BRB No. 07-0104 BLA

R. B. (o/b/o the Estate of J. B.) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 09/20/2007 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, P.S.C., Pikeville, Kentucky, for claimant.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (05-BLA-5599) of Administrative Law Judge Thomas F. Phalen, Jr., 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 judge credited the miner with 15.39 years of qualifying coal mine employment, but found that the weight of

[1] Claimant is the son of the miner and his widow. The miner's widow filed a survivor's claim for benefits on September 6, 2001. Director's Exhibit 3. After her death on June 30, 2004, the district director identified claimant as a party herein, and claimant is pursuing the claim on behalf of the Estate. Director's Exhibit 48.

the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that the autopsy and medical opinion evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2), (4). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits, to which claimant replies in support of his position.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see 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). 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); *see also 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).[2]

Claimant contends that the autopsy report and supplemental opinions of Dr. Dennis, the autopsy prosector, supported by the opinion of Dr. DeLara, are well-reasoned and sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2), (4), and that the administrative law judge erred in failing to accord greater weight to this evidence. Claimant essentially seeks a reweighing of the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

At Section 718.202(a)(2), the administrative law judge accurately reviewed the report of the autopsy conducted by Dr. Dennis on March 15, 2000, finding that the miner died primarily of cardiovascular disease, with final diagnoses of moderate to severe coronary artery disease manifested by left ventricular hypertrophy; mild to moderate pulmonary congestion with early focal bronchopneumonia; mild panlobular emphysema; and "minimal anthracosilicotic pigment deposition." Decision and Order at 6; Director's Exhibit 12. As "anthracosilicotic pigment deposition" does not constitute a diagnosis of anthracosilicosis, and the physician did not link any of his other findings to dust exposure in coal mine employment, the administrative law judge properly found that Dr. Dennis's autopsy evidence was insufficient to establish the existence of pneumoconiosis at subsection (a)(2). Decision and Order at 10-11; Director's Exhibit 12; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Hapney v. Peabody Coal Co.*, 22 BLR 1-106 (2001)(*en banc*).

At Section 718.202(a)(4), however, the administrative law judge determined that Dr. Dennis's report dated January 14, 2003, based on autopsy findings, "stands in stark contrast with his previous autopsy report," Decision and Order at 12, as the physician diagnosed cor pulmonale caused by and aggravated by coal workers' pneumoconiosis (CWP) and dust exposure; anthracosilicosis and progressive massive fibrosis caused by coal dust exposure; and the physician stated that the miner's death was pulmonary and was hastened by his repeated exposure to coal dust which caused CWP and fibrosis.[3] Decision and Order at 6; Director's Exhibit 48. In view of the discrepancies between the two reports, and Dr. Dennis's failure to explain his inconsistent findings, the administrative law judge permissibly concluded that the January 14, 2003 report was unreasoned and entitled to little weight. Decision and Order at 12; *see generally Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984).

In evaluating Dr. DeLara's opinion, that the miner "had COPD- clinically as a result of pulmonary emphysema and fibrosis secondary to Simple Coal Workers' Pneumoconiosis. . . .[t]he resulting Cor Pulmonale caused a right sided heart failure which was a contributory factor to his demise," Director's Exhibit 18, the administrative law judge found that the opinion was entitled to probative weight on the issue of clinical pneumoconiosis, based on the physician's credentials as a pathologist. Decision and Order at 6, 12. The administrative law judge further found, however, that the contrary

[3] Claimant additionally asserts that Dr. Dennis's report dated January 17, 2001 is well reasoned and sufficient to establish the existence of pneumoconiosis. Claimant's Brief at 2, 7. The Director, however, correctly notes that the report was not listed as claimant's designated evidence, *see* Decision and Order at 5, Claimant's Exhibit 1, and that this report is also wholly inconsistent with Dr. Dennis's original autopsy report. Director's Brief at 7, n. 4.

opinion of Dr. Crouch, that the miner did not suffer from clinical or legal pneumoconiosis, was entitled to equal weight based on the physicians' comparable qualifications. Decision and Order at 6-7, 12; Employer's Exhibits 2, 4. Moreover, the administrative law judge found that Dr. Crouch's opinion was well-reasoned and more consistent with his determination under subsection (a)(2), Decision and Order at 13, and that Dr. DeLara's diagnosis was insufficient to establish legal pneumoconiosis as it was "conclusory at best, and non-existent at worst," Decision and Order at 12; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge thus concluded that claimant failed to establish either clinical or legal pneumoconiosis by a preponderance of the evidence. Decision and Order at 13; *see* 20 C.F.R. §725.103; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). As claimant merely summarized the favorable evidence but did not identify any substantive error of law or fact in the administrative law judge's weighing of that evidence, nor challenge his crediting of Dr. Crouch's contrary opinion, we affirm the administrative law judge's findings pursuant to Section 718.202(a). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, as claimant has failed to establish the existence of pneumoconiosis, we affirm the administrative law judge's denial of survivor's benefits. *Trumbo*, 17 BLR at 1-88.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge