

BRB No. 08-0538 BLA

A.A.R. )  
(Widow of J.R.) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
U.S. STEEL MINING CORPORATION )  
 ) DATE ISSUED: 04/29/2009  
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

Christopher Pierson (Burns, White & Hickton, LLC), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5382) of Administrative Law Judge Michael P. Lesniak awarding benefits on a 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). This case involves a survivor's claim filed on April 26, 2006.<sup>1</sup>

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<sup>1</sup> At the time of death, on March 24, 2006, the miner was receiving black lung benefits on a claim that he filed on March 7, 1985. In a Decision and Order on Remand dated March 24, 1992, Administrative Law Judge Daniel L. Leland awarded benefits to the miner. Pursuant to employer's appeal, the Board affirmed Judge Leland's award of benefits. [*J.R.*] v. *USX Corp.*, BRB No. 92-1409 BLA (Feb. 22, 1994)(unpub.).

After crediting the miner with thirty-seven years of coal mine employment,<sup>2</sup> the administrative law judge found that the x-ray, autopsy, and medical opinion evidence established that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a).<sup>3</sup> The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Further, the administrative law judge found that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.<sup>4</sup>

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>5</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

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<sup>2</sup> The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, 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 (1989)(*en banc*).

<sup>3</sup> Because an autopsy was performed in the survivor's claim, the administrative law judge properly found that employer was not collaterally estopped from relitigating the issue of the existence of pneumoconiosis. See *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 n.2 (1999)(*en banc*); Decision and Order at 8.

<sup>4</sup> Because no party challenges the administrative law judge's findings that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>5</sup> Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

*OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In his consideration of whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge addressed Dr. Ashcraft's autopsy report and the autopsy reports of three reviewing pathologists, Drs. Rizkalla, Swedarsky, and Bush.<sup>6</sup> The administrative law judge noted that Dr. Ashcraft, the autopsy prosecutor, opined that the miner died due to an acute myocardium infarction. Director's Exhibit 9. The administrative law judge further noted that Dr. Ashcraft opined that the miner's severe coronary artery disease was a "significant contributing factor" in his death. *Id.* The administrative law judge, however, noted that Dr. Ashcraft "did not discuss what effect the miner's pneumoconiosis had on the course of his death nor did he discuss what

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- (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 where the death was caused by complications of pneumoconiosis, or
  - (3) Where the presumption set forth at §718.304 is applicable.
  - (4) However, 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.
  - (5) 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).

<sup>6</sup> The record also contains the miner's death certificate completed by Dr. Kupec. Dr. Kupec attributed the miner's death to cardiopulmonary arrest due to hypoxic brain damage, asystole, and coronary artery disease. Director's Exhibit 8. Although the administrative law judge included the miner's death certificate in his summary of the evidence, *see* Decision and Order at 4, he did not address its significance in his consideration of the evidence pursuant to 20 C.F.R. §718.205(c). On appeal, no party alleges any error in regard to the administrative law judge's treatment of the miner's death certificate.

effect the miner's pneumoconiosis had on the miner's serious cardiac disease." Decision and Order at 11.

The administrative law judge accorded the greatest weight to Dr. Rizkalla's opinion, that the miner's death was due to arrhythmic changes in the heart secondary to hypoxia<sup>7</sup> that was induced by his coal workers' pneumoconiosis and atherosclerotic coronary artery disease. Decision and Order at 11. The administrative law judge noted that Dr. Rizkalla opined that these changes induced a terminal cardiopulmonary arrest. *Id.* Although Dr. Rizkalla's opinion was contradicted by the opinions of Drs. Swedarsky and Bush, who opined that the miner's death was due solely to his cardiac condition, the administrative law judge accorded less weight to their opinions because neither physician diagnosed coal workers' pneumoconiosis. *Id.* The administrative law judge, therefore, found that claimant satisfied her burden of establishing that the miner's death was due to pneumoconiosis pursuant to 20 CF.R. §718.205(c).

Employer argues that the administrative law judge erred in his consideration of Dr. Rizkalla's opinion. Employer specifically contends that the administrative law judge erred in not addressing whether Dr. Rizkalla had improperly diagnosed cor pulmonale. Contrary to employer's contention, the administrative law judge addressed this issue, noting that Drs. Swedarsky and Bush questioned Dr. Rizkalla's diagnosis of cor pulmonale because the miner's heart measurements at autopsy<sup>8</sup> showed changes on both the right and left side of the heart, when cor pulmonale would affect only the right side of the heart. Decision and Order at 11. The administrative law judge, however, noted that Dr. Rizkalla explained why the miner's left and right ventricles were both damaged. Dr. Rizkalla explained that the miner sustained injury to his left ventricle due to coronary artery disease and damage to his right ventricle due to a combination of pulmonary and coronary artery disease. Decision and Order at 11; Claimant's Exhibit 3 at 56-57. The administrative law judge found that Drs. Swedarsky and Bush did not adequately explain why Dr. Rizkalla's explanation was not plausible. *Id.*

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<sup>7</sup> Hypoxia is defined as a condition of low oxygen content in the blood. *See Dorland's Illustrated Medical Dictionary* 755 (25th ed. 1974).

<sup>8</sup> Employer notes that Dr. Ashcraft's autopsy report does not include a diagnosis of cor pulmonale. Employer's Brief at 12. Although Dr. Ashcraft did not specifically address whether the miner suffered from cor pulmonale, the doctor indicated that the miner's left ventricle measured 2.3 cm. in thickness and that the miner's right ventricle measured 0.7 cm. in thickness. Director's Exhibit 9. Dr. Rizkalla relied upon these measurements in rendering his opinion. Director's Exhibit 10; Employer's Exhibit 3.

Moreover, Dr. Rizkalla's opinion, regarding the role that pneumoconiosis played in the miner's death, was not dependent upon his finding of cor pulmonale. Dr. Rizkalla explained that hypoxia, induced by coal workers' pneumoconiosis and atherosclerotic coronary artery disease, caused arrhythmic changes in the miner's heart that induced "terminal cardiorespiratory arrest." Claimant's Exhibit 3 at 22-23. Dr. Rizkalla also explained how the miner's lung disease and heart disease interacted to cause his death.<sup>9</sup> Consequently, the administrative law judge permissibly found that Dr. Rizkalla's opinion was sufficiently reasoned, *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986), and supportive of a finding that the miner's death was due to pneumoconiosis.<sup>10</sup> *See Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-108.

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<sup>9</sup> Dr. Rizkalla explained that:

The heart needs . . . oxygen to function. And that oxygen . . . come(s) . . . through blood vessels, which we call coronary arteries. The amount should be sufficient for the heart. And the quantity of the blood and the amount of oxygen through that blood should be sufficient. So [the miner's] lungs were affected by coal workers' pneumoconiosis inducing the hypoxic changes. So the quality of the heart was less than optimum.

Second thing, [the miner] ha[d] atherosclerotic coronary artery disease. The amount also of blood coming to the heart was less than optimum. So both of them, both his coal workers' pneumoconiosis, the quality of blood coming to his heart, and [the] amount through the coronary vessels were also less than optimum. And that will induce a case of chronic hypoxia or ischemia to the heart that can throw him into arrhythmia [at] any time . . . .

Claimant's Exhibit 3 at 29-30.

<sup>10</sup> In *Hill v. Director, OWCP*, - - - F.3d - - -, 2009 WL 946899 (3d Cir. 2009), the Third Circuit recognized that low oxygen levels affect the heart and lungs:

One need not be board certified in pulmonology nor have an advanced degree in anatomy to appreciate the impact that low oxygen levels in the blood can have on the human body. Common sense suggests that if the heart and lungs do not have a sufficient supply of oxygen to function properly, the result could surely include organ failure as well as other complications.

*Hill*, slip op. at 7.

Additionally, the administrative law judge permissibly accorded less weight to the opinions of Drs. Swedarsky and Bush because they were based on a faulty premise, that the miner did not suffer from pneumoconiosis.<sup>11</sup> See *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Clites v. J & L Steel Co.*, 663 F.3d 14, 3 BLR 2-86 (3d Cir. 1981); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); see also *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

The administrative law judge also found that the acknowledgment of Drs. Swedarsky and Bush, that hypoxia from coal workers' pneumoconiosis would play a role in heart disease. "len[t] support to Dr. Rizkalla's conclusion that pneumoconiosis contributed to the miner's serious cardiac disease and ultimately to his death."<sup>12</sup> Decision

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<sup>11</sup> Although Dr. Swedarsky noted that claimant's lungs showed evidence of "mild anthracosis," he explained that:

I did not find any pigment macules, and I did not find any pigment nodules. And I don't believe that one can make a diagnosis of coal workers' pneumoconiosis without finding macules or nodules, and there just were none in any of the sections that I reviewed.

Employer's Exhibit 3 at 15-16.

Dr. Bush also found that the miner's autopsy slides did not reveal the presence of pneumoconiosis:

I did not find any coal worker lesions. I did not find macules. I did not find micro nodules. I found rare particles of silicates and even rarer particles of silica by polarized light examination associated with the small amount of dust pigment that I found present in the normal lung tissue. So, in other words, there was a small amount of dust, but the dust was not stimulating a fibrous scarring reaction. And for that reason, it's inappropriate to make a diagnosis of disease and specifically not pneumoconiosis.

Employer's Exhibit 4 at 22.

<sup>12</sup> Dr. Swedarsky conceded that if the miner had enough coal workers' pneumoconiosis to produce chronic hypoxia, it would have played a role in his ischemic heart disease. Employer's Exhibit 3 at 23. Dr. Bush agreed that hypoxia from a primary lung disease, if it is severe enough, may cause ischemic heart disease and atrial fibrillation. Employer's Exhibit 4 at 42-43. Dr. Bush also agreed that hypoxia from coal workers' pneumoconiosis, if severe enough, can cause a myocardial infarction. *Id.* at 43.

and Order at 11.

Employer argues that the administrative law judge erred in his treatment of Dr. Ashcraft's autopsy report. Employer argues that the administrative law judge took Dr. Ashcraft's autopsy report "out of context to correlate his own findings that [the miner's] death was hastened by coal workers' pneumoconiosis." Employer's Exhibit at 11.

Although employer correctly notes that Dr. Ashcraft's opinion does not support a finding of death due to pneumoconiosis, we reject employer's contention that the administrative law judge erred in his consideration of Dr. Ashcraft's opinion. The administrative law judge accurately noted that Dr. Ashcraft opined that the miner's death was attributable to an acute myocardium infarction. Decision and Order at 4; Director's Exhibit 9. The administrative law judge further noted that Dr. Ashcraft also listed the miner's severe coronary artery disease as a significant contributing factor in his death. *Id.* Consequently, Dr. Ashcraft's opinion is consistent with the opinions of Drs. Rizkalla, Swedarsky, and Bush in attributing the miner's death to cardiac arrest. However, in addressing Dr. Ashcraft's autopsy report, the administrative law judge noted that the doctor "did not discuss what effect the miner's pneumoconiosis had on the course of his death nor did he discuss what effect the miner's pneumoconiosis had on the miner's serious cardiac disease." Decision and Order at 11. Consequently, the administrative law judge accurately found that Dr. Ashcraft did not address the relevant issue, specifically, whether the miner's pneumoconiosis substantially contributed to his death.

Employer's remaining statements regarding the opinions of its experts amount to a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

In this case, when the administrative law judge evaluated the evidence, he reasonably took into account the fact that the miner established entitlement to benefits during his lifetime by establishing, through medical evidence, that he was totally disabled due to pneumoconiosis. *See Hill v. Director, OWCP*, - - - F.3d - - -, 2009 WL 946899 (3d Cir. 2009); Decision and Order at 11. In adjudicating the survivor's claim, the administrative law judge found that the autopsy evidence established the existence of pneumoconiosis, essentially re-affirming the earlier finding of pneumoconiosis in the miner's claim. The administrative law judge credited Dr. Rizkalla's opinion, that the miner's hypoxia from his coal workers' pneumoconiosis (evidenced by a finding of total disability in the miner's claim), along with his coronary artery disease, caused ischemia to his heart resulting in an arrhythmia that caused the miner's death. In order to support a finding that pneumoconiosis hastened the miner's death, "pneumoconiosis need only have some identifiable effect on the miner's ability to live." *See Hill*, slip op. at 8. In

this case, the administrative law judge permissibly found that Dr. Rizkalla's opinion satisfied claimant's burden of establishing that the miner's pneumoconiosis substantially contributed to his death. *Hill*, slip op. at 8; *Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-108.

Thus, when considering whether the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge properly addressed the comparative credentials of the respective physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. See *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Substantial evidence supports the administrative law judge's permissible credibility determinations. We, therefore, affirm the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge