BRB No. 04-0193 BLA

GWENDOLYN SUE BURKE (Widow of CLARENCE BURKE)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 07/19/2004
NATIONAL MINES CORPORATION	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, the miner's widow,[1] appeals the Decision and Order (2002-BLA 275 and 2001-BLA 285) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a miner's duplicate claim and 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).[2]

The miner, Clarence Burke, filed his original claim for black lung benefits on September 14, 1988, which was denied by Administrative Law Judge W. Ralph Musgrave, who found that the miner did not establish the existence of pneumoconiosis in a Decision and Order dated July 17, 1990. Decision and Order at 3; Director's Exhibit 37. The miner filed his second claim on November 20, 1991, which was denied by Administrative Law Judge Daniel J. Roketenetz, who found that the miner did not establish the existence of pneumoconiosis in a Decision and Order dated March 31, 1994. Decision and Order at 3; Director's Exhibit 38. The miner filed his third claim on June 21, 1999, and while the claim was pending, the miner died. Decision and Order at 3; Director's Exhibits 30, 35-36, 39-40. On November 17, 2000, the miner's widow, claimant herein, filed a survivor's claim. Decision and Order at 3; Director's Exhibit 40. Subsequently, the third miner's claim and the survivor's claim were consolidated and the case was referred to the Office of Administrative Law Judges. The administrative law judge credited the miner with twenty-nine years of coal mine employment and adjudicated the miner's duplicate claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718.

With regard to the miner's claim, the administrative law judge applied the standards set forth in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), and found that the evidence developed since the denial of the miner's prior claim established that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge thus concluded that claimant demonstrated a material change in conditions in the miner's claim as required by 20 C.F.R. §725.309(d) (2000). Upon *de novo* review of the entire evidentiary record, the administrative law judge found that claimant failed to establish total disability due to pneumoconiosis

[1] Claimant is Gwendolyn Sue Burke, the widow and surviving spouse of the deceased miner, Clarence Burke, who died on October 15, 2000. Decision and Order at 4; Director's Exhibit 41. Claimant filed her survivor's claim on November 17, 2000. Decision and Order at 4; Director's Exhibit 40.

[2] 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002).

pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits on the miner's claim.

With respect to the survivor's claim, the administrative law judge considered all of the evidence of record and found that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in failing to accord dispositive weight to the treating physicians in finding that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1) in the miner's claim. Claimant also contends that the administrative law judge erred in finding that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) in the survivor's claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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).

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered 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 20 C.F.R. §718.304, is applicable. 20 C.F.R §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of 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).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

Claimant asserts that the administrative law judge should have accorded dispositive weight to the opinions of Drs. Sunduram and Musgrave regarding whether the miner was totally disabled due to pneumoconiosis and whether the miner's death was due to pneumoconiosis pursuant to Sections 718.204(c) and 718.205(c) based on their status as the miner's treating physicians.[3] The administrative law judge noted that Dr. Sundaram testified that he had treated the miner for several years, dating back to 1989, and that Dr. Musgrave had treated the miner from April 30, 1998, to his death. Decision and Order at 9, 13; Director's Exhibit 43. The administrative law judge also noted, however, that the criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion are not directly applicable to medical evidence developed in this case because it was developed prior to January 19, 2001, the effective date of the amended regulations. Decision and Order at 34. Nonetheless, the administrative law judge took into consideration the nature of the relationship, the duration of the relationship, frequency of treatment, and the extent of treatment rendered by Drs. Sundaram and Musgrave. *See* 20 C.F.R. §718.104(d)(1)-(4).

This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has held that in black lung litigation, the opinions of treating physicians are not presumptively correct nor are they afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 510-13, 22 BLR 2-625, 2-640-47 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 277 F.3d at 513, 22 BLR 2-647. In this case, the administrative law judge specifically considered Dr. Sundaram's opinion in light of the criteria provided in Section 718.104(d), but permissibly determined that the doctor's opinion did not demonstrate that he possessed unique or substantive evidence regarding the miner's condition based on his status as the miner's treating physician and that attributing additional weight to the doctor's opinion

[3] Contrary to claimant's assertion that Dr. Musgrave's opinion established total disability due to pneumoconiosis, the administrative law judge correctly noted that although Dr. Musgrave opined that the miner's death was due to pneumoconiosis, the record does not contain a reasoned medical opinion from Dr. Musgrave attributing the miner's totally disabling pulmonary impairment to pneumoconiosis. Decision and Order at 13, 40; Director's Exhibit 43; Claimant's Exhibit 2.

was not warranted on this basis. *Williams*, 277 F.3d 501, 22 BLR 2-625; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 39. In addition, the administrative law judge acted within his discretion in according little probative weight to the opinion of Dr. Musgrave, in spite of his status as the miner's treating physician, since the physician did not offer a supporting rationale for his conclusion that pneumoconiosis caused or contributed to the miner's death. *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Clark*, 12 BLR 1-149; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields*, 10 BLR 1-19; *Fuller*, 6 BLR 1-1291; Decision and Order at 46.

Moreover, when considering the miner's claim, the administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Broudy, Caffrey, Dahhan and Perper, based on the physicians' credentials and explanations of the etiology of the miner's totally disabling respiratory impairment when compared to Dr. Sundaram's opinion. Similarly, when considering the survivor's claim, the administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Broudy, Dahhan, DeLara, Caffrey, Fino and Perper, based on their better reasoning on the issue of the cause of the miner's death when compared to the opinions of Drs. Sundaram and Musgrave. Decision and Order at 41, 46. Thus, we reject claimant's assertion that the administrative law judge should have accorded dispositive weight to the opinions of Dr. Sundaram and Musgrave based on their status as the miner's treating physicians. Consequently, we affirm the administrative law judge's finding that the medical opinions of Drs. Sundaram and Musgrave failed to establish that the miner's total disability and death were due to pneumoconiosis pursuant to Sections 718.204(c) and 718.205(c). As claimant makes no other specific challenges to the administrative law judge's findings on the merits, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner was totally disabled due to pneumoconiosis or that pneumoconiosis caused, contributed to, or hastened the miner's death. 20 C.F.R. §§718.204(c), 718.205(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); *Brown*, 996 F.2d 812, 17 BLR 2-135.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Because claimant has not met her burden of proof on an essential element of entitlement under 20 C.F.R. Part 718 in either the miner's claim or the survivor's claim, benefits are precluded thereunder. 20 C.F.R. §718.204(c), 718.205(c); *see Adams*, 816 F.2d 1116, 10 BLR 2-69; *Brown*, 996 F.2d 812, 17 BLR 2-135; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Trumbo*, 17 BLR 1-85; *Neeley*, 11 BLR 1-85.

Accordingly, the Decision and Order of the administrative law judge denying benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge