

BRB No. 04-0147 BLA

MARY FOLWEILER )  
(Widow of FRANCIS A. FOLWEILER) )

Claimant-Petitioner )

v. )

DATE ISSUED: 10/20/2004

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Respondent )

DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Mary Folweiler, Port Carbon, Pennsylvania, *pro se*.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order (02-BLA-5464) of Administrative Law Judge Janice K. Bullard denying benefits on a 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). This case involves a survivor's claim

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<sup>1</sup>Claimant is the widow of the deceased miner, Francis Folweiler. Director's Exhibit 3.

filed on August 31, 2001.<sup>2</sup> The administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.<sup>3</sup> On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, contending that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>4</sup> *See*

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<sup>2</sup>The miner filed a claim on December 17, 1982. Director's Exhibit 1. On June 26, 1987, Administrative Law Judge Paul H. Teitler issued a Decision and Order denying benefits. *Id.* Because the miner did not pursue this claim any further, the denial became final. The miner filed another claim on October 4, 1990. *Id.* On May 18, 1993, Administrative Law Judge A.A. Simpson, Jr. issued a Decision and Order awarding benefits. The miner died on August 18, 2001. Director's Exhibits 1, 4.

<sup>3</sup>The administrative law judge properly noted that the only issue before her was whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 2. The Director, Office of Workers' Compensation Programs, did not contest the fact that the miner suffered from pneumoconiosis arising out of his coal mine employment. *See* Director's Exhibit 13. The administrative law judge found that the record supported the Director's stipulations. *See* Decision and Order at 2.

<sup>4</sup>Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (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

20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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 *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

The Director contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Specifically, the Director asserts that the administrative law judge erred in failing to provide a valid basis for discrediting Dr. Simelaro's opinion that the miner's death was due to pneumoconiosis. In considering whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge addressed the opinions of Drs. Simelaro and Sherman.<sup>5</sup> While Dr. Simelaro opined that pneumoconiosis contributed to the miner's death, Claimant's Exhibit 3, Dr. Sherman opined that the miner's death was not attributable to pneumoconiosis. Director's Exhibits 7, 17. Based on her finding that Dr. Sherman's opinion outweighed Dr. Simelaro's opinion, the administrative law judge found the evidence insufficient to establish that the miner's death was caused or hastened by pneumoconiosis.

The Director initially asserts that the administrative law judge erred in according less weight to Dr. Simelaro's opinion than to the contrary opinion of Dr. Sherman because Dr. Simelaro failed to quantify the miner's smoking history. The Director's assertion is based on the premise that the miner's smoking history is irrelevant in this case because neither Dr. Simelaro nor Dr. Sherman stated that the miner's COPD was related to the miner's smoking history. The administrative law judge stated that "because Dr. Simelaro does not indicate which pack-year history he relied upon in reaching his conclusion regarding the effects of the miner's smoking habit, I find that his opinion is not as well-documented or reasoned as Dr. Sherman's medical opinion." Decision and Order at 7. In a deposition, Dr. Simelaro attributed the miner's symptoms to coal workers' pneumoconiosis and not to smoking

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(3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

<sup>5</sup>Marlene Cook, the "medical examiner/coroner," completed the miner's death certificate. Ms. Cook attributed the miner's death to cardiopulmonary arrest due to respiratory insufficiency. Director's Exhibit 4. Because Ms. Cook did not provide a basis for her opinion, the administrative law judge found that the miner's death certificate was not entitled to any weight. See Decision and Order at 7-8.

because the miner stopped smoking fifteen years before he began to have pulmonary problems. Claimant's Exhibit 3 at 21-23. Dr. Simelaro specifically testified:

Okay. The coal worker's (sic) pneumoconiosis – the coal worker's (sic) pneumoconiosis produced what we call miner's asthma or chronic obstructive pulmonary disease, and he had some smoking in there, and I'm sure the smoking did a little bit of damage, too, but, again, like I said, in fifteen years nothing happened. So the only thing I could relate would have been the coal worker's (sic) pneumoconiosis.

Claimant's Exhibit 3 at 22-23. Although Dr. Sherman stated that records from Good Samaritan Hospital noted a 25 pack-year smoking history and noted that the miner stopped smoking in 1974, Dr. Sherman did not opine that the miner's COPD was related to smoking. Rather, Dr. Sherman opined that the miner's "[d]eath...does appear to have been sudden and unexpected." Director's Exhibit 7. Further, Dr. Sherman opined that "[s]udden death is more suggestive of a cardiac cause (e.g. arrhythmia) or a pulmonary embolism and is not typical of COPD." *Id.* Thus, as the Director asserts, since neither Dr. Simelaro nor Dr. Sherman opined that the miner's COPD was related to his smoking history, we hold that the administrative law judge erred in according less weight to Dr. Simelaro's opinion than to the contrary opinion of Dr. Sherman because Dr. Simelaro failed to quantify the miner's smoking history.

The Director next asserts that the administrative law judge erred in discrediting Dr. Simelaro's opinion, based on the administrative law judge's erroneous implication that the most recent blood gas study contradicted Dr. Simelaro's opinion. In considering the opinions of Drs. Simelaro and Sherman, the administrative law judge stated:

In addressing the actual cause of the miner's death, Dr. Sherman considered the results of blood gas studies, including one performed only ten days before the miner's death, which do not reflect significant hypoxia or the presence of right ventricular hypertrophy, which he would expect with severe chronic obstructive pulmonary disease. Dr. Simelaro addressed the blood test evidence in his testimony, stating that '...at ten days before his death his heart was pretty good because he was still alive, but on the day he died, I assure you his oxygen wasn't fifty-seven. It was probably a lot more...'. CX-3 at 24. I find that this conclusion is speculative and not based on the evidence of record. Dr. Sherman's conclusions are better supported by the objective record.

Decision and Order at 7. A history and physical examination report, which lists Dr. Bane as the miner's attending physician, indicates that the miner was admitted to Good Samaritan Hospital on December 9, 2000 and that an arterial blood gas study administered on that date yielded a PO<sub>2</sub> value of 57 and a PCO<sub>2</sub> value of 42. Director's Exhibit 6. In a report dated

February 3, 2002, Dr. Sherman did not find that an arterial blood gas study was administered ten days before the miner died. Rather, Dr. Sherman stated:

COPD may be a contributing cause of arrhythmias (or an ischemic cardiac event) when the pulmonary disease is severe enough to cause significant hypoxia and/or when right ventricular hypertrophy is present. However, all of [the miner's] room air oxygen measurements were above 55 and most were in the 60 to 70 range. The lowest measurement of 57 was obtained when [the miner] was admitted for an acute exacerbation, and such an exacerbation was not present 10 days prior to his death. No mention was made of right ventricular hypertrophy on the reports of his echocardiogram. The absence of edema was noted on several examinations, indicating that right ventricular failure (or cor pulmonale) was not present.

Director's Exhibit 7. As the Director asserts, the administrative law judge erred in finding that the blood gas study that yielded a PO<sub>2</sub> value of 57 was administered ten days before the miner died.<sup>6</sup> Decision and order at 7. This study was actually administered in December 2000. Director's Exhibit 6. Thus, since the administrative law judge mischaracterized the date that the most recent blood gas study was administered, we hold that the administrative law judge erred in finding that the most recent blood gas study evidence contradicted Dr. Simelaro's opinion. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Finally, the Director asserts that the administrative law judge erred in discrediting Dr. Simelaro's opinion based on the administrative law judge's erroneous characterization of his opinion. The administrative law judge stated that "Dr. Simelaro's opinion is inconsistent...[because] [h]e acknowledged that a cardiac event caused the miner's death, yet attributed it to pneumoconiosis, despite the arterial blood gas evidence." Decision and Order at 7. Contrary to the administrative law judge's finding, Dr. Simelaro did not render an inconsistent opinion with regard to the cause of the miner's death. Although Dr. Simelaro opined that the miner's death resulted from a cardiac condition, Dr. Simelaro also opined that pneumoconiosis caused this condition. Dr. Simelaro specifically explained that pneumoconiosis strained the miner's heart until it either went into arrhythmia or stopped beating. Claimant's Exhibit 3 at 23, 31-32. Thus, as the Director asserts, the administrative law judge erred in discrediting Dr. Simelaro's opinion based on the administrative law judge's erroneous characterization of it.

Since the administrative law judge failed to provide a valid basis for discrediting Dr. Simelaro's opinion, we vacate the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and remand the case to the administrative law judge for further consideration.

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<sup>6</sup> As previously noted, *see* n.2, *supra*, the miner died on August 18, 2001.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for further consideration 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