BRB No. 08-0635 BLA

E.C.F. (Widow of H.F.) Claimant-Petitioner v. AZTEC MINING COMPANY and KENTUCKY CENTRAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/14/2009 DECISION and ORDER

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

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

Johanna F. Ellison (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denying Benefits (06-BLA- 5005) 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). The administrative law judge accepted the parties' stipulation to twenty-four years of qualifying coal mine employment, as supported by the record, and adjudicated this claim pursuant to the regulations contained at 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or 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 makes a due process challenge to the administrative law judge's admission into the record of Dr. Broudy's negative interpretations of x-rays dated December 26, 1999 and January 4, 2000, on the basis that the original films were unavailable for rebuttal purposes.[2] Claimant also challenges the administrative law judge's weighing of the evidence at 20 C.F.R. §§718.202(a)(4), 718.205, and 718.104(d). Specifically, claimant maintains that the opinions of Drs. Ghazal and Baker are sufficient to establish entitlement to survivor's benefits, and that the opinion of treating physician Dr. Ghazal should have been accorded determinative weight. Employer responds in support of the denial of benefits.[3] The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's admissibility ruling pursuant to 20 C.F.R. §718.102(d).[4]

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[1] Claimant is the widow of the deceased miner, who died on January 10, 2000. Decision and Order at 2; Director's Exhibits 2, 14.

[2] These x-ray interpretations were contained in Dr. Broudy's medical report dated December 4, 2005. Employer's Exhibit 2 at 7-9; *see* Decision and Order at 3-4.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), as no autopsy was performed; there is no biopsy evidence of record; and the presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this case. Decision and Order at 3, 12; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The Director, Office of Workers' Compensation Programs (the Director), advises that this issue will be rendered moot should the Board affirm either the administrative law judge's finding that the evidence of record failed to establish that the miner's death was due to pneumoconiosis, or his finding that the failure to obtain the x-ray evidence in

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.[5] 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 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, 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). 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).

Turning to the issue of the cause of the miner's death, the administrative law judge accurately summarized the evidence supportive of claimant's burden pursuant to Section 718.205(c), consisting of the medical reports of Drs. Ghazal and Baker. Dr. Ghazal completed the miner's death certificate, identifying the sole cause of death as "Lung Cancer – non small type," and listing an approximate four-month interval between onset and death. Decision and Order at 10, 15; Director's Exhibit 14. Subsequently, Dr. Ghazal completed a questionnaire in May 2007 that reflected his treatment of the miner from October 1999 until the miner's death on January 10, 2000. Claimant's Exhibit 2 at 2-3. Dr. Ghazal diagnosed clinical and legal pneumoconiosis, and stated that the miner's

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question prior to its destruction was due to claimant's lack of diligence. Director's Brief at 2.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because the miner's last coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Decision and Order at 2 n.1; Director's Exhibit 2.

toleration of radiation therapy for his lung cancer "certainly could be compromised by his coal dust exposure…[which] may have accelerated his morbidity and mortality – his death." Claimant's Exhibit 2 at 4. Further, Dr. Ghazal opined that the miner's lung condition "contributed in a way to his accelerated death and inability to tolerate treatment for his lung cancer." Claimant's Exhibit 2 at 4.

Dr. Baker reviewed the miner's medical records, and opined that he suffered from both clinical and legal pneumoconiosis, and that without the underlying disease he may not have developed pneumonia. Claimant's Exhibit 1 at 3. Dr. Baker stated that, in a patient with cancer, "the presence of other disease may sometimes influence the total outcome…in those cases in which a patient dies a pulmonary death and has underlying COPD, chronic bronchitis and Coal Workers' Pneumoconiosis, I feel this is related and may materially hasten the patient's death." Claimant's Exhibit 1 at 3-4.

In evaluating the opinions of Drs. Ghazal and Baker at Section 718.205(c), the administrative law judge assumed, *arguendo*, that the miner had pneumoconiosis, but found that the evidence was insufficient to establish that pneumoconiosis hastened the miner's death. In so finding, the administrative law judge noted that although Dr. Ghazal stated he was "confident" that the miner's chronic lung condition "due to coal dust exposure has contributed in a way to his accelerated death," he also stated that pneumoconiosis "may have" hastened the miner's death. Decision and Order at 15; Claimant's Exhibit 2. The administrative law judge permissibly concluded that Dr. Ghazal did not adequately explain the process by which pneumoconiosis hastened the miner's death, an assessment within his discretion as fact-finder. *See 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 v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*). Moreover, the administrative law judge placed "significant weight" on the fact that Dr. Ghazal did not mention pneumoconiosis when completing the death certificate, and did so only later when completing a questionnaire for litigation purposes. Decision and Order at 15; Director's Exhibit 14. We note that questionnaires of this nature are not inherently defective, *see Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991)(*en banc*); *Chancey v. Consolidation Coal Co*., 7 BLR 1-240, 1-242 (1984), and that an administrative law judge may rely on medical reports prepared for litigation. *Stanford v. Valley Camp Coal Co*., 7 BLR 1-906 (1985). However, an administrative law judge may choose to reject an opinion where the physician fails to explain his diagnosis, *see Clark*, 12 BLR at 1-155, and he may find two opinions submitted by one doctor to be unpersuasive if the physician does not explain the significantly different conclusions reached, *see generally Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hopton v. United States Steel Corp*., 7 BLR 1-12 (1984). Here, because Dr. Ghazal originally listed lung cancer as the sole cause of death, and listed no contributing causes of death, we conclude that the administrative law judge's inferences under the facts of this case were rational.

Consequently, the administrative law judge properly declined to accord controlling weight to the opinion of Dr. Ghazal pursuant to Section 718.104(d)(5), based on his status as the miner's treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002). Specifically, the administrative law judge referenced Dr. Ghazal's hospital treatment notes detailing the miner's care, Decision and Order at 5, 7, 91-10, 13, but observed that Dr. Ghazal's "expertise is in oncology and hematology, not pulmonary disease." Decision and Order at 13. Consideration of this factor was appropriate, since an administrative law judge is obliged to consider the physician's qualifications in weighing the evidence. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). After reviewing the relevant factors under Section 718.104(d), the administrative law judge determined that Dr. Ghazal's opinion was "insufficiently reasoned to support an award of benefits, regardless of the relationship between [the miner] and Dr. Ghazal." Decision and Order at 13, n.12. A treating physician's opinion that is found to be unreasoned may validly be discredited. *See generally Jericol Mining Inc., v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Groves*, 277 F.3d 829, 22 BLR 2-320. We conclude that the administrative law judge adequately evaluated the probative value of Dr. Ghazal's medical opinion, and rationally identified deficiencies therein, in determining that it was insufficiently reasoned to carry the claimant's burden under Section 718.205(c).

The administrative law judge also permissibly found that Dr. Baker's opinion was speculative and thus insufficient to support a finding that pneumoconiosis hastened the miner's death, given the qualified nature of the physician's conclusions, *e.g.*, "[the miner] *may* never have developed pneumonia" without the underlying lung disease. Decision and Order at 15; Claimant's Exhibit 1 (emphasis added); s*ee Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988). Moreover, the administrative law judge noted Dr. Baker's acknowledgment that there was no support in the medical literature for his theory that the miner's underlying lung disease rendered him more susceptible to pneumonia. Decision and Order at 15; *see Clark*, 12 BLR at 1-151. As trier-of-fact, the administrative law judge may validly reject an unsupported medical conclusion and need not accept any particular medical theory, but is empowered to weigh the medical evidence and draw his own inferences therefrom. *See Maypray v. Island Creek Coal Co*., 7 BLR 1-683 (1985).

In assigning appropriate weight to the evidence at Section 718.205(c), the administrative law judge made credibility determinations that were both rational and within his discretion. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-298 (6th Cir. 1994); *Rowe*, 710 F.2d at 255, 5 BLR at 103). Because he permissibly discounted the only medical evidence that could support a finding that pneumoconiosis played a role in the miner's death, we affirm his finding that the

evidence of record is insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to Section 718.205(c).[6] Consequently, entitlement to benefits is precluded, and we need not reach claimant's challenges to the administrative law judge's admissibility ruling or his determination that the evidence failed to establish the existence of pneumoconiosis under Section 718.202(a). *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).

[6] Finding that the evidence supportive of claimant's burden at 20 C.F.R. §718.205(c) was insufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge did not weigh the contrary opinions of Drs. Dahhan and Broudy, that the miner's death was due to complications of lung cancer unrelated to pneumoconiosis. Thus, we need not address claimant's assertion that the opinions of Drs. Dahhan and Broudy are unreasoned. Claimant additionally asserts that "[e]ven Dr. Broudy agreed that if the miner had significant COPD [chronic obstructive pulmonary disease] it could have caused the pneumonia and hastened the miner's death." Claimant's Brief at 15. However, Dr. Broudy opined that the miner "died of progressive carcinoma of the lung due to cigarette smoking," stating that the miner "terminally may have developed pneumonia as a complication," and that exposure to coal mine dust neither caused nor hastened his death. Employer's Exhibit 1 at 5. Further, at his deposition, Dr. Broudy testified that COPD did not in any way hasten the miner's death. Employer's Exhibit 2 at 29.

Accordingly, the administrative law judge's Decision and Order–Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge