

BRB No. 08-0623 BLA

N.H. )  
(Survivor of W.H.) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
LEMARCO, INCORPORATED ) DATE ISSUED: 05/19/2009  
 )  
and )  
 )  
OLD REPUBLIC INSURANCE COMPANY )  
 )  
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 Awarding Benefits of Alice M. Craft,  
Administrative Law Judge, United States Department of Labor.

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:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-06087) of  
Administrative Law Judge Alice M. Craft (the administrative law judge) 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). Adjudicating this  
claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant  
established that the miner had thirteen and three-quarters years of coal mine employment,

that employer was collaterally estopped from re-litigating the issue of pneumoconiosis, which was established in the miner's claim<sup>1</sup> on the basis of x-ray evidence at 20 C.F.R. §718.202(a)(1), that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis at Section 718.205(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a substantive brief in 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 the applicable law, they are binding upon this Board and may not be disturbed.<sup>2</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and 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. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). 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, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that 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). 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).

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<sup>1</sup> The miner was awarded benefits on a claim filed on October 17, 1991. That award was affirmed by the Board. The miner died on June 17, 2004. Director's Exhibit 12. Claimant filed her survivor's claim on July 9, 2004. Director's Exhibit 2.

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

Employer contends that the administrative law judge erred in finding that the miner's death was due to legal pneumoconiosis,<sup>3</sup> without first making a finding as to whether the miner had legal pneumoconiosis. Employer also contends that, although the administrative law judge found that the miner had clinical pneumoconiosis, the evidence of record does not support a finding that the miner's death was due to clinical pneumoconiosis.

In finding that the miner's death was due to legal pneumoconiosis at Section 718.205(c), the administrative law judge credited the opinion of Dr. Eubank, that the immediate cause of the miner's death was congestive heart failure secondary to cor pulmonale,<sup>4</sup> which was caused by pneumoconiosis. The administrative law judge found that Dr. Eubank's opinion was particularly probative because she treated the miner for at least three years prior to his death. The administrative law judge further found that Dr. Eubank's opinion was supported by the medical opinions contained in the miner's treatment records, *i.e.*, the opinion of Drs. Qazi, Rahmen, Saleh and Halukurike, who were Board-certified in their respective fields, and who attributed the miner's organ failures to his congestive heart failure and cor pulmonale.<sup>5</sup> The administrative law judge noted that the only opinions that suggested that the miner's death was unrelated to legal pneumoconiosis were the opinion of Dr. Rosenberg, who found that the miner's death was due to severe alcohol-related, end-stage cardiomyopathy and the opinion of Dr. Vuskovich, who found that the miner's death was due to his medical treatment, which involved the ingestion of a large amount of acetaminophen and narcotics that caused liver and kidney failure, and cardiomyopathy. The administrative law judge, however, found

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<sup>3</sup> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

<sup>4</sup> Cor pulmonale is a cardiovascular disease recognized as a sequela of pneumoconiosis. It may be indicative of the existence of coal workers' pneumoconiosis, and its existence is relevant to causation. *See Christian v. Monsanto Corp.*, 12 BLR 1-56 (1988); *Gilson v. Price River Coal Co.*, 6 BLR 1-96 (1983); *see Mancina v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997).

<sup>5</sup> The miner's treatment records, contain the opinions of Drs. Qazi, Rahmen and Saleh, Board-certified specialists in Cardiovascular Disease, who concluded that the miner suffered from congestive heart failure due to cor pulmonale. Director's Exhibits 12, 15, 17, 19. Dr. Halukurike, a Board-certified nephrologist, determined that the miner's renal failure was due to liver parenchyma secondary to right-sided heart failure. Director's Exhibit 15-94.

that their opinions were not supported by the opinions contained in the miner's treatment records. Accordingly, the administrative law judge concluded, based on her weighing of this evidence, that the miner's death was due to heart disease, which was related to his coal mine employment.

At the outset, we agree with employer that the administrative law judge erred in finding that the miner's death was due to legal pneumoconiosis, without first addressing whether the evidence established that the miner had legal pneumoconiosis. *See Trumbo v. Director, OWCP*, 17 BLR 1-85 (1993). The administrative law judge relied on the finding of clinical pneumoconiosis based on x-ray evidence, which was established in the miner's case, to find the existence of pneumoconiosis established at Section 718.202(a), and did not, therefore, address whether legal pneumoconiosis was established. Because, as employer contends, the administrative law judge found that the miner died from legal pneumoconiosis, without first determining whether the evidence established legal pneumoconiosis, the administrative law judge's finding that death causation was established at Section 718.205(c) is vacated and the case is remanded for the administrative law judge to first make a finding regarding the existence of legal pneumoconiosis. *See Trumbo*, 17 BLR at 1-88.

In this case, there is conflicting evidence as to whether the miner had legal pneumoconiosis and, consequently, whether his death was due to legal pneumoconiosis. Dr. Eubank, the miner's treating physician, found that the miner had heart disease, caused by his coal workers' pneumoconiosis and cor pulmonale, and that he died from it. The miner's death certificate listed: congestive heart failure, due to cor pulmonale, as a consequence of COPD, as the cause of death. The miner's treatment records contained opinions diagnosing heart disease related to cor pulmonale. Contrary evidence, consisting of the opinions of Drs. Rosenberg and Vuskovich, however, indicated that the miner's heart disease was not related to his coal mine employment. Dr. Rosenberg opined that it was alcohol-induced, and unrelated to his coal mine employment. Dr. Vuskovich opined that it was caused by the heavy ingestion of acetaminophen and narcotics during his medical treatment, which ultimately led to death from liver and kidney failure. Dr. Vuskovich opined that the miner's "COPD was entirely attributable to his smoking history." Decision and Order at 10. Accordingly, on remand, the administrative law judge must reconsider this evidence, weigh it, and determine whether it is sufficient to establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(2) and, then, determine whether it is sufficient to establish that the miner's death is due to legal pneumoconiosis at 20 C.F.R. §718.205(c); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Director, OWCP*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1986) (*en banc*).

Further, on remand, since the administrative law judge found the existence of clinical pneumoconiosis established, she may consider whether the evidence, discussed *supra* at 4, establishes that the miner's death is due to clinical pneumoconiosis.<sup>6</sup> The administrative law judge must determine whether the evidence establishes that the miner's clinical pneumoconiosis caused his death, and whether the opinions on the issue are reasoned.<sup>7</sup> See 20 C.F.R. §§718.201(a)(1), 718.205(c); see *Williams*, 338 F.3d at 509, 22 BLR at 2-655; *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

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<sup>6</sup> "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particular matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

<sup>7</sup> Both Drs. Rosenberg and Vuskovich opined that the miner did not have clinical pneumoconiosis. Employer's Exhibits 1, 2. Dr. Eubank, however, diagnosed clinical pneumoconiosis and the miner's treatment records included x-ray and medical opinion evidence of clinical pneumoconiosis. Director's Exhibits 12-94.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge