initially found that Dr. Racadag's gross and microscopic finding of a 2.1 centimeter mass established the presence of a large pulmonary mass in the miner's lungs.⁵ Decision and Order at 13-14.

Regarding the etiology of the large mass, the administrative law judge found that: Dr. Racadag concluded that the mass was progressive massive fibrosis or complicated pneumoconiosis; Dr. Crouch concluded it was old necrotizing granulomatous disease; Dr. Kahn diagnosed a large caseating granuloma, usually representative of old tuberculosis; and, Dr. Naeye did not provide a specific diagnosis regarding the mass. Decision and Order at 14. The administrative law judge set aside the "non-specific" analysis by Dr. Naeye, and acknowledged that Drs. Racadag, Crouch and Kahn are well-qualified pathologists and that they presented reasoned and probative explanations for their respective diagnoses. Decision and Order at 14. The administrative law judge found that

⁵ The administrative law judge found that Dr. Naeye did not identify a lesion of pneumoconiosis that exceeded one centimeter in size and Drs. Kahn and Crouch did not address the actual size of the pulmonary mass. Decision and Order at 13.

the preponderance of the evidence, consisting of the opinions of Drs. Crouch and Kahn, that the large pulmonary mass represents a granuloma not associated with coal mine dust exposure, outweighed Dr. Racadag's conclusion that the mass is progressive massive fibrosis or complicated pneumoconiosis. *Id.*

While an autopsy prosector may have an additional perspective based upon his gross observations, *see Perry*, 469 F.3d at 366, 23 BLR at 2-386, an administrative law judge is not required to accord his opinion enhanced weight solely on that basis, *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). In this case, the administrative law judge recognized that Dr. Racadag was the only doctor who had actually examined the miner's lungs, but nonetheless permissibly found his opinion as to the nature of the mass was outweighed by the equally reasoned reports of Dr. Crouch, who reviewed the miner's autopsy slides, and Dr. Kahn, who reviewed the miner's records and autopsy slides. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-262; *Urgolites*, 17 BLR at 1-23, Decision and Order at 14; Director's Exhibit 15; Claimant's Exhibits 4, 5. We, therefore, affirm the administrative law judge's finding that claimant was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.304.

In considering the evidence pursuant to Section 718.205,⁶ the administrative law judge found that Drs. Racadag and Kahn opined that pneumoconiosis contributed to the miner's death and, in contrast, Drs. Crouch, Naeye, Zaldivar and Crisalli opined that pneumoconiosis did not play any role in the miner's death.⁷ Decision and Order at 17-22. The administrative law judge accorded diminished probative value to Dr. Racadag's opinion because he found that it was based on an erroneous diagnosis of complicated

⁶ On the miner's death certificate, Dr. Sells noted that the immediate cause of death was small lymphocytic lymphoma due to end stage chronic obstructive pulmonary disease and identified urosepsis as a contributing cause of death. Director's Exhibit 13. The administrative law judge accorded the death certificate little probative weight due to insufficient reasoning. Decision and Order at 23. We affirm the administrative law judge's finding, as it has not been challenged on appeal. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

⁷ The administrative law judge determined that the earlier evidence from the West Virginia Occupational Pneumoconiosis Board, and the reports of Drs. Ahmed, Bhanot and Atassi did not address the cause of the miner's death. Decision and Order at 22.

pneumoconiosis and, therefore, was not a reasoned opinion.⁸ The administrative law judge, however, credited Dr. Kahn's conclusion that:

[T]he functional alterations caused by the coal workers' pneumoconiosis combine with those from the emphysema and chronic bronchitis, and this combination then acts in a synergistic way to enhance the pulmonary impairment, and thus contribute to the disability [the miner] suffered in life and it contributed to his death.

Decision and Order at 18, *quoting* Claimant's Exhibit 4. The administrative law judge found that, based on the documentation and reasoning provided, Dr. Kahn's opinion, and the contrary opinions of Drs. Crouch, Naeye, Zaldivar and Crisalli, were equally probative. Decision and Order at 24. The administrative law judge determined that the preponderance of the probative medical opinions by Drs. Crouch, Naeye, Zaldivar and Crisalli, outweighed Dr. Kahn's conclusion and established that the miner's simple coal workers' pneumoconiosis did not contribute to or hasten his death. *Id.*

Claimant specifically alleges that while the administrative law judge found Dr. Kahn's opinion well-reasoned and documented, "as four physicians have given opinions that the miner's pneumoconiosis did not contribute to his death, versus the one physician who did, the administrative law judge has chosen the greater number of the physicians" in finding that pneumoconiosis did not contribute to the miner's death. *Id.* Claimant contends that because Dr. Kahn was "the only physician who reviewed all of the miner's medical records pertaining to the miner's clinical history," the administrative law judge should have found that his opinion outweighed the opinions of Drs. Naeye and Crouch. Claimant's Brief at 14. Claimant further argues that the administrative law judge erred in failing to consider that Dr. Kahn's status as a pathologist made him more highly qualified to provide an opinion on the cause of the miner's death than Drs. Crisalli and Zaldivar, who are pulmonologists. Claimant's allegations of error are without merit.

Contrary to claimant's contention, the administrative law judge specifically acknowledged that Dr. Kahn examined the miner's autopsy slides, reviewed the miner's hospitalization and treatment records, the autopsy/pathology reports by Drs. Racadag, Crouch and Naeye, the medical opinions of Drs. Zaldivar and Crisalli and considered the

⁸ The administrative law judge noted that Dr. Racadag opined that the miner had complicated pneumoconiosis, which was contrary to the preponderance of the pathology evidence. Decision and Order at 23. The administrative law judge further found that Dr. Racadag failed to explain his opinion, that pneumoconiosis contributed to the miner's death, in light of his conclusion that the miner would have died as and when he did regardless of his occupational history. *Id.*

miner's smoking history. Decision and Order at 18, 23. The administrative law judge found that Drs. Zaldivar and Crisalli, like Dr. Kahn, provided documented and reasoned opinions based on their review of the miner's medical records, including treatment records, a CT scan, x-rays and autopsy reports by Drs. Racadag, Kahn and Crouch, in concluding that pneumoconiosis did not play a role in or hasten the miner's death. Decision and Order at 18-24; Employer's Exhibits 1, 4. The administrative law judge similarly found that Drs. Crouch and Naeye provided a documented and reasoned contrary opinion based on their review of the autopsy report by Dr. Racadag, and on their examination of the miner's autopsy slides. Decision and Order at 12, 13, 18, 23, 24; Director's Exhibit 15; Employer's Exhibit 3. The administrative law judge however reasonably exercised his discretion in relying on the preponderance of the probative medical opinions by Drs. Zaldivar, Crisalli, Crouch and Naeye to determine that simple pneumoconiosis did not contribute to or hasten the miner's death. Decision and Order at 24; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In addition, we reject claimant's contention that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Kahn, based upon Dr. Kahn's status as a Board-certified pathologist. Contrary to claimant's contention, the administrative law judge was not required to mechanically accord greater weight to the opinion of Dr. Kahn merely because he is a Board-certified pathologist. *Clark*, 12 BLR at 1-154; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge recognized Dr. Kahn's qualifications as a Board-certified pathologist, but rationally concluded that his opinion did not outweigh the equally probative conflicting opinions of the remaining physicians, who included two Board-certified pathologists and two Board-certified pulmonologists. *Id.* Therefore, the administrative law judge properly considered all of the relevant evidence, *i.e.*, the pathologists' reports, as well as the reports of the pulmonologists, and the respective professional qualifications of the physicians, and provided a valid basis for finding that the preponderance of the evidence did not establish that pneumoconiosis contributed to or hastened the miner's death. Decision and Order at 24; *Sparks*, 213 F.3d at 191, 22 BLR at 2-260; *Hicks*, 138 F.3d at 533, 21 BLR at 2-341-342.

Although claimant cites to evidence to support her contention that the miner's death was hastened by pneumoconiosis, her arguments on appeal amount to little more than a request that the Board reweigh the evidence, which we are not authorized to do. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because the administrative law judge's findings are supported by substantial evidence, we affirm his finding that claimant failed to satisfy her burden to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge