



BRB No. 19-0342 BLA

PATRICIA J. HALE)
(Widow of JOHNNIE M. HALE))

Claimant-Respondent)

v.)

CONSOLIDATION COAL COMPANY)

and)

CONSOL ENERGY, INCORPORATED)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 07/30/2020

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta,
Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania,
for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for
Employer/Carrier.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2018-BLA-05613) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves a survivor's claim filed on March 28, 2017.

The administrative law judge found no evidence to establish the Miner had complicated pneumoconiosis and, thus, Claimant could not invoke the irrebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge found the Miner had 19.8 years of coal mine employment but the evidence was insufficient to establish he was totally disabled. Thus, she found Claimant was unable to invoke the rebuttable presumption the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.¹ Considering Claimant's entitlement without the aid of either presumption, the administrative law judge found the Miner had clinical and legal pneumoconiosis.² 20 C.F.R. §718.202(a). She further found his death was due to legal pneumoconiosis and awarded benefits. 20 C.F.R. §718.204(b).

On appeal, Employer contends the administrative law judge erred in finding the Miner's death was due legal pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review 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.³ 33 U.S.C. §921(b)(3), as

¹ Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the Miner's death was due to pneumoconiosis if she establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

² Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

³ Because the Miner's coal mine employment occurred in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit

incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a survivor’s claim where the Section 411(c)(3) and (c)(4) presumptions are not invoked, a claimant must establish the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(b)(1), (2). A miner’s death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of his death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a “substantially contributing cause” if it hastens the miner’s death. 20 C.F.R. §718.205(b)(6); see *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, (3d Cir. 1989).

Employer concedes the Miner had clinical coal worker’s pneumoconiosis and does not challenge the administrative law judge’s determination that the autopsy evidence established the Miner had legal pneumoconiosis in the form of diffuse fibrosis and emphysema significantly related to coal mine dust exposure.⁴ Decision and Order at 20; Hearing Transcript at 5. Those findings are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Considering the issue of death causation, the administrative law judge credited the opinions of Drs. Zezulak and Perper that legal pneumoconiosis hastened the Miner’s death over the contrary opinions of Drs. Caffrey and Rosenberg. Decision and Order at 22. Employer contends Dr. Zezulak did not credibly explain why pneumoconiosis hastened the Miner’s death. Employer’s Brief at 8. Employer asserts Dr. Zezulak “was never provided medical records regarding the [M]iner’s condition prior to his death” and had she been given those records and found he had normal pulmonary function studies prior to his diagnosis of metastatic squamous cell carcinoma, “her opinion most certainly would have been different.” *Id.* Employer’s arguments are without merit.

Employer does not specifically identify the treatment records or pulmonary function

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⁴ The administrative law judge found Dr. Caffrey’s opinion equivocal regarding the etiology of the Miner’s emphysema. Decision and Order at 18. She noted Dr. Rosenberg opined the Miner could have legal pneumoconiosis if the centrilobular emphysema found on his autopsy was associated with an abundant amount of coal dust. *Id.* The administrative law judge found legal pneumoconiosis established based on Dr. Zezulak’s autopsy finding of emphysema closely associated with coal macules and Dr. Perper’s opinion that the Miner had centrilobular emphysema caused by both smoking and coal mine dust exposure. *Id.*

studies Dr. Zezulak failed to consider, and the administrative law judge found there were no pulmonary function studies in the record. Decision and Order at 8. The administrative law judge further noted Dr. Rosenberg reviewed treatment records containing pulmonary function studies that were not admitted into the record and gave his opinion less weight for this reason. Decision and Order at 22. Nor does employer explain why the unidentified pulmonary function testing allegedly conducted prior to Claimant's earlier cancer diagnosis would undermine Dr. Zezulak's diagnosis on autopsy. She specifically diagnosed metastatic squamous cell carcinoma but nevertheless identified severe coal dust-related emphysema as a significant contributing cause and hastening factor in the Miner's death from bronchopneumonia. See *Lukosevicz*, 888 F.2d at 1006 (pneumoconiosis need only be a substantial contributor to a miner's death and not the primary cause of it). Because Employer does not adequately explain its allegation of error, we reject it. See 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 1-120 (1987).

Further, contrary to Employer's contention, the administrative law judge permissibly found Dr. Zezulak's opinion reasoned and documented based on the evidence before her. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Dr. Zezulak performed the autopsy of the Miner on November 30, 2016, which included both gross and microscopic descriptions of his lungs. Director's Exhibit 12. She noted the Miner had a twenty-six year history of coal mine employment, a twenty-six pack-year smoking history, and a medical history of diabetes mellitus and squamous cell carcinoma of the lung. *Id.* Her final anatomic diagnoses were atherosclerotic and hypertensive cardiovascular disease, pulmonary congestion and edema, simple coal workers' pneumoconiosis, emphysema, acute bronchopneumonia, and metastatic squamous cell carcinoma. *Id.*

As the administrative law judge accurately noted, Dr. Zezulak testified the Miner had "severe," "advanced," and "very, very extensive" emphysema because she observed three forms during the Miner's autopsy: "pathopneumonic," which is adjacent to macules of coal workers' pneumoconiosis, centrilobular and panacinar emphysema. Employer's Exhibit 3 at 41. She noted the Miner had emphysema "all throughout the lower region" and stated "[w]hen I say panacinar, that [means it is] everywhere." *Id.* at 53. She opined the Miner's emphysema was caused by a combination of smoking and coal mine dust exposure. *Id.* at 41. In addressing the mechanism of his death, she explained the Miner's coal dust-related emphysema was a significant contributing cause and hastened his death because it impaired the ability of his lungs "to respire" and put him at greater risk of dying from bronchopneumonia. *Id.* at 51, 53. She further opined the Miner "could have had a longer life expectancy" had the emphysema not been so severe. *Id.* at 53. Because the administrative law judge permissibly found Dr. Zezulak's opinion credible to establish the Miner's death was hastened by legal pneumoconiosis, we affirm her determination. See *Hill v. Director, OWCP*, 562 F.3d 264, 270-72 (3d Cir. 2009). *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d

158, 163 (3d Cir. 1986).

Employer also contends the administrative law judge improperly credited Dr. Perper's opinion to the extent he attributed the Miner's lung cancer to coal dust exposure when "[t]here is absolutely no scientific evidence that links coal dust exposure to the development of cancer." Employer's Brief at 10-11. However, the administrative law judge specifically rejected Dr. Perper's opinion on the etiology of the Miner's cancer, finding it outweighed by the preponderance of medical opinions indicating the Miner's cancer was unrelated to his coal mine employment. Decision and Order at 18. Although she discredited portions of Dr. Perper's opinion relating to the cause of the Miner's cancer, we see no error in her determination that Dr. Perper's opinion is otherwise adequately reasoned and supports Dr. Zezulak's opinion that legal pneumoconiosis in the form of emphysema hastened the Miner's death. *See Kertesz*, 788 F.2d at 163; *Clark*, 12 BLR at 1-155; Decision and Order at 22.

Regarding Employer's experts, the administrative law judge found Dr. Caffrey's opinion equivocal as to whether legal pneumoconiosis hastened the Miner's death. Decision and Order at 21; Employer's Exhibits 1, 4. She gave less weight to Dr. Rosenberg's opinion that the Miner's death was not hastened by legal pneumoconiosis because he relied on pulmonary function study evidence not admitted into the record, he is not a pathologist, and he did not personally review the Miner's autopsy slides. *Id.* at 22; Employer's Exhibits 2, 5. Although Employer generally asserts the opinions of Drs. Caffrey and Rosenberg are the most reasoned and documented, Employer's Brief at 11, it does not specifically explain why the administrative law judge erred in giving their opinions less weight. As the Board must limit its review to contentions of error the parties specifically raise, we affirm the administrative law judge's rejection of Drs. Caffrey's and Rosenberg's opinions. *See* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120; Decision and Order at 22.

We consider Employer's arguments on appeal a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that Claimant established legal pneumoconiosis hastened the Miner's death. 20 C.F.R. §718.205(b); *Lukosevicz*, 888 F.2d at 1006. Thus, we affirm the administrative law judge's award of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge