BRB No. 01-0287 BLA

KATHERINE E. VICTOR (Widow of EDWIN L. VICTOR) Claimant-Respondent v. J & J COAL MINING PARTNERSHIP	)	DATE ISSUED:
and WEST VIRGINIA COAL WORKERS= PNEUMOCONIOSIS FUND Employer/Carrier-Petitioner DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding of Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Robert Weinberger (West Virginia Coal Workers= Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Carrier appeals the Decision and Order - Awarding Benefits (00-BLA-749) of Administrative Law Judge Daniel L. Leland rendered on a survivor=s 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).[1] The administrative law

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass=n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting

judge found that the parties stipulated to thirty-one years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 2. The administrative law judge found the evidence of record sufficient to establish that the miner=s death was due to pneumoconiosis.[3] Accordingly, benefits were awarded.

On appeal, carrier contends that the administrative law judge erred in his weighing of the medical opinion evidence of record. Claimant has not responded. The Director, Office of Workers= Compensation Programs, has filed a letter indicating that he would not participate in the appeal.

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preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass=n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

[2] The miner filed claims for benefits on October 30, 1981 and March 1, 1999. Director=s Exhibits 32, 33. The first claim was denied by the district director on July 26, 1983, but the second claim was approved by the district director on October 19, 1999 and employer was ordered to pay benefits on the miner=s claim. Director=s Exhibits 32, 33. The miner died on June 21, 1999. Director=s Exhibit 16. Claimant filed her claim for survivor=s benefits on August 18, 1999.

[3] We affirm, as unchallenged on appeal, the administrative law judge=s finding of thirty-one years of coal mine employment based on the parties stipulation that claimant established the existence of pneumoconiosis at Section 718.202. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

To establish entitlement to survivor=s benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner=s death was due to pneumoconiosis. 20 C.F.R. ''718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor=s claims filed on or after January 1, 1982, death will be considered to be 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)-(4). Pneumoconiosis is a substantially contributing cause of the miner=s death if it hastens the miner=s death. 20 C.F.R. '718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. den*. 506 U.S. 1050 (1993).

Carrier first contends that the administrative law judge erred in relying on Dr. Hartley=s statement on the death certificate, that Ablack lung@ was a significant condition contributing to death, to find that the miner=s death was due to pneumoconiosis because Dr. Hartley offered no support for this statement. Dr. Hartley signed the death certificate and listed the immediate cause of the miner=s death as lung cancer, with black lung and diabetes mellitus listed as other significant conditions contributing to death. Director=s Exhibits 13, 33. As carrier contends, however, because Dr. Hartley provided no explanation of the basis for his statement that Ablack lung@ contributed to the miner=s death, the administrative law judge erred in finding that the statement on the death certificate established death due to pneumoconiosis. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR (4th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 155 (1989)(*en banc*); *Cf*; *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997). Although there was no autopsy performed, which would buttress the findings made by Dr.

Hartley on the death certificate, there are hospital records, and reports from physicians who saw the miner during his lifetime, diagnosing the existence of coal workers= pneumoconiosis, which the administrative law judge failed to discuss. Accordingly, this case must be remanded in order for the administrative law judge to review all the evidence to determine whether it provides sufficient support to establish a causal nexus between the miner=s pneumoconiosis and his death. *See Lango*, *supra*; *Sparks*, *supra*.

Carrier next contends that the administrative law judge erred in discounting the opinion of Dr. Fino because he did not diagnose the existence of pneumoconiosis, citing *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Carrier contends that this was error because Dr. Fino opined that, even assuming hypothetically that the miner had pneumoconiosis, pneumoconiosis would still not have contributed to his death.

The Board has held that an administrative law judge may discount a doctor=s opinion on disability causation because the underlying premise on which it is based, *i.e.*, that the miner does not have pneumoconiosis is inaccurate. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *see also Clark*, *supra*. As the carrier contends, however, the United States Court of Appeals for the Fourth Circuit in *Dehue* and *Hobbs* held that medical opinions which acknowledge the miner=s respiratory or pulmonary impairment, but nevertheless conclude that an ailment other than pneumoconiosis caused the miner=s total disability are relevant because they directly rebut the miner=s evidence that pneumoconiosis contributed to his disability.

Dr. Fino found that the miner did not have occupational pulmonary disease caused by coal dust exposure, but that the miner was unable to perform his last coal mine employment due to a respiratory impairment which the doctor attributed to cigarette smoking, not to coal dust exposure. Dr. Fino further concluded that the miner=s death was due to lung cancer, and that even if he had had pneumoconiosis, his death was not caused, contributed to, or hastened by coal dust exposure. Director=s Exhibit 27. Thus, because we are remanding this case for consideration of evidence relevant to whether the miner=s death was due to pneumoconiosis, the administrative law judge should reconsider the entirety of Dr. Fino=s statements concerning the cause of death. *See Clark*, *supra*; *Bobick*, *supra*; *Trujillo*, *supra*; *see*

also Ballard, *supra*; *Hobbs*, *supra*.[4]

Finally, citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000), carrier contends that the administrative law judge erred in discounting Dr. Fino=s opinion because he had not examined the miner. In considering the evidence, the administrative law judge found Dr. Fino=s opinion less probative than Dr. Hartley=s because Dr. Fino had never examined the miner and Dr. Hartley was a treating physician. We have already held, however, that Dr. Hartley=s opinion, which consists of his statement on the death certificate that Ablack lung@ was a significant cause of death, was insufficient to establish that the miner=s death was due to pneumoconiosis unless the administrative law judge determines that there is evidence of record to support that conclusion. Accordingly, the administrative law judge may not simply accord greater weight to the opinion of Dr. Hartley because he treated the miner. *Lango*, *supra*; *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *see Compton*, *supra*; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling*

[4] Carrier, West Virginia Coal-Workers= Pneumoconiosis Fund, asserts that this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. The record, however, indicates that after working in West Virginia from 1970 through 1976, the miner worked from 1977 through 1978 in Pennsylvania. Claimant also worked in Pennsylvania from 1941 through 1969. Director=s Exhibit 13. The Board has held that it will apply the law of the United States Court of Appeals for the circuit in which the miner most recently performed coal mine employment when the miner=s work occurred in more than one jurisdiction. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). However, because the miner worked in both Pennsylvania and West Virginia, and carrier, the West Virginia Coal Workers= Pneumoconiosis Fund, has filed the appeal in this case, we have considered the case under the law of both jurisdictions.

Smokeless Coal Co. v. Akers, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Cf*; *Mancia*, *supra*.

Accordingly, the administrative law judge=s Decision and Order - Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge