BRB No. 00-0922 BLA

EDITH K. WILTROUT (Widow of WALTER WILTROUT) Claimant-Petitioner v. SHANNOPIN MINING COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

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

Edith K. Wiltrout, Bobtown, Pennsylvania, *pro se*.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, without the assistance of counsel, appeals the Decision and Order on Remand-Denying Benefits (98-BLA-757) of Administrative Law Judge Daniel L. Leland 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] Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] This case is on appeal to the Board for the second time. Pursuant to the prior appeal by employer, the Board affirmed the administrative law judge's finding that the evidence was sufficient to establish the existence of pneumoconiosis, but vacated the administrative law judge's finding that pneumoconiosis hastened the miner's death and remanded for reconsideration of the evidence on that issue. On remand, the administrative law judge concluded that the evidence of record was insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death and denied benefits.

On appeal, claimant generally contends that she is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.C.C.

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[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. 80,107 (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.

[2] The miner filed his claim for benefits March 11, 1994, which was denied by the district director June 15, 1994. Director's Exhibit 26. The miner died June 4, 1997. Director's Exhibit 7. Claimant filed her claim for survivor's benefits June 30, 1997.

Feb. 9, 2001)(order granting preliminary injunction). In the present case the Board established a briefing schedule by order issued on March 16, 2001, to which employer and the Director have responded. Employer contends that application of the following challenged regulations will affect the outcome of this case: Section 718.104(d), dealing with the consideration of a treating physician's opinion; Section 718.201(a), (c), broadening the definition of pneumoconiosis to include both clinical and legal pneumoconiosis and recognizing pneumoconiosis as a latent and progressive disease; Section 718.204(a), dealing with the effect of a nonpulmonary or nonrespiratory condition; and Section 718.205(c), providing that pneumoconiosis will be considered a substantially contributing cause of death if it hastens the miner's death. The Director contends that the regulations at issue in the lawsuit will not affect the outcome of the case.

Contrary to employer's argument, Section 718.104(d) is inapplicable to this case because the treating physician evidence in this record was developed prior to January 19, 2001. *See* 20 C.F.R. §718.101(a). Additionally, 20 C.F.R. §718.204(a) is inapplicable because the issues of disability and disability causation are not elements in a survivor's claim. *See* 20 C.F.R. §718.205(a)(1)-(3). Further, the principle that pneumoconiosis is progressive is the same under both the existing law recognizing the progressive nature of pneumoconiosis, *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), and 20 C.F.R. §718.201(c), which codifies existing law. 65 Fed. Reg. 79937, 79971-72. Similarly, 20 C.F.R. §§718.201(a)(2) and 718.205(c)(5) merely codify existing law recognizing "legal pneumoconiosis", *see Swarrow*, *supra*, and set forth the "hastening death" standard. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); 65 Fed. Reg. 79937-38, 79949-50. Additionally, based on our review, we conclude that none of the other challenged regulations affects the outcome of this case. Therefore, we will proceed with the adjudication of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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)-(3). 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, supra*.

After consideration of the Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error. Noting that the Board had remanded this case because he had failed to provide a rationale for according more weight to the opinion of the autopsy prosector, Dr. Wecht, than to opinions of the pathologists, Drs. Oesterling and Kleinerman, who had reviewed the autopsy slides, and because he had erred in according greater weight to the opinion of Dr. Elnicki simply because he was claimant's treating physician, the administrative law judge reconsidered the evidence.[3] The administrative law judge noted that although Dr. Wecht was the autopsy prosector, his opinion, that pneumoconiosis contributed to the miner's death, was outweighed by the contrary opinions of Drs. Oesterling and Kleinerman, that pneumoconiosis did not contribute to death, because

[3] The death certificate lists the immediate cause of death as ventricular fibrillation due to arteriosclerotic heart disease, with chronic obstructive lung disease listed as a significant condition. Director's Exhibit 7. Dr. Wecht performed the autopsy and diagnosed hypertensive and arteriosclerotic cardiovascular disease and chronic obstructive pulmonary disease, including coal workers' pneumoconiosis. Director's Exhibit 8. In a subsequent letter, Dr. Wecht found that the miner died as a result of hypertensive and arteriosclerotic heart disease and that the miner's pneumoconiosis, the basis for his chronic obstructive pulmonary disease, was a substantially contributing cause of death. Claimant's Exhibit 7. Dr. Wecht further found that pneumoconiosis hastened the miner's death by aggravating and worsening his heart disease. Claimant's Exhibit 1. Dr. Elnicki, the miner's treating physician since 1994, noted no history of coronary artery disease and after review of the autopsy report, noted that the miner's pulmonary disease precipitated the miner's acute arrhythmia and that it was likely that pneumoconiosis contributed to death. Director's Exhibit 9. Dr. Everett, a board certified pathologist, and Dr. Tuteur, a board certified pulmonologist, found no significant pneumoconiosis, that pneumoconiosis did not contribute to death, and that death was due to ischemic heart disease. Director's Exhibit 19; Employer's Exhibit 1. Dr. Kleinerman, a board certified pathologist, reviewed the autopsy slides and noted that the minimal amount of pneumoconiosis did not cause or hasten the miner's death and that death was due to cardiac arrhythmia. Employer's Exhibit 2.

Dr. Wecht's expertise was roughly equivalent to Dr. Oesterling's while Dr. Kleinerman's qualifications were superior to Dr. Wecht's, and because the opinions of Drs. Oesterling and Kleinerman were more thorough and extensive than the opinion of Dr. Wecht. This was rational. *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Further, the administrative law judge noted that although Dr. Elnicki was claimant's treating physician, Dr. Tuteur's opinion was more credible as Dr. Tuteur had reviewed more of claimant's medical evidence than had Dr. Elnicki, Dr. Tuteur's opinion was more definitive than Dr. Elnicki's, and Dr. Tuteur was board certified in pulmonary diseases, while Dr. Elnicki's credentials were not in the record.[4] Additionally, the administrative law judge accorded less weight to Dr. Elnicki's opinion because he found it equivocal. This was rational. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Dillon, supra*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hall, supra*; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1939 (1985); *see Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730, 1-733 (1983).

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 *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, since the administrative law judge rationally concluded that the evidence of record was insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death, we must affirm the administrative law judge's denial of benefits in this survivor's claim as it is supported by substantial evidence and is in accordance with law. *See Trumbo, supra*; *Lukosevicz, supra*;

[4] In his prior Decision and Order, the administrative law judge also noted that Dr. Elnicki's credentials were not in the record, but took judicial notice of the fact that Dr. Elnicki was board certified in internal medicine. Decision and Order dated January 5, 1999 at 4, fn. 2. In any case, we note that the administrative law judge properly accorded greater weight to the opinion of Dr. Tuteur inasmuch as the record shows that he is Board certified in pulmonary diseases, Employer's Exhibit 1; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

see also Director, OWCP v. Greenwich Colleries, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Colleries v. Director, OWCP [Ondecko]*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Accordingly, the administrative law judge's Decision and Order on Remand-Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge