BRB No. 01-0244 BLA

ELLETHA V. STANFORD (Widow of WORLEY C. STANFORD)	)	
Claimant-Petitioner	)	
v.	)	
JEWELL SMOKELESS COAL CORPORATION	)	DATE ISSUED:
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Elletha V. Stanford, Oakwood, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order -

[1] Claimant, Elletha V. Stanford, is the widow of the miner, Worley C. Stanford, who died on August 10, 1998. The death certificate lists the cause of death as congestive cardiomyopathy and arteriosclerotic cardio-vascular disease. Other listed "factors" are renal failure, diabetes mellitus, chronic pancreatis, and hypothyroidism. Director's Exhibit 191.

Denying Benefits (99-BLA-0761) of Administrative Law Judge Edward Terhune Miller on both a miner's claim and 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).[3] The administrative law judge found that the evidence established a coal mine employment history of twenty-four years and that claimant established modification on the miner's claim, inasmuch as the newly submitted evidence, *i.e.*, that evidence submitted

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The instant appeal encompasses denials of claimant's request for modification of the denied miner's November 20, 1980 claim, and the survivor's December 16, 1998 claim.

[2] Claimant was initially represented by counsel, but on August 25, 2001, counsel advised the Board that he was no longer representing claimant. By Order dated June 5, 2001, the Board stated that since claimant was no longer represented the Board would review the case under the general standard of review and thus the Board need not address the specific allegations of error made by claimant's counsel. *See McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (1986). Claimant was also advised by this order that it was unnecessary to be represented by counsel, but, that if claimant did retain an attorney or legal representative, the Board must be immediately notified, and a copy of the notification forwarded to counsel for employer and the Director, Office of Workers' Compensation Programs was required. No such notification has been received.

[3] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot any arguments made by the parties regarding the impact of the challenged regulations.

subsequent to the most recent denial on the miner's claim, established the existence of pneumoconiosis sufficient to establish a change in conditions. Decision and Order at 4. Considering the merits of entitlement on the miner's claim, the administrative law judge found that the weight of the evidence established the presence of a totally disabling respiratory impairment. Decision and Order at 17-20. Because the miner's claim was filed on November 20, 1980, and the miner had over fifteen years of coal mine employment, Director's Exhibit 1, the administrative law judge found that the miner was entitled to the presumption that his totally disabling respiratory impairment was due to pneumoconiosis. Decision and Order at 20. The administrative law judge found, however, that employer established rebuttal of the presumption by demonstrating that the miner's totally disabling respiratory impairment was not due to pneumoconiosis. In making that finding, the administrative law judge further found that claimant had not proven that the miner's pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. Decision and Order at 20-22. Accordingly, benefits were denied on the miner's claim. With regard to the survivor's claim, the administrative law judge concluded that claimant was unable to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death or hastened death in any way. Decision and Order at 22-24. Accordingly, benefits were denied on the survivor's claim. Employer responds and urges affirmance of the denials on both claims. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers

[4] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination as well as the determination that claimant established modification on the miner's claim pursuant to 20 C.F.R. §725.310 by establishing the existence of simple pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm, as unchallenged, the administrative law judge's determination that the miner's simple coal workers' pneumoconiosis arose out of coal mine employment, and that the evidence supported a finding of a totally disabling respiratory impairment. *See Skrack*, *supra*; 20 C.F.R. §§718.203, 718.204(b).

the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In claims which are filed prior to January 1, 1982, and which the miner can establish a coal mine employment history of greater than fifteen years and the presence of a totally disabling respiratory impairment, a miner is entitled to a presumption that his totally disabling respiratory impairment or death were due to pneumoconiosis. 20 C.F.R. §718.305(a), *see* 30 U.S.C. §921(c)(4). *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). In order to establish rebuttal of the presumption, the party opposing entitlement must establish either that the miner did not have pneumoconiosis or that the miner's pulmonary or respiratory impairment did not arise out of or in connection with coal mine employment. 20 C.F.R. §718.305(a).

In this case, the administrative law judge concluded that, since claimant established the presence of a totally disabling respiratory impairment, invocation of this presumption was established. The administrative law judge, however, concluded that employer established rebuttal of the presumption. After careful review of the evidence of record, we affirm the administrative law judge's determination and thus we affirm the denial of benefits on the miner's claim.

The administrative law judge accorded greatest weight to the medical opinions of Drs. Naeye, Hutchins and Castle, physicians who recognized that the miner suffered from a totally disabling respiratory impairment, but at the same time concluded that pneumoconiosis and coal mine employment played no role in the disability. Director's Exhibit 144, Employer's Exhibits 18-21. In a permissible exercise of his discretion, the administrative law judge found these opinions to be the best reasoned of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, the administrative law judge, permissibly accorded the opinion of Dr. Castle greatest weight based on his status as board-certified pulmonologist. *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); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Corp.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986).

Lastly, the administrative law judge accorded less weight to the medical reports of Drs. Forehand and Robinette, both of whom opined that the miner's disabling respiratory impairment arose from coal mine employment, Director's Exhibit 134; Claimant's Exhibits 2, 3. The administrative law judge permissibly found that Dr. Forehand's conclusions that claimant's impairment was "typical" and "appeared" to have arisen from coal mine employment were entitled to little weight as the opinions were equivocal, *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge found that while the opinion of Dr. Robinette was entitled to "some weight," Decision and Order at 21, the opinion was ultimately outweighed by the opinions of the physicians discussed, *supra*, who provided a more thorough review of the medical evidence. *See Hicks*, *supra*; *Akers, supra*; *Clark*, *supra*; *Peskie*; *supra*; *Lucostic*, *supra*.

Since the administrative law judge has reviewed the entirety of the relevant evidence pursuant to rebuttal of the presumption at Section 718.305, and provided affirmable bases for determining that rebuttal was established, *see* discussion, *supra*, we affirm that finding and thus affirm the denial of benefits on the miner's claim. 20 C.F.R. §§718.305, 718.204(c); *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *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 the evidence establishes that pneumoconiosis the cause of the miner's death, was a substantially contributing cause or factor leading to the miner's death, or where the presumption set forth at 20 C.F.R. §718.304, concerning complicated pneumoconiosis, is applicable. 20 C.F.R. §718.205(c)(1), (2), (3), (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); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

In finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge provided affirmable bases for rejecting the medical opinions of record which could be supportive of claimant's burden. Decision and Order at 15-16. Specifically, the administrative law judge permissibly accorded little weight to the opinion of Dr. Scott, that pulmonary fibrosis contributed to the miner's death, Claimant's Exhibit 1, because the physician failed to explain his conclusion. *See Clark*, *supra*; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel*

Corp., 7 BLR 1-842 (1985). Further, the administrative law judge accorded little weight to Dr. Forehand's opinion that pneumoconiosis contributed to the miner's death, Claimant's Exhibit 2, because the physician's opinion was based on a finding that the miner suffered from cor pulmonale, a statement unsupported by any medical evidence of record, *see Hicks*, *supra*; *Akers, supra*; *Clark, supra*; *Peskie*, *supra*; *Lucostic, supra*. Lastly, the administrative law judge found that while Dr. Robinette explained his conclusion that the miner's death was at least partially attributable to pneumoconiosis, Claimant's Exhibit 3, and the physician possessed superior credentials, the opinion was nevertheless entitled to less weight than the opinions of the board-certified pathologists, Drs. Naeye, Joyce and Hutchins, all of whom found that pneumoconiosis played no role in the miner's death. Director's Exhibit 179; Employer's Exhibits 20, 21. *See Hicks, supra*; *Akers*, *supra*; *Clark, supra*; *Martinez, supra*; *Wetzel*, *supra*.

Accordingly, the administrative law judge has provided valid bases for the weight accorded the medical evidence, *see Hicks, supra; Akers, supra*, and substantial evidence supports his findings. Therefore, we affirm the administrative law judge's finding that the weight of the credible medical evidence was not sufficient to establish that pneumoconiosis caused, contribute to or hasten the miner's death. *See* 20 C.F.R. §718.205(c); *see Shuff*, *supra*.

Because claimant has failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits. *See* 20 C.F.R. §718.205(a)(1)-(3). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge