

BRB No. 00-0725 BLA

PAULINE HILLARY TOMBLIN)
(Widow of EUGENE TOMBLIN))
)
 Claimant-Respondent)
)
 v.)
)
 ISLAND CREEK COAL COMPANY)
) DATE ISSUED:
 Employer-Petitioner)
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (1999-BLA-0082) of Administrative Law Judge Stuart A. Levin awarding benefits on a claim filed pursuant to the provisions of Title

¹Claimant is Pauline Hillary Tomblin, the widow of Eugene Tomblin, the miner. The miner filed a claim for benefits on August 18, 1986 which was denied in a Decision and Order issued by Administrative Law Judge John H. Bedford on December 14, 1989. Director's Exhibit 36. The miner died on June 18, 1996 and claimant filed the instant survivor's claim on October 20, 1997. Director's Exhibits 1, 8.

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 administrative law judge found that the parties stipulated that the miner had twenty-eight years of qualifying coal mine employment and that claimant established that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.205(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, declining to submit a response brief on appeal.³

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.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which claimant, the Director and employer have responded, asserting that the regulations at issue in the lawsuit

²The 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. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

³We affirm the administrative law judge's findings regarding the length of the miner's coal mine employment and pursuant to 20 C.F.R. §718.202(a)(2) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

do not affect the outcome of this case. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 under Part 718 based on a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that death was due to, or hastened by, pneumoconiosis. See 30 U.S.C. §901(a); 20 C.F.R. §§718.1, 718.205, 725.201; *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir., 1992); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

Employer initially contends that the administrative law judge did not provide an adequate explanation for his weighing of the opinions of Drs. Kleinerman, Naeye, Caffrey, Crouch, Coogan and Perper. Employer's Brief at 29-37. Dr. Coogan, a Board-certified pathologist and the autopsy prosector, opined that the miner had a tumor in the right upper lung, the center of which was comprised of a large anthrasilicotic macule consisting of densely hyalinized connective tissue containing an abundance of anthrasilicotic crystalline pigmented material, which radiates from a fibrous scar. Director's Exhibits 6, 7. Dr. Coogan then diagnosed, among other conditions, invasive, moderately differentiated adenocarcinoma (scar carcinoma) in the right upper lung and anthrasilicotic macules consistent with simple coal workers' pneumoconiosis. *Id.* Dr. Perper, a Board-certified pathologist and clinical professor of pathology at the University of Miami School of Medicine, opined that the miner had simple pneumoconiosis which was associated with the development of adenocarcinoma arising in a pneumoconiotic scar as well as centri-lobular emphysema of the lungs and which was a substantial contributory cause of the miner's death. Director's Exhibits 24, 25.

Dr. Crouch, a professor of pathology at the Washington University School of Medicine, opined that the miner did not have simple coal workers' pneumoconiosis and that the miner's coal dust exposure did not cause or otherwise hasten the miner's death from complications of atherosclerotic cardiovascular disease and metastatic lung carcinoma. Director's Exhibit 9. Dr. Kleinerman, a Board-certified

pathologist and Professor Emeritus of Pathology at Case Western Reserve University School of Medicine, opined that the mild degree of simple coal workers' pneumoconiosis present in the miner's lung did not cause, contribute to or hasten the miner's death and that the miner died as a result of a primary adenocarcinoma of the right upper lung lobe with a complicating bronchopneumonia and clinically diagnosed metastases to the brain which were the result of his prolonged and heavy cigarette smoke inhalation. Director's Exhibits 26, 27; Employer's Exhibit 13.

Dr. Caffrey, a Board-certified pathologist, opined that the miner had a very mild degree of simple coal workers' pneumoconiosis which did not cause him pulmonary disability and did not cause, contribute to or hasten the miner's death. Director's Exhibit 35; Employer's Exhibit 4. Dr. Naeye, a Board-certified pathologist and Professor of Pathology at Pennsylvania State University College of Medicine, diagnosed simple coal workers' pneumoconiosis and opined that the miner's pneumoconiosis did not contribute to his disability or hasten his death and that the miner's lung cancer cannot be attributed to his occupational exposure to coal dust. Employer's Exhibits 8; 12.

Upon weighing the medical opinions of record, the administrative law judge stated that:

Having considered the qualifications of the various experts who offered opinions about the etiology of [the miner's] carcinoma, I find and conclude that opinions of Drs. Coogan and Perper outweigh the contrary opinions of Drs. Kleinerman, Caffrey, Morgan, Naeye, Branscomb, and Fino.

Decision and Order at 18. The administrative law judge then noted the differences between the various physicians' opinions and stated:

Upon consideration of the record evidence, I have accorded greater weight to the opinion of the prosector, Dr. Coogan, that there was a large anthrasic lesion in the center of [the miner's] lung cancer. I further find and conclude, based upon the opinion of Dr. Perper, a well qualified pathologist with teaching credentials, that the pneumoconiosis produced a scar in this particular miner which caused "a scar carcinoma originating in a pneumoconiotic fibro-anthratic nodule." Indeed, until raised as a competent etiology of lung cancer, Naeye, Caffrey, and Kleinerman did not suggest that scarring from pneumoconiosis could cause cancer...Having considered the miner's cigarette and cigar smoking history and statistical studies, I find that the

autopsy evidence, as interpreted by the prosector and Dr. Perper, whom I have accorded greater weight than the contrary opinions of Drs. Naeye, Kleinerman, Crouch, and Caffrey, supports the conclusion that the pneumoconiosis in the right upper lobe of the miner's lung caused a scar which led to the cancer which surrounded it.

Decision and Order at 19.

While Dr. Coogan opined that the miner had an anthracotic lesion in the center of his lung cancer, she did not opine that the miner's lung cancer was caused by his pneumoconiosis. Director's Exhibit 6. Thus, Dr. Perper is the only physician of record to opine that the miner's lung cancer was caused by his pneumoconiosis. In weighing Dr. Perper's opinion against the contrary opinions of record, the administrative law judge stated that he considered the qualifications of the physicians and he noted that Dr. Perper is a well-qualified pathologist with teaching credentials. Decision and Order at 18-19. However, the administrative law judge did not provide a specific explanation for his finding that Dr. Perper's opinion is entitled to greater weight than the contrary opinions of record, several of which were submitted by well-qualified pathologists with teaching credentials.

The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). The failure of the administrative law judge to address all relevant evidence, explain his rationale, or clearly indicate the specific statutory or regulatory provisions involved in his decision, requires remand. An administrative law judge must provide a sufficient rationale that explains the relationship between the findings and conclusions and must independently evaluate the evidence of record. If there is no independent evaluation of the evidence, the parties are deprived of their right to due process. *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); see *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). In the instant case, the administrative law judge did not provide an adequate explanation of his weighing of the medical opinions relevant to the issue of the cause of the miner's death because he did not give any reason to support his finding that the opinions of Drs. Coogan and Perper's are entitled to greater weight than the contrary opinions of record. *Id.* Consequently, we vacate the administrative law judge's findings pursuant to Section 718.205(c) and remand the case for the administrative law judge to reconsider the medical opinion evidence of record and to provide specific explanations for his weighing of that evidence pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge