BRB No. 08-0708 BLA

C.M. (Widow of D.G.M.) Claimant-Petitioner v. MAG INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/29/2009 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

C.M., Naugatuck, West Virginia, *pro se*.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (06-BLA-5199) of Administrative Law Judge Michael P. Lesniak 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 miner died on May 1, 1998, and claimant filed her claim for survivor's benefits on October 21, 2004.[1] Director's Exhibits 2, 10. In a Decision and Order dated June 11, 2008, the administrative law judge found, based on employer's stipulations and the evidence of record, that the miner had at least nineteen years of coal mine employment,[2] and that claimant established that the miner had simple clinical pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found, however, that claimant failed to establish that the miner's death was due to, or hastened by, pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits.[3] Employer responds, urging affirmance of the administrative law judge's denial

[1] Claimant previously filed a survivor's claim on August 19, 1998. However, she requested withdrawal of her prior claim on July 26, 2000, and her request was granted by Administrative Law Judge Daniel L. Leland on July 31, 2000. At the hearing in claimant's 2004 claim, employer moved for summary judgment, asserting that claimant's 1998 claim had not been properly withdrawn, and that claimant's 2004 claim should, therefore, be dismissed as an improper subsequent claim, pursuant to 20 C.F.R. §725.309(d)(3). In his June 11, 2008 Decision and Order, Administrative Law Judge Michael P. Lesniak (the administrative law judge) denied employer's motion for summary judgment, finding that claimant's first survivor's claim had been properly withdrawn, and that, therefore, claimant's 2004 claim was properly before him. *See* 20 C.F.R. §§725.306(c), 725.309(d)(3); *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-194, 1-200 (2002)(*en banc*); *Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-191 (2002)(*en banc*); Decision and Order at 3-4. On appeal, employer does not challenge the administrative law judge's denial of its motion for summary judgment.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 3, 5.

[3] Although she is not represented by counsel, claimant submitted a detailed letter to the Board in which she specifically asserted that the administrative law judge evaluated the evidence under an improper standard, failed to accord proper weight to the miner's treating physician, and erred in admitting into the record certain evidence submitted by employer.

of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis where the irrebuttable presumption of death due to pneumoconiosis set forth at 20 C.F.R. §718.304 is applicable,[5] or if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish any one of these elements precludes

[4] We affirm the administrative law judge's findings that claimant established the existence of simple clinical pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b), as employer does not challenge these findings and they are not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).; Decision and Order at 15.

[5] Claimant is not entitled to the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §§718.205(c)(3), 718.304 as the record contains no evidence of complicated pneumoconiosis. Decision and Order at 16. In addition, contrary to claimant's assertion, claimant is not entitled to the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.303, formerly 20 C.F.R. §410.462, as this presumption does not apply to any claim filed on or after January 1, 1982. *See* 20 C.F.R. §718.303(c). Therefore, there is no merit to claimant's argument that the administrative law judge evaluated her survivor's claim under an improper standard. Claimant's letter at 3.

entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In considering the medical evidence relevant to the cause of the miner's death pursuant to 20 C.F.R. §718.205(c), the administrative law judge properly found that the miner's death certificate[6] identified the immediate cause of death as lung cancer due to multiple metastases, and did not list pneumoconiosis as a contributing cause of death. Decision and Order at 5, 16; Director's Exhibit 10. The administrative law judge further found, correctly, that while the records from Williamson-Appalachian Regional Hospitals document treatment for asthmatic bronchitis, pneumonia, diabetes and lung cancer, and include diagnoses of coal workers' pneumoconiosis, they do not provide any opinions as to the cause of the miner's lung cancer, or offer any evidence that the miner's death was due to coal workers' pneumoconiosis. Decision and Order at 16; Employer's Exhibit 1.

Additionally, the administrative law judge considered the treatment notes of Dr. Tweel, the miner's treating physician, who opined that the miner had "significant coal workers['] pneumoconiosis impairing his function for oxygen transport." Director's Exhibit 13; Claimant's Exhibit 1. To the extent it could support a conclusion that pneumoconiosis contributed to the miner's death, the administrative law judge permissibly discounted Dr. Tweel's opinion as not well-reasoned because the physician did not explain why he attributed the miner's impairment to coal dust, rather than to the miner's extensive smoking history.[7] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 16; Director's Exhibit 13; Claimant's Exhibit 1. As the administrative law judge acted within his discretion in finding Dr. Tweel's opinion to be unreasoned, there is no merit to claimant's contention that the administrative law judge should have accorded greater weight to Dr. Tweel's opinion based on his status as the miner's treating physician. *See* 20 C.F.R. §718.104(d)(5); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564

[6] The administrative law judge found that the signature on the death certificate is illegible. Decision and Order at 5; Director's Exhibit 10.

[7] The administrative law judge found that the miner had a smoking history of at least sixty pack-years, based on the smoking histories documented in the miner's treatment records. Decision and Order at 5. The administrative law judge acted within his discretion in concluding that the smoking histories contained in the miner's treatment records were more objective, and thus more credible, than those provided by claimant and the miner's daughter. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Gattuso v. Director, OWCP*, 10 BLR 1-155 (1987); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 5.

(4th Cir. 2002); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Thus, the administrative law judge permissibly concluded that the miner's hospitalization and treatment records do not establish that pneumoconiosis caused, contributed to, or hastened the miner's death. Decision and Order at 16.

The administrative law judge next considered the pathology reports of Drs. Morris, Caffrey, and Hansbarger.[8] The administrative law judge correctly found that Dr. Morris did not render an opinion as to whether the miner's coal workers' pneumoconiosis caused his death, and that Dr. Caffrey opined that the miner's death was due to lung cancer, as a result of the miner's extensive smoking history, with no contribution from pneumoconiosis. Decision and Order at 16; Director's Exhibit 12; Employer's Exhibits 6, 8. By contrast, the administrative law judge noted that Dr. Hansbarger opined that "[the miner's] death was hastened in a minor way by the coal workers' pneumoconiosis." Decision and Order at 17; Claimant's Exhibit 6. The administrative law judge permissibly discounted Dr. Hansbarger's opinion as not well-reasoned or well-documented, because the physician's only explanation for his conclusion was that it was based "on the moderate nature of [the miner's pneumoconiosis]."[9] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 17; Claimant's Exhibit 6. Thus, the administrative law judge acted within his discretion in concluding that the pathology evidence also does not establish that the miner's death was caused, contributed to, or hastened by the miner's coal workers' pneumoconiosis. Decision and Order at 17.

Finally, the administrative law judge considered the medical opinions of Drs. Ghio, Jarboe, and Bellotte,[10] noting, correctly, that while all of the physicians agreed that

[8] Prior to the miner's death, Dr. Morris reviewed samples of tissue removed from the miner's right lung, following the miner's right lung resection in 1996. Following the miner's death, Drs. Caffrey and Hansbarger reviewed the pathology evidence, including the biopsy tissue slides, and offered opinions as to the cause of the miner's death. No autopsy was performed in this case. Director's Exhibits 11, 12; Claimant's Exhibit 6.

[9] Dr. Hansbarger stated: "I believe that [the miner's] death was hastened in a minor way by the coal workers' pneumoconiosis. This statement is made because of the moderate nature of the condition." Claimant's Exhibit 6.

[10] The administrative law judge considered the qualifications of all the physicians of record, and took "administrative notice" of the qualifications of Drs. Morris and Tweel, as their qualifications were not in the record. *See* Decision and Order at 16 n.7. The administrative law judge found that the physicians' qualifications did not affect the reasoning, documentation, and credibility of their medical opinions. *Id.*

the miner's death was due primarily to lung cancer, the physicians disagreed as to the cause of the miner's lung cancer, and as to whether pneumoconiosis contributed to the miner's death. Decision and Order at 17. Specifically, Drs. Ghio and Jarboe opined that the miner's lung cancer was due to cigarette smoking, and that neither pneumoconiosis nor coal mine dust exposure contributed to his death. By contrast, Dr. Bellotte stated that he could not "exclude the possibility" that the miner's exposure to silica, a component of coal dust and a known carcinogen, had acted in concert with the miner's smoking habit to cause his lung cancer. Claimant's Exhibit 4 at 2. Dr. Bellotte further opined that pneumoconiosis hastened the miner's death by interfering with the miner's oxygen transfer and contributing to his hypoxemia. Claimant's Exhibit 4 at 4.

The administrative law judge rationally discounted Dr. Bellotte's opinion, that the "possibility exists" that silica exposure in coal mine employment "may have contributed" to the miner's development of lung cancer, based in part on the fact that silica is a known carcinogen and "may well have" a latency period,[11] as too speculative to support the physician's conclusion that the miner's lung cancer was due to coal mine dust exposure. *U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-653 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 9, 10, 17; Employer's Exhibit 10 at 21, 25, 30, 41; Claimant's Exhibit 4 at 3. The administrative law judge also found Dr. Bellotte's opinion to be unsupported by objective evidence because, while attempting to draw a connection between the miner's lung cancer and his coal mine dust exposure, Dr. Bellotte admitted that the medical literature did not support his conclusion,[12] and that he was unable to quantify the miner's actual silica exposure.[13] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Hutchens v. Director, OWCP*, 8 BLR 1- 16 (1985); Decision and Order at 17.

[11] In his report dated May 30, 2007, Dr. Bellotte recognized the latency period in asbestosis, and then stated that, "Silica as a carcinogen may well have this same latency period for the development of malignancy." Claimant's Exhibit 4 at 3.

[12] In his July 2, 2007 deposition, Dr. Bellotte testified that studies have shown that occupational silica dust exposure increases the risk of developing lung cancer. However, Dr. Bellotte acknowledged that these studies did not involve coal miners and admitted that many studies have shown that there is no relationship between cancer and coal dust exposure. Employer's Exhibit 10 at 21, 25, 30.

[13] Dr. Bellotte admitted at his deposition that he did not know how much silica the miner was exposed to in his coal mine employment. Employer's Exhibit 10 at 41.

The administrative law judge then considered Dr. Bellotte's additional opinion that the miner's diffusion abnormality, as seen on pulmonary function testing, would interfere with the miner's oxygen transfer, contribute to hypoxemia, and hasten the miner's death from lung cancer by further impairing his lung function. Decision and Order at 18; Claimant's Exhibit 4 at 4. The administrative law judge permissibly discredited Dr. Bellotte's opinion as equivocal and speculative because Dr. Bellotte stated only that a diffusion capacity abnormality "can be" attributed to pneumoconiosis,[14] and further based his conclusion on his unsupported assumption that the miner's coal workers' pneumoconiosis was moderate and spread throughout his lungs.[15] *See Jarrell*, 187 F.3d at 391, 21 BLR at 2-653; *Justice*, 11 BLR at 1-94; Decision and Order at 18; Claimant's Exhibit 4 at 4; Employer's Exhibit 10 at 6-8, 42. Thus, the administrative law judge acted within his discretion in concluding that Dr. Bellotte's opinion was not a reasoned opinion sufficient to meet claimant's burden of proof to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336.

As the administrative law judge properly analyzed the medical opinions and explained his reasons for discrediting the opinions of Drs. Tweel, Hansbarger, and Bellotte, the only physicians supportive of claimant's position that pneumoconiosis contributed to the miner's death, we affirm the administrative law judge's conclusion that a finding of entitlement is precluded in this case.[16] *See* 20 C.F.R. §718.205(c)*; Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Trent*, 11 BLR at 1-27.

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[14] During his deposition, however, Dr. Bellotte acknowledged that cigarette smoking can also cause "a significant problem with the diffusion impairment." Employer's Exhibit 10 at 7.

[15] Dr. Bellotte testified at his deposition that he was able to conclude that the miner's impairment was due to coal workers' pneumoconiosis because it was "most likely" distributed throughout both lung fields. Employer's Exhibit 10 at 7-8. However, in his written report dated May 30, 2007, Dr. Bellotte acknowledged that only the miner's right lower lung zone had been examined. Claimant's Exhibit 4 at 1. Dr. Bellotte stated that this fact did not exclude the "probability" that anthracotic nodules were distributed throughout both of the miner's lung fields because one could "infer," based on the customary pattern of pneumoconiosis, that the upper lung zones would be more involved than the lower lung zones. Claimant's Exhibit 4 at 1.

[16] In her letter in support of her appeal, claimant asserts that the administrative law judge erred in admitting the deposition testimony of Dr. Caffrey, and the January 9, 2008 medical report of Dr. Jarboe. Claimant's letter at 1-2. Any error in the administrative law judge's admission of Dr. Caffrey's deposition is harmless, since the administrative

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

law judge did not rely on it to deny benefits, and in any event, limited the admission of Dr. Caffrey's deposition to the "the confines" of his biopsy report. *See Larioni v. Director,* OWCP, 6 BLR 1-1276, 1-1278 (1984); Hearing Transcript at 11; Decision and Order at 3. Contrary to claimant's additional contention, the administrative law judge committed no abuse of discretion in admitting Dr. Jarboe's January 9, 2008 report as a supplemental report. 20 C.F.R. §725.414(a)(1); *Clark*, 12 BLR at 1-153; Decision and Order at 3. Moreover, as discussed above, the denial of benefits is affirmed based on the administrative law judge's permissible rejection of all the medical opinions supportive of claimant's position, and not on the administrative law judge's reliance on Dr. Jarboe's opinion.