

BRB No. 06-0266 BLA

PEGGY HILL)	
(Widow of CHARLES W. HILL))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
)	DATE ISSUED: 09/29/2006
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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:

Claimant¹ appeals the Decision and Order Denying Benefits (05-BLA-5875) of Administrative Law Judge Robert D. Kaplan on a survivor's claim filed pursuant to the

¹The miner died on August 7, 2004. Director's Exhibit 3. The miner was awarded Black Lung benefits on June 19, 1997, which he was receiving at the time of his death. Claimant filed a claim for survivor's benefits on September 3, 2004. It was denied in a Proposed Decision and Order on February 15, 2005. Director's Exhibits 2, 10. Claimant requested a formal hearing on February 18, 2005, and the case was transferred 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 noted that the parties stipulated that the miner had nine and one-half years of coal mine employment. Decision and Order at 2. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge additionally noted that the parties stipulated to the existence of pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.202, 718.203; *Id.* The administrative law judge, however, found the evidence insufficient to establish 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 contends that the administrative law judge committed reversible error in finding the evidence insufficient to establish that pneumoconiosis significantly contributed to the miner's death. Claimant urges the Board to vacate the administrative law judge's denial of benefits and to award benefits. Alternatively, claimant requests a remand of the case for further consideration at 20 C.F.R. §718.205(c). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of benefits.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The relevant evidence at 20 C.F.R. §718.205(c)(2), (c)(5) consists of the opinions of Drs. Sherman and Carey. In his report dated July 5, 2005, Dr. Sherman noted that the death certificate listed the immediate cause of the miner's death as cardiopulmonary arrest due to respiratory arrest, renal failure and chronic obstructive pulmonary disease.² Director's Exhibit 15. Dr. Sherman also noted that records dated August 5, 2004 listed a history of chronic obstructive pulmonary disease. *Id.* Dr. Sherman found that the "cause of death is not clear from the record" and "there are no records after 8/5/04, so the circumstances immediately surrounding Mr. Hill's death two days later are not known."

Office of Administrative Law Judges on May 13, 2005. Director's Exhibits 11, 12. A hearing was held on September 29, 2005.

²Arteriosclerotic cardiovascular disease, anemia, urinary tract infection and urosepsis are listed as other significant conditions on the death certificate. Director's Exhibit 3.

Id. Dr. Sherman further found that there was no evidence suggesting that the miner had dyspnea, respiratory distress or respiratory failure upon his arrival at the nursing home, and concluded that there was no evidence that pneumoconiosis or chronic obstructive lung disease caused or contributed to the miner's death. *Id.*

In a deposition dated September 7, 2005, Dr. Carey testified that he treated the miner during his hospitalization and his transfer to a nursing home. Claimant's Exhibit 1 at 7. Dr. Carey signed the miner's death certificate, and after noting the findings listed on the death certificate³, testified that the decreased breath sounds found by Drs. Decker and Glasso, and the rhonchi found by Dr. Delassandro, are consistent with ongoing lung disease. *Id.* at 11. Dr. Carey indicated that he also found, during his examination on August 5, 2004, that the miner had "decreased breath sounds," "some chronic rhonchi, some course rhonchi, related to a chronic lung disease." *Id.* Dr. Carey found that the miner's lung disease contributed to his death as renal failure could be attributed partially to his lung disease, and his lung disease affected his arteriosclerotic cardiovascular disease and anemia. *Id.* at 12.

Dr. Carey, explaining his conclusions, found:

Someone with a chronic lung disease or chronic obstructive pulmonary disease is going to have lower volumes of oxygen that makes [sic] everything work harder. If this is occupational exposure that has caused this chronic obstructive pulmonary disease it's going to also cause his arteriosclerotic, to an extent, his arteriosclerotic cardiovascular disease. His renal failure, if your kidneys aren't getting enough oxygen, that tends to push to towards renal failure.

Id.

The administrative law judge concurred "with Dr. Sherman's conclusion that there is no record evidence that pneumoconiosis contributed to the miner's death." Decision and Order at 6. The administrative law judge noted that the miner was found to have decreased breath sounds and scattered rhonchi during his hospitalization, and decreased breath sounds and bilateral crackles upon examination on August 5, 2004. *Id.* The administrative law judge found that these findings, alone, are "insufficient to support a

³As discussed, *supra*, the death certificate lists the immediate cause of death as cardiopulmonary arrest due to respiratory arrest, renal failure and chronic obstructive pulmonary disease. Arteriosclerotic cardiovascular disease, anemia, urinary tract infection and urosepsis are listed as other significant conditions. Director's Exhibit 3.

finding that pneumoconiosis contributed significantly to death” and concluded that Dr. Sherman’s opinion is reasoned. *Id.*

In reviewing Dr. Carey’s opinion, the administrative law judge found:

Dr. Carey failed to describe how lung disease contributed to or hastened the miner’s death. The physician only spoke of how “**Someone** with a chronic lung disease or chronic obstructive lung disease” is affected by such a condition. Dr. Carey did not describe how a lung disease such as he diagnosed in the miner in this case – this particular individual – affected his life or death. Indeed, Dr. Carey’s opinion is tantamount to stating that with anyone and everyone who suffers from a chronic lung disease or COPD and dies, those conditions are always substantial contributors to or hasteners of death. I find this opinion is not a reasoned medical opinion. Based on the foregoing, I find that the opinion of Dr. Carey is entitled to no weight.

Decision and Order at 6.

Claimant contends that the administrative law judge erred in rejecting Dr. Carey’s opinion and finding it insufficient to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c)(2).⁴

Claimant specifically contends that the administrative law judge erred in discrediting Dr. Carey’s opinion on the grounds that Dr. Carey did not actually state that pneumoconiosis contributed to the miner’s death. Claimant’s Brief at 9-10. However, as the administrative law judge found, Dr. Carey only stated that the “miner’s ‘chronic lung disease’ or ‘chronic obstructive pulmonary disease’ contributed to death” and did not state (in the death certificate or in his testimony) that “pneumoconiosis or a pulmonary disease related to coal mine employment contributed to or hastened the miner’s death.” Decision and Order at 5, 6; Claimant’s Exhibit 1 at 11-13; Director’s Exhibit 3. Moreover, as the administrative law judge rationally found, “The closest that Dr. Carey came to uttering a finding of clinical or “legal” pneumoconiosis” was in his statement ... that begins, “**If** this is occupational exposure that has caused this chronic obstructive pulmonary disease...” (Emphasis supplied.)” Decision and Order at 6.

⁴We affirm the administrative law judge’s finding that the evidence does not establish death due to pneumoconiosis at Section 718.205(c)(1) and (c)(3) as it is unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

As Dr. Carey did not make a finding of clinical pneumoconiosis, and as he did not state that his finding of chronic obstructive pulmonary disease/chronic lung disease is related to coal mine employment (legal pneumoconiosis)⁵, the administrative law judge properly found the opinion insufficient to establish that the miner's death was due to pneumoconiosis.⁶ *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

As the administrative law judge properly declined to credit Dr. Carey's opinion, the only medical opinion of record that arguably supports claimant's burden at 20 C.F.R. §718.205(c)(2), we affirm the administrative law judge's finding that the evidence is insufficient to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c)(2).⁷

Based on the foregoing, we affirm the administrative law judge's finding that the evidence of record is insufficient to support claimant's burden to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), as it is supported by substantial evidence and is in accordance with law. We thus affirm the administrative law judge's denial of benefits in this survivor's claim.

⁵“Legal” pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

⁶Thus, we need not address claimant's argument that the administrative law judge erred in determining that Dr. Carey did not explain how lung disease specifically contributed to the miner's condition or death as any error therein is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

⁷Claimant's contentions regarding Dr. Sherman's opinion similarly need not be addressed, as any error in the administrative law judge's treatment of Dr. Sherman's opinion is harmless. *Larioni, supra*; *Kozele, supra*.

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