

BRB No. 96-0192 BLA

GLADYS SMITH)
(Widow of JIMMIE SMITH))
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand-Rejection of Claim of Edward T. Miller, Administrative Law Judge, United States Department of Labor.

Maryann Zoll (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Barry H. Joyner (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand-Rejection of Claim (91-BLA-2149) of Administrative Law Judge Edward T. Miller denying benefits on a claim

¹Claimant is Gladys Smith, the miner's widow, who filed a survivor's claim for benefits on April 26, 1990. Director's Exhibit 1. The miner, Jimmie Smith, died on

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 is before the Board for the second time. In the first Decision and Order, Administrative Law Judge Aaron Silverman found that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that pneumoconiosis substantially contributed

July 4, 1989. Director's Exhibit 1.

to the miner's death pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied on the survivor's claim.

On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 718.202(a)(2) and (3), vacated his findings pursuant to Section 718.202(a)(1) and (4), and remanded the case for further consideration at those subsections and Section 718.205(c), if necessary. *Smith v. Director, OWCP*, BRB No. 94-0216 BLA (Jan. 30, 1995)(unpub.).

On Remand, Administrative Law Judge Edward Terhune Miller found that claimant established that the miner had six years of qualifying coal mine employment and pneumoconiosis arising out of his coal mine employment pursuant to Section 718.202(a)(1) and 20 C.F.R. §718.203(c). The administrative law judge then found that claimant failed to establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing Dr. Bushey's opinion and in finding that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c). The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance.²

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first contends that Dr. Katzenstein's opinion, in the death certificate and final summary, that the cause of death was severe ischemic cardiomyopathy with myocardial infarction and hyperkalemia possibly contributing, does not disprove that pneumoconiosis contributed to the miner's death. Claimant's Brief at 7;

²We affirm the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.203(c), and regarding coal mine employment as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Director's Exhibits 6, 7. This argument does not benefit claimant, however, because the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that claimant must prove that pneumoconiosis was a substantially contributing cause or factor in the miner's death. See *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). The court further held that pneumoconiosis "will be found to be a `substantially contributing cause or factor' of a miner's death in a case in which it has actually hastened his death." *Id.* Because claimant bears the burden of proving that death was due to pneumoconiosis, claimant must present evidence in support of her position instead of arguing that evidence is not contrary to her position.

Claimant next contends that Dr. Bushey's opinion establishes that pneumoconiosis hastened the miner's death. Claimant's Brief at 10-14. In a deposition dated August 21, 1992, Dr. Bushey stated that he treated the miner, but that he was unable to find the miner's records and was relying on his memory to answer the questions. He also diagnosed pneumoconiosis and stated: "[t]he coal workers' pneumoconiosis is primary in the lungs but it will effect the body as a whole and particularly the heart. It would be a contributing factor into the production of the Ischemic Cardiomyopathy in my opinion." Bushey Deposition, pp. 8-9. He then answered "yes" to the question of whether the miner's pneumoconiosis contributed to the miner's death. Bushey Deposition, p. 9.

The administrative law judge considered Dr. Bushy's opinion and deposition testimony. The administrative law judge noted that Dr. Bushey lost the miner's medical records and did not attend the miner during his last hospitalization. Decision and Order on Remand at 7-8. The administrative law judge then found Dr. Bushey's opinion to be "vague", "imprecise", [sic], "not well-documented", and insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Decision and Order on Remand at 8. In regards to Doctor Bushey's answers to questions regarding the cause of the miner's death, the administrative law judge stated:

The last two questions, and especially the last, to which the doctor assented, were leading questions directed at a critical disputed issue of mixed law and fact at a deposition where the opposing party was not represented. The credibility of the doctor's answer is thus seriously impaired.

Decision and Order on Remand at 7.

Inasmuch as it is within the administrative law judge's discretion to weigh the evidence and draw his own conclusions and inferences, see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), and to determine whether a physician's opinion is sufficiently reasoned and documented, see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985), and because the administrative law judge is not required to assign greater weight to the opinion of the treating physician, see *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994), but may reject an opinion if the physician fails to explain his diagnosis, *Clark, supra*, and should consider factors which tend to undermine the reliability of the physician's opinion, see *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985), we affirm the administrative law judge's weighing of Dr. Bushey's opinion and deposition testimony and his finding that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c).³

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

³Claimant also contends, citing *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), that Dr. Bushey's opinion is entitled to greater weight than Dr. Katzenstein's opinion because Dr. Bushey was the miner's treating physician. Claimant's Brief at 12. We reject this argument because Dr. Katzenstein also treated claimant prior to his death and because the administrative law judge permissibly rejected Dr. Bushey's opinion as not being credible. Decision and Order on Remand at 8.

NANCY S. DOLDER
Administrative Appeals Judge