

BRB No. 08-0849 BLA

I.C.)
(Widow of V.C.))
)
Claimant-Petitioner)
)
v.)
)
MAJESTIC MINING, INCORPORATED) DATE ISSUED: 09/16/2009
)
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 Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

Jerome R. Novobilski, Clay, West Virginia, for claimant.

William S. Mattingly and Christina N. Morgan (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2008-BLA-5213) of
Administrative Law Judge Daniel L. Leland rendered 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). V.C., the miner, died on February 7, 2007,¹

¹ The Board affirmed the denial of benefits in the miner’s claim in *V.C. v. Majestic Mining, Inc.*, BRB No. 06-0944 BLA (July 26, 2007)(unpub.). The miner took no further action in regard to his claim.

and claimant, the miner's widow, filed her application for survivor's benefits on March 16, 2007. Director's Exhibits 2, 7. The district director awarded benefits on November 6, 2007 and, at employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing. The administrative law judge found that the miner was employed as a coal miner in excess of thirty years and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge further found the evidence failed to establish either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and that the evidence did not 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.

On appeal, claimant contends that the administrative law judge erred in failing to find that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) and that the pneumoconiosis contributed to the miner's death pursuant to Section 718.205(c).² Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.³

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed.⁴ 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).

² On March 11, 2009, the Board issued an Order granting employer's motion to strike claimant's reply brief as untimely. Claimant's untimely reply brief included additional documentation in support of her claim that was not admitted into evidence before the administrative law judge and therefore cannot be considered by the Board. 20 C.F.R. §802.301(b). Claimant's response to the Board's Order, filed on March 24, 2009, requesting reconsideration of the March 11, 2009 Order is denied.

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination as to the length of claimant's coal mine employment, and his findings that the miner smoked one-half pack of cigarettes a day for most of his adult life and that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

⁴ The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the

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 the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *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 pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.205(c), the administrative law judge considered all the evidence relevant to the cause of the miner's death consisting of the miner's death certificate, signed by the miner's treating physician, Dr. Stewart, the opinion of Dr. Stewart and the opinions and depositions of Drs. Ghio and Spagnolo. Decision and Order at 3-6; Director's Exhibits 7-9, 11; Employer's Exhibits 14, 15, 17, 18. On the death certificate, Dr. Stewart recorded lung cancer as the immediate cause of the miner's death and identified pneumoconiosis, coronary heart disease, diabetes mellitus, and congestive heart failure as other significant conditions contributing to the miner's death. Director's Exhibit 7. In a letter dated May 22, 2007, Dr. Stewart stated that "prior to [the miner's] death, [he] was identified as having an irregular 4-cm soft tissue mass in the superior segment of the left lower lung worrisome for primary malignancy," and concluded that pneumoconiosis was a primary contributor to the miner's death. Director's Exhibit 9

The administrative law judge permissibly found Dr. Stewart's opinion, the only evidence of record that could support a finding that pneumoconiosis contributed to the miner's death, to be unreasoned and undocumented because Dr. Stewart failed to address the role of the miner's smoking history⁵ in concluding that pneumoconiosis was the

United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

⁵ Dr. Stewart indicated in 1992 and 1996, that the miner smoked one-half pack of cigarettes a day for most of his adult life. In 2003, Dr. Stewart stated the miner was still smoking. In 2006, Dr. Stewart stated that the miner "had a long standing history of tobacco use but denied smoking at this time." Director's Exhibits 8, 11.

primary contributor to the miner's death. *Clark v. Karsts-Robbins Coal Co*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 2, 6. Moreover, the administrative law judge found that Drs. Ghio and Spagnolo provided better reasoned opinions, based on their review of the miner's medical records, treatment records, CT scan and x-rays, in concluding that: the miner's lung cancer was not caused by coal dust exposure; pneumoconiosis had no role in his death; and the miner's pulmonary symptoms were caused by his cigarette smoking.⁶ The administrative law judge also noted that Drs. Ghio and Spagnolo are pulmonary specialists with Board certifications in internal medicine and pulmonary disease while the qualifications of Dr. Stewart are not in the record. Decision and Order at 6. The administrative law judge, therefore, reasonably exercised his discretion in relying on the preponderance of the probative expert opinions of Drs. Ghio and Spagnolo to find that pneumoconiosis did not contribute to, or hasten, the miner's death. *Sterling Smokeless Coal Co v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark*, 12 BLR 1-155; Decision and Order at 4-6; Employer's Exhibits 14, 15, 17, 18.

Although claimant cites to evidence to support her contention that the miner's death was due to pneumoconiosis, her arguments on appeal amount to little more than a request that the Board reweigh the evidence, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. Furthermore, since the administrative law judge permissibly determined that the Dr. Stewart's opinion was not reasoned or documented, there is no merit to claimant's contention that Dr. Stewart's opinion was entitled to controlling weight based solely on his status as the miner's treating physician. See 20 C.F.R. 718.104(d)(5). Therefore, because the administrative law judge's credibility determinations are supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and affirm the denial of benefits.

⁶ Claimant asserts that "[i]t is unreasonable to accept at face value that pneumoconiosis was not a contributing factor in [the miner's death]" on the basis of the opinions of Drs. Ghio and Spagnolo without consideration of the x-ray evidence, which was interpreted as showing abnormalities and evidence of interstitial pulmonary fibrosis. Claimant's Brief (not paginated). Contrary to claimant's contention, the administrative law judge properly concluded that there was insufficient evidence to establish the etiology of the interstitial pulmonary fibrosis. Decision and Order at 5. He also properly considered the death causation opinions of Drs. Ghio and Spagnolo to be supported by the x-ray evidence, which consisted of three x-rays dated April 10, 1986, October 14, 1988 and February 26, 1997, which were read as negative for pneumoconiosis by dually qualified Board-certified radiologists and B readers. Decision and Order at 2, 5; Employer's Exhibits 5-8. Thus, we reject claimant's assertion of error.

Anderson, 12 BLR at 1-112. Consequently, we need not address claimant's arguments at Section 718.202(4).

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge