

BRB No. 13-0042 BLA

DOROTHY A. KIDD )  
(Widow of DONALD J. KIDD) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
CONSOLIDATION COAL COMPANY ) DATE ISSUED: 09/23/2013  
 )  
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 on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Teresa M. Dewey Bacho (Law Offices of Teresa Dewey Bacho, LLC), Toledo, Ohio, for claimant.

Jeffrey R. Soukup and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals<sup>1</sup> the Decision and Order Denying Benefits on Remand (2005-BLA-05033) of Administrative Law Judge Joseph E. Kane rendered on a survivor's claim filed on September 9, 2003, pursuant to the provisions of the Black Lung Benefits

---

<sup>1</sup> Claimant is the widow of the miner, Donald J. Kidd, who died on June 23, 2003. Claimant filed a claim for survivor's benefits on September 9, 2003.

Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).<sup>2</sup> This is the third time this case has been on appeal to the Board. The sole issue in this case is whether claimant has established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

The case was first considered by Administrative Law Judge Daniel J. Roketenetz, who awarded benefits, relying on the opinion of Dr. Booth, the autopsy prosector, who opined that the miner's death was due, in part, to pneumoconiosis.<sup>3</sup> Judge Roketenetz's 2005 Decision and Order. Pursuant to employer's appeal, the Board vacated this finding and remanded the case to Judge Roketenetz, instructing him to reconsider the relevant evidence and to explain his reliance on the testimony of Dr. Booth to find death causation established. *Kidd v. Consolidation Coal Co.*, BRB Nos. 06-0124 BLA and 06-0124 BLA-S (Nov. 30, 2006)(unpub.).

In light of Judge Roketenetz's retirement, the case was assigned to Administrative Law Judge Thomas F. Phalen, Jr., who denied benefits because he found that Dr. Booth's opinion, attributing the miner's death to pneumoconiosis, was "conclusory." Thus, he accorded it little weight. Judge Phalen accorded determinative weight to the opinions of Drs. Tomashefski and Fino that the miner's death was unrelated to his pneumoconiosis. Judge Phalen's 2009 Decision and Order. Claimant appealed. The Board affirmed Judge Phalen's denial of benefits, based on his weighing of medical opinion evidence. *Kidd v. Consolidation Coal Co.*, BRB No. 09-0420 BLA (Mar. 17, 2010)(unpub.).

Claimant appealed the Board's decision to the United States Court of Appeals for the Sixth Circuit,<sup>4</sup> which vacated the Board's decision and remanded the case. The Sixth Circuit held that the administrative law judge failed to address one of the key statements made by Dr. Booth regarding the process by which pneumoconiosis hastened the miner's

---

<sup>2</sup> The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the claim herein was filed before January 1, 2005.

<sup>3</sup> Administrative Law Judge Daniel J. Roketenetz accepted the parties' stipulations that the miner had at least seventeen years of coal mine employment, that the existence of pneumoconiosis arising out of coal mine employment was established and that employer was the responsible operator. Judge Roketenetz's 2005 Decision and Order.

<sup>4</sup> The record indicates that the miner's coal mine employment was in Ohio. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

death, namely, that pneumoconiosis accentuates chronic obstructive pulmonary disease and accelerates the desiccation of the lungs. *Kidd v. Consolidation Coal Co.*, 454 F. App'x 389 (6th Cir. 2011).

On remand to the Office of Administrative Law Judges, the case was assigned to Judge Kane (the administrative law judge) in light of Judge Phalen's retirement. On remand, the administrative law judge denied benefits, finding that, while Dr. Booth rendered a credible opinion attributing the miner's death to his pneumoconiosis, it was outweighed by the more credible opinions of Drs. Tomashefski and Fino, who found that the miner's death was unrelated to his pneumoconiosis.<sup>5</sup>

On appeal, claimant contends that because the Sixth Circuit stated that the opinion of Dr. Booth *should be credited* on the issue of death causation, the administrative law judge should have awarded benefits on the claim. Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand denying benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief in response to claimant's appeal.

---

<sup>5</sup> Dr. Booth performed an autopsy of the miner on March 19, 2004. Dr. Booth opined that the miner died of multi-organ failure and that respiratory disease contributed to the miner's death. Dr. Booth also opined that the miner had pneumoconiosis, which was a contributing factor in his death because pneumoconiosis accentuates chronic obstructive pulmonary disease and accelerates the desiccation of the lungs. Director's Exhibit 25.

Dr. Tomashefski reviewed the miner's autopsy slides, Dr. Booth's autopsy report, and the miner's medical reports. In a report dated May 10, 2004 and by deposition dated May 24, 2005, he opined that the miner died from hepatic failure due to end-stage cirrhosis and that end-stage renal disease also contributed to death. He further opined that the miner's pneumoconiosis would not cause death and that the miner "would have died at the same time and in the same manner even if he had never worked as a coal miner or developed ... pneumoconiosis." Director's Exhibit 32; Employer's Exhibit 7.

Dr. Fino submitted a report dated March 29, 2005 and was deposed on May 26, 2006. Dr. Fino opined, based on his review of the miner's medical files and the reports of Drs. Booth and Tomashefski, that the miner died from hepatic and renal failure (liver and kidney disease). He further opined that pneumoconiosis and lung disease were not problems for the miner and that "[h]e would have died when he did had he never smoked cigarettes, worked in the mines, done anything." Employer's Exhibits 2, 8.

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

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(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); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In discussing Judge Phalen's consideration of Dr. Booth's opinion and his denial of benefits, the administrative law judge noted that the Sixth Circuit stated:

Ordinarily, we affirm the [administrative law judge's] decision whether to grant benefits if it is supported by substantial evidence. But '[w]here ... an [administrative law judge] has improperly characterized the evidence or failed to account [for] relevant record material, deference is inappropriate and remand is required.'

Just such an improper characterization and omission occurred here. Dr. Booth stated clearly that he thought pneumoconiosis contributed to [the miner's] death. [Judge Phalen] found that Dr. Booth failed to offer sufficient objective support for this opinion, rendering it 'conclusory,' and therefore gave Dr. Booth's views little, if any, weight in his analysis. But [Judge Phalen's] analysis of the issue consisted of just two sentences and, crucially, made no mention of Dr. Booth's statement that pneumoconiosis 'accentuates the chronic obstructive pulmonary disease and accelerates the desiccation of the lungs. This statement suggested the avenue by which the disease could have hastened [the miner's] death - the very thing that [Judge

Phalen] found lacking in Dr. Booth's testimony. As such, [Judge Phalen's] failure 'to account [for this] relevant record material' means that 'deference is inappropriate and remand is required.' [Claimant] asks for no more than a remand, and that is what she is entitled to.

Decision and Order on Remand at 3; *Kidd*, 454 F. App'x at 390 (internal citations omitted).

Contrary to claimant's argument, the Sixth Circuit's decision does not require that the administrative law judge award benefits. Rather, the Sixth Circuit merely instructed the administrative law judge to credit the opinion of Dr. Booth as a reasoned opinion on the issue of death causation. *Kidd*, 454 F. App'x at 390. The administrative law judge has done so in this case when he stated: "I am mindful of the Sixth Circuit's finding that Dr. Booth's opinion is credible[.]" Decision and Order on Remand at 6. The administrative law judge was not required to do more. *Kidd*, 454 F. App'x at 390. Claimant's argument that the administrative law judge was required to award benefits in this case is, therefore, rejected.

Additionally, the administrative law judge properly found that claimant was not entitled to benefits in this case. On remand, as noted above, the administrative law judge followed the Sixth Circuit's instructions in finding that Dr. Booth rendered a credible opinion on the issue of death causation. The administrative law judge, however, permissibly found Dr. Booth's opinion outweighed by the contrary opinions of Drs. Tomashefski and Fino, that pneumoconiosis played no part in the miner's death. Director's Exhibit 32; Employer's Exhibits 2, 7, 8. Specifically, the administrative law judge found:

In weighing the evidence on the cause of the miner's death, I agree with Judge Phalen that the medical opinions of Drs. Tomashefski and Fino outweigh the opinion of Dr. Booth. In coming to this conclusion, I am mindful of the Sixth Circuit's finding that Dr. Booth's opinion is credible; however, as explained earlier, I do not read the Sixth Circuit's opinion as saying Dr. Booth's opinion is the most credible or that Dr. Tomashefski and Fino are not credible. Drs. Tomashefski and Fino had the benefit of reviewing the entirety of the [m]iner's medical records in forming their conclusions. Both doctors pointed out that the [m]iner's clinical course prior to his death was mainly one of treatment for kidney disease and liver disease. They both unequivocally opined that the miner died from kidney and liver disease, and that he would have died in the same manner and at the same time notwithstanding his pneumoconiosis. In addition, even though Drs. Tomashefski and Booth are both Board-certified pathologists, Dr. Tomashefski appears to have more experience with pneumoconiosis

than Dr. Booth. Dr. Booth stated that he mostly deals with lung cancers and has seen only ‘a couple,’ or less than ten, cases of pneumoconiosis. (DX 25 at 7). Dr. Tomashefski, on the other hand, testified that he taught at the biannual B-reader course on pneumoconiosis, and that fifteen percent of the autopsies he performs have issues related to pneumoconiosis. (EX 7 at 8, 11). I find that Dr. Tomashefski’s more extensive experience with pneumoconiosis over Dr. Booth is a reason for giving his opinion greater weight. In sum, if Dr. Booth’s opinion were the only opinion in the record, I would find that benefits should be awarded. However, all the relevant evidence must be weighed to determine if the preponderance of the evidence establishes death due to pneumoconiosis. Weighing the evidence here, I find that Drs. Tomashefski and Fino’s opinions outweigh Dr. Booth’s and the preponderance of the evidence does not establish that the miner died due to pneumoconiosis.

Decision and Order on Remand at 6-7.

The evaluation of the credibility of the medical experts is a matter within the sound discretion of the administrative law judge and the Board will not reweigh the evidence or substitute its inferences for those of the administrative law judge, as long as the administrative law judge’s findings are rational, supported by substantial evidence, and in accordance with law. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(en banc). In this case, the administrative law judge has fully explained his reasons for according greater weight to the opinions of Drs. Tomashefski and Fino over the opinion of Dr. Booth, and those findings are rational, supported by substantial evidence and in accordance with law.<sup>6</sup> *See Napier*, 301 F.3d at 708, 22 BLR at 2-547; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-400 (1982). Therefore, we affirm the administrative law judge’s finding that Dr. Booth’s opinion was outweighed by the contrary opinions of Drs. Tomashefski and Fino, and we affirm his finding that claimant has failed to establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c).

---

<sup>6</sup> The administrative law judge explained that he found the opinions of Drs. Tomashefski and Fino to be better reasoned than the opinion of Dr. Booth, because the former physicians had the benefit of reviewing the entirety to the miner’s medical file. The administrative law judge also explained that Dr. Tomashefski had more extensive experience than Dr. Booth in conducting autopsies involving pneumoconiosis. Decision and Order on Remand at 6-7.

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

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge