

BRB No. 01-0167 BLA

ALMA J. DICK)
(Widow of SHELDON J. DICK))
)
Claimant-Petitioner)
)
v.)
)
BETHENERGY MINES, INCORPORATED)
)
Employer-Respondent)
)
DATE ISSUED: _____)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
DECISION and ORDER)
Party-in-Interest)

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

Alma J. Dick, Johnstown, Pennsylvania, *pro se*.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (00-BLA-0240) of Administrative Law Judge Michael P. Lesniak denying benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

¹Claimant is Alma J. Dick, widow of Sheldon J. Dick, the miner, who filed her claim for benefits in April of 1999. Director's Exhibit 1.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the miner with fourteen years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 9. Decision and Order at 2. The administrative law judge noted that the parties stipulated that the miner had pneumoconiosis arising out of coal mine employment, Hearing Transcript at 9. Decision and Order at 4 n.3. Applying the regulations at 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Decision and Order at 11-13. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to find that pneumoconiosis contributed to the miner's death. Employer responds,

²The 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). Accordingly, on August 10, 2001, the Board issued a second order in which it rescinded its earlier order requesting supplemental briefing. While employer submitted a supplemental brief in response to the Board's initial order, the court's decision renders moot those arguments made by employer regarding the impact of the challenged regulations.

urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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).

Benefits are payable on a survivor's claim filed on or after January 1, 1982, only when claimant meets her burden of establishing that the miner's death was due to pneumoconiosis arising out of coal mine employment, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established. 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c)(2), (c)(3), (c)(5);

³We affirm the administrative law judge's finding regarding the length of the miner's coal mine employment as it is not adverse to claimant and is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴The administrative law judge properly found that the presumption at 20 C.F.R. §718.304 was inapplicable to this case inasmuch as no physician diagnosed complicated pneumoconiosis. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

⁵Specifically, 20 C.F.R. §718.205(c)(2), (c)(5) of the new regulations provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Moreover, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is considered to have substantially contributed to death if it hastened the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Regarding the cause of the miner's death, the record contains a death certificate signed by Dr. Chandran in which he attributes the miner's death to respiratory arrest and lists "Endstage COPD, Emphysema, HTN, PVD, [and] CAD" under "other significant conditions." Director's Exhibit 6. In the autopsy report, Drs. Ashcraft and Hanna found severe coronary artery disease, macronodular coal workers' pneumoconiosis, centrilobular emphysema, and acute bronchopneumonia involving the left lower lobe, but did not specifically discuss the cause of the miner's death. Director's Exhibit 7. Additionally, Dr. Ashcraft subsequently testified that the miner's death was caused by respiratory and heart failure and that the respiratory failure was due to smoking and coal workers' pneumoconiosis. Claimant's Exhibit 3 at 25-26. Dr. Perper, who reviewed the medical evidence of record and the autopsy slides, opined that coal workers' pneumoconiosis was a

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(5) 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)(2), (c)(5); see *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

substantial contributing cause and hastening factor of the miner's death. Claimant's Exhibit 1. Drs. Naeye, Bush, Mendelow, Griffith, and Cagle, who reviewed the medical evidence of record and the autopsy slides, and Dr. Fino, who reviewed the medical evidence of record, all found that pneumoconiosis did not contribute to or hasten the miner's death. Director's Exhibit 11; Employer's Exhibits 2-9.

The administrative law judge initially noted that all of the physicians found that the miner suffered from coal workers' pneumoconiosis. Decision and Order at 11. In reviewing the relevant evidence regarding the cause of the miner's death, the administrative law judge thoroughly considered the medical opinions, noting the qualifications of the physicians and the documentation underlying their medical judgments. Decision and Order at 4-13. The administrative law judge found that the "preponderance of the well-reasoned medical opinion evidence, specifically Drs. Naeye, Bush, Mendelow, and Fino indicates that the Miner's death was not due to pneumoconiosis." Decision and Order at 13. Accordingly, the administrative law judge permissibly concluded that claimant has not met her burden of establishing that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000) and *Lukosevicz* based on the numerical superiority of the well-reasoned opinions. Decision and Order at 13; *Director, OWCP v. Greenwich Collieries* [*Ondecko*],

⁶Drs. Griffith and Cagle found no causal relationship between pneumoconiosis and the miner's death and Dr. Mendelow opined that the miner would have died at the same time and in the same manner regardless of whether or not he had been exposed to coal dust. Employer's Exhibits 3, 5, 6.

⁷Drs. Naeye, Bush, Fino, Mendelow, Griffith, and Cagle all found that pneumoconiosis did not contribute to or hasten the miner's death whereas Drs. Ashcraft and Perper found that pneumoconiosis did contribute to the miner's death. Additionally, the

512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Inasmuch as an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met her burden of proof, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we hold that the administrative law judge permissibly found that claimant failed to establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(c)(2), (c)(5); *Lukosevicz, supra*; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis, *see Lukosevicz, supra*; *see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct.

administrative law judge found the "death certificate, in and of itself," to be unreliable. *See Addison v. Director, OWCP*, 11 BLR 1-68 (1987).

969 (1993), an essential element of entitlement, we also affirm his denial of benefits on the survivor's claim under 20 C.F.R. Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*); *see also Trumbo, supra*.

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