

BRB No. 08-0138 BLA

M.K.)
(Widow of A.K.))
)
Claimant-Petitioner)
)
v.)
)
S & M COAL COMPANY)
) DATE ISSUED: 09/18/2008
and)
)
WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

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

Randall A. Hanson (Womble, Carlyle, Sandridge & Rice), Greensboro, North Carolina, for claimant.

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (06-BLA-5281) of Administrative Law Judge Daniel L. Leland denying benefits 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). This case involves a survivor's claim filed on February 11, 2005.¹ After crediting the miner with at least eighteen years of coal mine employment,² the administrative law judge found that the doctrine of collateral estoppel was not applicable to the finding of pneumoconiosis that was made in the miner's claim for benefits, because autopsy evidence had been submitted in the survivor's claim. The administrative law judge found that the survivor's claim evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Assuming *arguendo* that the evidence established the existence of pneumoconiosis, the administrative law judge found 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 argues that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis.³ See 20 C.F.R. §§718.1, 718.202, 718.203,

¹ The miner filed a claim for benefits on June 23, 1986. See Director's Exhibit 1. In a Decision and Order dated February 17, 1989, Administrative Law Judge John S. Patton awarded benefits in the miner's claim. *Id.*

² The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³ Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

Claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We disagree. In this case, the administrative law judge correctly found that there was no evidence in the record supportive of a finding that the miner's death was due to pneumoconiosis. Decision and Order at 7 n.5. Dr. Tummala completed the miner's death certificate. Dr. Tummala attributed the miner's death to cholangiocarcinoma due to upper gastrointestinal bleeding, radiation enteritis, and chronic renal failure. Director's Exhibit 7. Dr. Tummala listed diabetes mellitus type II and "s/p cardiac transplant" as other significant conditions that contributed to the miner's death. *Id.* Dr. Tummala did not relate any of these conditions to the miner's coal dust exposure. *Id.*

The only other physicians to address the cause of the miner's death,⁴ Drs. Swedarsky, Bush, Castle, and Rosenberg, each opined that the miner's death was not due

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- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
 - (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
 - (3) Where the presumption set forth at §718.304 is applicable.
 - (4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
 - (5) 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).

⁴ Although Dr. Todd, the autopsy prosector, did not directly address the cause of the miner's death, he opined that there was "no gross or microscopic evidence of coal worker's pneumoconiosis." Director's Exhibit 8.

to or hastened by pneumoconiosis.⁵ Employer's Exhibits 1, 3, 5, 7, 9. Because it is based upon 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 20 C.F.R. §718.205(c).⁶

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we need not address claimant's arguments regarding the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁵ Dr. Swedarsky reviewed the miner's autopsy slides and medical records. Dr. Swedarsky opined that the miner's "death was due to complications secondary to chronic immunosuppressive therapy after [a] cardiac transplant." Employer's Exhibit 1. Dr. Swedarsky opined that there was no evidence that the miner's death was contributed to, or hastened by, any chronic lung disease arising out of coal mine employment. *Id.*

Dr. Bush also reviewed the miner's autopsy slides and medical records. Dr. Bush opined that the miner "died as a result of carcinoma of the bile ducts and the effects of treatment for this condition, including GI bleeding and multiple organ failure." Employer's Exhibit 3. Dr. Bush further opined that the miner's death was not caused by, contributed to, or hastened by any chronic dust disease related to coal mine employment. *Id.*

Dr. Castle reviewed the medical evidence. Dr. Castle opined that the miner's death "was entirely caused by complications and treatment of adenocarcinoma of the biliary tree" and "was in no way related to his previous coal mine employment or coal dust exposure." Employer's Exhibit 5.

Dr. Rosenberg also reviewed the medical evidence. Dr. Rosenberg opined that the miner's death was due to complications of cholangiocarcinoma. Employer's Exhibits 7, 9. Dr. Rosenberg opined that neither coal dust exposure nor coal workers' pneumoconiosis caused, hastened, or accelerated the miner's death. *Id.*

⁶ Because there is no evidence in the record supportive of a finding of complicated pneumoconiosis, the administrative law judge properly found that claimant was precluded from establishing entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 7; *see* 20 C.F.R. §718.205(c)(3).

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

JUDITH S. BOGGS
Administrative Appeals Judge