U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 February 2006

Case No: 2004-BLA-05490

In the Matter of

ETTA PARKS, Widow of
GORDON PARKS, Deceased,
Claimant

v.

LEECO , INC.,
Employer,

JAMES RIVER COAL COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Monica Rice Smith, Esquire
For the claimant

John H. Baird, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER —DENYING BENEFITS

This proceeding arises from a claim for survivor's benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On December 19, 2003, this case was referred to the Office of Administrative Law Judges for a formal hearing. Following proper notice to all parties, a hearing was held on February 9, 2005 in London, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence and to present closing arguments or post-hearing briefs.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. whether the deceased miner had pneumoconiosis as defined by the Act and regulations;

2. whether the deceased miner's pneumoconiosis arose out of coal mine employment; and,

3. whether the deceased miner's death was due to pneumoconiosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

Claimant, Etta Parks, timely filed her claim for survivor's benefits under the Act on February 14, 2002 (DX 1). The Office of Worker's Compensation Programs issued a proposed denial on September 23, 2003. Pursuant to Mrs. Park's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges on December 19, 2003 (DX 24, 25, 29).

Gordon Parks, Claimant's husband and the miner upon whom this claim is based, was born on May 11, 1930 and died on November 2, 2001. Claimant and the miner were married on March 22, 1951, and they resided together until the miner's death. They had no children who

were under eighteen or dependent upon them at the time this claim was filed. At the time of the hearing, Mrs. Parks resided in Annville, Kentucky and had not remarried. (DX 1, 11, 7, Tr 10).

Claimant testified that her husband had breathing problems for several years. He had problems sleeping and he had a persistent cough. Claimant also testified her husband was treated by Dr. Spady with an inhaler. Claimant testified Dr. Spady suspected her husband had lung cancer; however, her husband would not go to a cancer doctor or a breathing specialist. He was never treated in the hospital for his final illness. Claimant stated her husband died at home (Tr 11, DX 12). Claimant also testified her husband worked 42 years in coal mine employment and his last employment was as an underground foreman. All of his coal mine employment was underground (Tr 12). Claimant stated her husband smoked cigarettes for about 47 years and he quit smoking two to three years before he died (DX 12). Claimant stated her husband retired from coal mine employment because of illness (DX 11).

Claimant's husband filed a black lung claim on September 28, 1972, which was finally denied by the Office of Workers' Compensation Programs (OWCP) on June 15, 1981. OWCP found Claimant had not established the presence of pneumoconiosis. He also did not establish that such pneumoconiosis arose out of coal mine employment or total disability due to pneumoconiosis (DX 1-60). Mr. Parks filed a second claim for benefits on January 24, 1992. That claim was denied by Administrative law Judge Frank Marden on February 5, 1996. Claimant-miner appealed, and the Benefits Review Board affirmed Judge Marden's finding that pneumoconiosis was not established under Sections 718.202(a)(2-4) of the regulations; however, the Board remanded the matter for further consideration of the x-ray evidence of record on March 21, 1997. On remand, Judge Marden found the x-ray evidence was insufficient to establish the presence of pneumoconiosis. In addition, Judge Marden found Claimant-miner had not established total disability due to any respiratory or pulmonary condition. Accordingly, Judge Marden again denied benefits. Claimant-miner appealed to the Board a second time, and on September 13, 1999, the Board affirmed the denial of benefits. Claimant-miner then submitted a request for modification on April 13, 2000; however, Claimant subsequently requested this second claim for benefits be withdrawn. By Order dated January 26, 2001, Judge Rudolf Jansen issued a decision and order allowing withdrawal of the miner's claim (DX 1).

As noted above, the miner died on November 2, 2001 and on February 14, 2002, his widow, the claimant Mrs. Parks, filed this claim for survivor's benefits (DX 2) [1].

Medical Evidence

Medical evidence submitted under a claim for benefits under the Act is subject to two different requirements. First, medical evidence must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. § 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies, and "other medical

[1] Given the filing date of this claim, subsequent to the effective date of the permanent criteria of Part 718 (i.e., March 31, 1980), the regulations set forth at 20 C.F.R. Part 718 will govern its adjudication. Because the miner's last exposure to coal mine dust occurred in Kentucky, this claim arises under the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit. *See Broyles v. Director, OWCP*, 143 F.3d 1348, 21 BLR 2-369 (10th Cir. 1998).

evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. § 725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports, and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, biopsy, or autopsy. § 725.414(a)(2)(ii). Likewise, responsible operators and the district director are subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii).

A. X-ray reports[2]

Exhibit	**Date of X-ray**	**Physician/ Qualifications**	**Interpretation**
DX 10	3-06-2000	Stinnett	Mass, left mid-lung field suspicious for carcinoma
EX 3	3-06-2000	Rosenberg, B	0/0, large lesion in left mid-lung
EX 5	3-06-2000	Halbert, BCR	0/0, mass in left lung, probably carcinoma

B. Pulmonary Function Studies

No pulmonary function study results were submitted with the widow's claim for benefits.

C. Arterial Blood Gas Studies

No arterial blood gas study results were submitted with the widow's claim for benefits.

D. Narrative Medical Evidence and Other Medical Evidence

The amended regulations provide that, notwithstanding the evidentiary limitations contained at 20 C.F.R. § 725.414(a)(2) and (a)(3), any record of a miner's hospitalization for respiratory or pulmonary or related disease may be received into evidence. 20 C.F.R. § 725.414(a)(4). Furthermore, a party may submit "other medical evidence" reported by a

[2] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a,b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

physician and not specifically addressed under the regulations under section 718.107, such as a CT scan. The record includes two narrative medical review reports, a brief statement by the miner's treating physician, the treating physician's office records and the death certificate.

The death certificate, signed by the deputy coroner (whose name is illegible) states the cause of death as pneumonia due to cancer of the lungs due to chronic obstructive pulmonary disease (DX 8).

Dr. S. Spady stated on February 12, 2002, that he was the miner's treating physician from 1990 until his death. He stated the miner had chronic obstructive pulmonary disease and pneumoconiosis. He stated further these diagnoses were related to the miner's death because of increased chronic obstructive pulmonary disease with hypoxia (DX 9).

Dr. Spady's treatment records indicate treatment for hypertension, gastritis or GERD, a series of ear infections, an occasional upper respiratory infection or bronchitis from 1991 through April, 2000. In 1999, the miner was treated for hyperlipidemia, hyperkalemia, and hypercholesterolemia. The records indicate that in March, 2000, a chest x-ray reading by Dr. Stinnett reported a mass in the left lung field suspicious for carcinoma. A CT scan was performed by Dr. Stinnett which also found the mass in the left mid lung field suspicious for carcinoma. On the CT scan report, Dr. Stinnett also noted possible metastasis in the left upper lung field. Dr. Stinnett recommended bronchoscopy with biopsy to confirm the presence of cancer. On April 14, 2000, however, Dr. Spady reported the patient was refusing the biopsy or bronchoscopy and any treatment for the possible cancer. This visit in April, 2000 was the miner's last office visit with Dr. Spady before the miner's death in November, 2001 (DX 10).

Dr. Bruce Broudy, a pulmonary specialist, reviewed the records on December 14, 2004, including Dr. Spady's office treatment notes. Dr. Broudy stated there was not sufficient objective evidence to justify a diagnosis of pneumoconiosis. Dr. Broudy stated the office notes did not show any treatment for chronic obstructive pulmonary disease or chronic respiratory insufficiency due to any cause. There is no evidence of impairment from coal mine dust exposure in the records nor is there any evidence of pneumoconiosis in the records. Therefore, there is no evidence pneumoconiosis contributed to the miner's disabling respiratory impairment or to his death. Dr. Broudy stated the clinical diagnosis of carcinoma of the lung is most likely due to the miner's long history of cigarette smoking. There is no evidence of the severity of chronic obstructive pulmonary disease, if present. Dr. Broudy noted the physical examination findings of wheezing and expiratory delay indicate some degree of obstruction was probably present, however, it was probably mild considering the pulmonary function study results of 1992 were normal. Dr. Broudy stated there is no objective evidence the miner was disabled prior to his final illness. He further stated that although it was most likely at some point Mr. Parks was disabled prior to his death, there is no evidence that coal worker's pneumoconiosis worsened his pulmonary condition or worsened any totally disabling condition (EX 1). At a deposition taken on January 13, 2005, Dr. Broudy noted the CT lung scan reports showed no evidence of pneumoconiosis. He discussed the fact the pulmonary test results in 1992 were normal and the fact that at some point before his death, the miner was disabled by carcinoma, chronic obstructive pulmonary disease and pneumonia. However, Dr. Broudy stated none of these conditions was due to coal mine dust exposure. Dr. Broudy noted the miner's coal mine

employment ended 10 years before his death and, thus, he stated it is unlikely it was related to these terminal conditions (EX 2).

Dr. R. Rosenberg, a pulmonary specialist, reviewed the records on December 20, 2004. Dr. Rosenberg noted the chest x-ray readings of March, 2000 were negative for pneumoconiosis and the CT lung scan, a more accurate test, confirmed the absence of pneumoconiosis. Dr. Rosenberg also stated there is no objective evidence from a pulmonary perspective of any disability. He noted the miner had bronchitis several times over the course of Dr. Spady's treatment; however, Dr. Rosenberg stated that any bronchitis due to coal mine dust exposure dissipates within months after coal mine employment ceases, so he stated it was unlikely the miner's recurrent bronchitis was due to coal mine dust exposure. Dr. Rosenberg stated the miner's death was due to lung cancer which was not caused by or due to coal mine dust exposure. He concluded there is no objective evidence of chronic obstructive pulmonary disease and no objective evidence that if it was present, it was causing an impairment (EX 3). At a deposition taken on February 1, 2005, Dr. Rosenberg reiterated his written findings. He concluded the miner's death was due to lung cancer and the miner would have died at the same time irrespective of the kind of employment in which he engaged (EX 4).

DISCUSSION AND APPLICABLE LAW

Claimant filed her claim on June 9, 1995 (DX 2). Therefore, entitlement to benefits must be established under the regulatory criteria at Part 718. Section 718.205(a) provides that benefits are available to eligible survivors of a miner whose death was due to pneumoconiosis which arose out of coal mine employment. An eligible survivor will be entitled to benefits if claimant proves that: 1) The miner had pneumoconiosis; 2) The miner's pneumoconiosis arose out of coal mine employment; and 3) The miner's death was due to pneumoconiosis as provided by Section 718.205. For purposes of claims filed after January 1, 1982, death will be considered due to pneumoconiosis if any of the following criteria is met: 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 3) Where the presumption set forth in § 718.304 (evidence of complicated pneumoconiosis) is applicable. 20 C.F.R. 718.205(c). The regulations also provide that 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. 20 C.F.R. 718.205(c)(4). The regulations further provide that 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).

On review of the record, I note that Dr. Spady, the miner's treating physician, did state that he had treated the miner for chronic obstructive pulmonary disease and pneumoconiosis. While the treatment records do support Dr. Spady's statement with regard to the diagnosis of chronic obstructive pulmonary disease, there is no diagnosis in the record of pneumoconiosis. In addition, while Dr. Spady diagnosed chronic obstructive pulmonary disease, according to the review of the record by Dr. Broudy, there is no indication Dr. Spady prescribed any medication or other treatment for the chronic obstructive pulmonary disease. Under these circumstances, I find Dr. Spady's statement that the chronic obstructive pulmonary disease and pneumoconiosis

were related to the miner's death is conclusory since he includes no discussion of the basis of this statement. Dr. Spady did not support this statement with any discussion of test results or examination findings that establish the increasing chronic obstructive pulmonary disease and/or pneumoconiosis contributed to the miner's death from lung cancer and pneumonia. Furthermore, he did not explain or demonstrate how the chronic obstructive pulmonary disease caused or contributed to the miner's death from lung cancer and pneumonia.

I note that Dr. Spady was the miner's treating physician, and therefore his opinion must be considered pursuant to Section 718.104(d). This regulation in effect states that a treating physician's opinion shall be accepted "in the absence of contrary probative evidence" and may be given controlling weight if it is credible "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. § 718.104(d)(5). The regulations list several factors to be considered including the nature of the relations, the duration of the relationship, the frequency of the treatment, and the extent of the treatment. 20 CFR § 718.104(d).

Dr. Spady did see the miner frequently until April, 2000. He treated him for a variety of medical conditions and, according to Mrs. Parks' testimony, he was the only physician to treat the miner during the last 10 years of his life. However, as noted above, the miner ceased medical visits in April, 2000 once the diagnosis of lung cancer was made. Thus, Dr. Spady did not see the miner during the last eighteen months of his life. In addition, on review of Dr. Spady's statement as noted above, Dr. Broudy, a highly qualified pulmonary specialist, stated that the medical treatment records do not include any objective findings to support the diagnosis of chronic obstructive pulmonary disease and they do not include any treatment for chronic obstructive pulmonary disease. In addition, the medical records do not include any reference to or diagnosis of coal worker's pneumoconiosis. Similarly, Dr. Rosenberg found no objective evidence in the treatment records to support a diagnosis of chronic obstructive pulmonary disease or any disability due to chronic obstructive pulmonary disease. Thus, based on the fact Dr. Spady did not attend the miner during the last eighteen months of his terminal illness and the fact that the physician's records do not support his brief statement of February 12, 2002, and based on the contrary analysis of two pulmonary specialists, which are well supported by the objective findings in the record, I do not accord controlling weight to Dr. Spady's opinions under the provisions of Section 718.104(d).

On review of all of the evidence, I find it is insufficient to establish the presence of pneumoconiosis. The x-ray readings are all negative for pneumoconiosis and, thus, pneumoconiosis is not established under the provisions of subsection (a)(1). There is no biopsy or autopsy evidence, so pneumoconiosis is not established under subsection (a)(2). Furthermore, the presumptions set forth at Section 718.202(a)(3) are not applicable to this claim. Finally, I find Dr. Spady's diagnosis of chronic obstructive pulmonary disease, which he apparently attributed to the miner's coal mine employment, is not sufficiently supported and is outweighed by the contrary medical opinion review reports of Drs. Broudy and Rosenberg which note there is no objective evidence to support such a diagnosis. Similarly, there is no basis for or support for the statement by the deputy coroner on the death certificate that chronic obstructive pulmonary disease was present. Furthermore, the death certificate does not indicate that even if chronic obstructive pulmonary disease was present that it was related to the miner's coal mine

dust exposure. Thus, I find the evidence is not sufficient to establish the presence of pneumoconiosis which arose out of the miner's coal mine employment.

However, even if pneumoconiosis was established, this survivor's claim would still fail since there is no credible evidence which establishes the miner's death was due to pneumoconiosis under any of the provisions of Section 718. Initially, I note that there is no evidence of complicated pneumoconiosis, so death due to pneumoconiosis is not established under Section 718.205(c)(3). There is no competent evidence which establishes that pneumoconiosis was the cause of the miner's death, so death due to pneumoconiosis is not established under Section 718.205(c)(1). For the reasons set forth above, I find Dr. Spady's conclusory statement that the miner had pneumoconiosis and chronic obstructive pulmonary disease which were related to his death are outweighed by the contrary better reasoned and better supported medical review reports of Drs. Broudy and Rosenberg. Therefore, I find the evidence is not sufficient to establish that pneumoconiosis was a substantially contributing cause or factor in the miner's death under Section 718.205(c)(2).

Accordingly, I find the evidence is not sufficient to establish the miner's death was due to pneumoconiosis under any of the provisions of Section 718.205(c).

Entitlement to Benefits

Claimant failed to establish the presence of pneumoconiosis or that her husband's death was due to pneumoconiosis, which are essential elements of entitlement on a survivor's claim. Therefore, she is not entitled to benefits under the Act.

Attorney's Fees

The award of attorney's fees under the Act is permitted only in cases in which the claimant is entitled to the receipt of benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Etta Parks, widow of deceased miner, Gordon Parks, for black lung survivor's benefits under the Act is hereby denied.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).