OPHELIA WILMA GRAY ) BRB No. 88-2964 BLA
(Widow of VINCENT R. GRAY))
)
Claimant-Respondent )
)
v. )
)
GREENWICH COLLIERIES ) DATE ISSUED:
)
Employer-Petitioner )
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Party-in-Interest )
)
OPHELIA WILMA GRAY ) BRB No. 89-2675 BLA
(Widow of VINCENT R. GRAY)) )
Claimant-Respondent )
)
v. )
)
GREENWICH COLLIERIES )
)
Employer-Petitioner )
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Party-in-Interest )
)
WILMA OPHELIA GRAY ) BRB No. 90-0662 BLA
(Widow of VINCENT R. GRAY)) )
Claimant-Petitioner )
)
v. )
)
GREENWICH COLLIERIES )

)
Employer-Respondent )
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Party-in-Interest ) DECISION and ORDER

Appeals of the Decisions and Orders of Gerald M. Tierney and George P. Morin, Administrative Law Judges, United States Department of Labor.

Theresa C. Homady and Robert J. Bilonick (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judges, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order Denying Employer's Request for Modification (86-BLA-3844) of Administrative Law Judge Gerald M. Tierney awarding benefits on a miner's claim, and claimant, the surviving spouse, appeals the Decision and Order (89-BLA-417) of Administrative Law Judge George P. Morin denying benefits 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). Regarding the miner's claim, the administrative law judge credited the miner with fourteen years of qualifying coal mine employment with employer, based on employer's stipulation, and found that the

evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b) and 718.302, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded on the miner's claim. On appeal, employer challenges the administrative law judge's

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(Supp. V 1988).

findings pursuant to Sections 718.202(a)(2) and 718.204(b), and contends that the administrative law judge erred in denying modification pursuant to 20 C.F.R. §725.310, based on new evidence filed in support of the survivor's claim. Claimant responds, urging affirmance. Regarding the survivor's claim, the administrative law judge found that the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and consequently denied benefits. Claimant appeals, challenging the administrative law judge's findings pursuant to Section 718.205(c), and employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in these appeals.

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 by 30

U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Turning first to the procedural issue, employer contends that the administrative law judge, in adjudicating the merits of the miner's claim, erred in refusing to additionally consider all of the new evidence developed in support of the survivor's claim, specifically expert review of the autopsy evidence, which employer asserts is sufficient to support modification pursuant to Section 725.310. We disagree. An administrative law judge has broad discretion in procedural matters, and may refuse to admit into the record medical opinions submitted post-hearing. See Itell v. Ritchey Trucking Co., 8 BLR 1-356 (1985). Contrary to employer's arguments, the administrative law judge permissibly found that modification pursuant to Section 725.310 was not appropriate, as employer had ample opportunity to develop medical evidence, including review of the autopsy evidence obtained on December 27, 1985, prior to the hearing held on January 1, 1988. The Board has held that where, as here, a party waited until after the administrative law judge issued an unfavorable Decision and Order to seek consideration of new medical evidence, such evidence provided no basis upon which to grant modification, as it failed to establish a mistake in fact or a change of condition. Gill v. Director, OWCP, 8 BLR 1-427 (1986). In the instant case, there could be no change in the deceased miner's condition. See Wojtowicz v. Duquesne Light Co., 12 BLR 1-162 (1989). Moreover, the autopsy protocol and twenty-two slides were in existence at the time of the hearing and

employer did not show good cause for its failure to obtain earlier review of this evidence, or make a timely request that the record remain open. The administrative law judge therefore permissibly excluded from the record in the miner's claim any expert review of said evidence which was developed in support of the survivor's claim. See 20 C.F.R. §§725.414(e)(2), 725.456(d); see also Witt v. Dean Jones Coal Co., 7 BLR 1-21 (1984); Thomas v. Freeman United Coal Mining Co., 6 BLR 1-739 (1984). We therefore affirm the administrative law judge's denial of employer's request for modification pursuant to Section 725.310.

Turning to the merits of the miner's claim, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Block and Shaub to support his finding that the evidence of record established the existence of pneumoconiosis pursuant to Section 718.202(a)(2). Specifically, employer argues that the administrative law judge mischaracterized the opinion of Dr. Block, who diagnosed "focal anthracosis" rather than

"anthracosilicosis" as found by the administrative law judge.[1] Employer also maintains that the administrative law judge erred in finding that the opinion of Dr. Azer, who listed a diagnosis of "ant[h]racosis" but concluded that there was no evidence of pneumoconiosis, was contradictory. Contrary to employer's arguments, however, "anthracosis" is included within the regulatory definition of pneumoconiosis at 20 C.F.R. §718.201, and therefore the administrative law judge's substitution of the word "anthracosilicosis" for "anthracosis" constitutes harmless error. Larioni v. Director, OWCP, 6 BLR 1-1276 (1984). Further, as the records attached to Dr. Azer's reports contained Dr. Block's finding of anthracosis, the administrative law judge rationally concluded that in listing a diagnosis of "ant[h]racosis," Dr. Azer contradicted his statement that there was no evidence of pneumoconiosis. Employer additionally contends that the opinions of Drs. Naeye, Bush and Fino, who have superior qualifications and whose opinions were based on a more comprehensive review of the evidence, are entitled to greater weight. The administrative law judge properly noted the relative qualifications of the physicians, however, and acted within his discretion as trier-of-fact in according greatest weight to the opinion of Dr. Shaub, the autopsy prosector, who concluded that the miner had pneumoconiosis, as he had the opportunity to perform both gross and microscopic examinations. Decision and Order at 5; Claimant's Exhibit 1. See

[1] Employer asserts that a diagnosis of anthracosis merely constitutes a finding of anthracotic pigmentation, and thus is insufficient to establish the existence of pneumoconiosis.

United States Steel Corp. v. Oravetz, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982); Gruller v. Bethenergy Mines, Inc., 16 BLR 1-3 (1991); Fetterman v. Director, OWCP, 7 BLR 1-6;88 (1985). Consequently, we affirm the administrative law judge's findings at Section 718.202(a)(2), as supported by substantial evidence.

Employer finally contends that the administrative law judge, in finding that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204, erred in relying on the opinion of Dr. Sabo rather than crediting the opinion of Dr. Fino. Employer asserts that Dr. Sabo merely performed a physical examination without objective tests; his abnormal findings on physical examination and assessment of physical limitations were consistent with totally disabling lung cancer; and he did not explicitly state that the miner suffered disabling coal workers' pneumoconiosis. However, Dr. Fino, a pulmonologist, performed a comprehensive review of the evidence and found no occupationally-related disease or disability. The administrative law judge, nevertheless, acted within his discretion in according greater weight to the opinion of Dr. Sabo, as he personally examined the miner and his diagnosis of pneumoconiosis was consistent with the weight of the pathology evidence. See generally Wetzel v. Director, OWCP, 8 BLR 1-139 (1985). Additionally, the administrative law judge permissibly accorded less weight to the opinion of Dr. Fino, as he relied on the opinion of Dr. Naeye in finding that claimant did not suffer from pneumoconiosis, see Trujillo v. Kaiser Steel Corp., 8 BLR 1-472

(1986), and his conclusions were based solely upon a review of the record. See generally Evosevich v. Consolidation Coal Co., 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); Tackett v. Cargo Mining Co., 12 BLR 1-11 (1988). Dr. Sabo diagnosed chronic obstructive pulmonary disease with pneumoconiosis as well as cancer, checked the "yes" box on Department of Labor Form CM-988, indicating that the diagnosed condition was related to dust exposure in the miner's coal mine employment, and listed an assessment of physical limitations attributable to pulmonary disease, which the administrative law judge compared with the exertional requirements of the miner's usual coal mine employment in finding that Dr. Sabo's opinion was sufficient to establish that claimant is totally disabled due to pneumoconiosis. Decision and Order at 5, 6; Director's Exhibit 18; see Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986). Contrary to employer's arguments, although Dr. Sabo did not perform objective testing, the administrative law judge could rationally find that the physician's conclusions were adequately supported by the miner's symptoms, abnormal findings on physical examination, and medical and smoking histories, and thus rely on the opinion as documented and reasoned. See generally Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Hess v. Clinchfield Coal Co., 7 BLR 1-295 (1984). We therefore affirm the administrative law judge's findings pursuant to Section 718.204 as supported by substantial evidence, and affirm his award of benefits on the miner's claim.

Turning to the survivor's claim, claimant maintains that the administrative law

judge, in finding that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), failed to apply the "true doubt" rule by resolving all conflicts in the evidence in claimant's favor. Claimant's contention is without merit. As the administrative law judge did not find that the conflicting evidence was equally probative, the "true doubt" rule is inapplicable. See King v. Cannelton Industries, Inc., 8 BLR 1-146 (1985); Stanford v. Director, OWCP, 7 BLR 1-541 (1984). The administrative law judge permissibly relied on the opinions of a numerical preponderance of the better qualified pathologists, who found no pneumoconiosis and stated that death was due to cancer unrelated to coal mine employment. Decision and Order at 7-13; see generally Anderson, supra; Wetzel v. Director, OWCP, 8 BLR 1-139 (1985). Although Dr. Goldblatt possessed comparably impressive credentials and opined that the miner's pneumoconiosis substantially contributed to his death, the administrative law judge acted within his discretion in giving less weight to Dr. Goldblatt's opinion, as his findings varied significantly from all of the other expert opinions regarding the cause of death. Decision and Order at 11-13; see generally Snorton v. Zeigler Coal Co., 9 BLR 1-106 (1986). As the administrative law judge's findings pursuant to Section 718.205(c) are supported by substantial evidence, we affirm the administrative law judge's denial of benefits on the survivor's claim.

Accordingly, Administrative Law Judge Tierney's Decision and Order awarding benefits on the miner's claim and his Decision and Order Denying Employer's

Request for Modification are affirmed. The Decision and Order of Administrative Law Judge Morin denying benefits on the survivor's claim is also affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge