BRB No. 09-0313 BLA

HESTER ANDERSON (Widow of RALPH ANDERSON)	)	
Claimant-Respondent	)	
v.	)	
KENTLAND ELKHORN COAL CORPORATION	)	DATE ISSUED: 04/29/2010
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 Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order Award of Benefits (07-BLA-5006) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited the

miner with thirty-four years of coal mine employment,[1] based on the parties' stipulation, and found that claimant[2] established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's admission of Dr. Perper's medical report pursuant to 20 C.F.R. §725.414. Employer also challenges the administrative law judge's weighing of the autopsy evidence at 20 C.F.R. §718.202(a)(2), and his weighing of the medical opinions pursuant to 20 C.F.R. §§718.202(a)(4), 718.205(c). Claimant responds, urging affirmance of the administrative law judge's admission of Dr. Perper's report as within the limitations on evidence, and further urges affirmance of the administrative law judge's findings on the merits of entitlement. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(4). 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). *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of

[1] The record indicates that the miner's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] Claimant is the widow of the miner, Ralph Anderson, who died on July 3, 2005. Director's Exhibit 13.

these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

20 C.F.R. §725.414: Evidentiary limitations

We initially address employer's evidentiary challenges. Employer, citing *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239-40 (2007)(*en banc*), contends that, because Dr. Perper's medical report, submitted by claimant, contains an autopsy slide review, Dr. Perper's opinion constitutes a second affirmative autopsy report, and therefore, violates the evidentiary limitations of 20 C.F.R. §725.414(a)(2), allowing claimant to submit only one affirmative autopsy report.[3] Because claimant had already designated Dr. Dennis' report as her affirmative autopsy report, employer contends that the administrative law judge's admission of Dr. Perper's report allowed claimant to exceed the evidentiary limits on autopsy evidence. Employer's Brief at 13-14. We disagree.

The revised regulation at 20 C.F.R. §725.414 provides that each party is entitled to submit, *inter alia*, two affirmative medical reports, one autopsy report, one autopsy rebuttal report, and one rehabilitative autopsy report.[4] Claimant designated Dr. Dennis' report as an affirmative autopsy report, and Dr. Perper's report as an affirmative medical report, while employer designated the reports of Drs. Oesterling and Rosenberg as its two affirmative medical reports. Claimant's Exhibit 8; Employer's Exhibit 7. Although employer did not designate any autopsy evidence, because Dr. Oesterling's report contained an autopsy slide review, the administrative law judge reasonably determined that Dr. Oesterling's report constituted both an affirmative autopsy report and a medical report. *See Keener*, 23 BLR at 1-239-40. Where the opposing party has submitted affirmative autopsy evidence, a party is entitled to submit a rebuttal autopsy report. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Therefore, the administrative law judge rationally

[3] In *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239-40 (2007)(*en banc*), the Board held that a physician's review of a miner's autopsy slides could constitute an autopsy report.

[4] Specifically, the revised regulation at 20 C.F.R. §725.414 provides, in pertinent part, that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit, in rebuttal, one physician's interpretation of each x-ray reading, autopsy report, biopsy report, pulmonary function study, and blood gas study submitted as the opposing party's affirmative case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit certain rehabilitative evidence. *Id.*

determined that Dr. Perper's report was admissible as a combined autopsy rebuttal report and medical report for claimant. Contrary to employer's assertion, therefore, Dr. Perper's opinion does not exceed the evidentiary limitations of 20 C.F.R. §725.414. *See Keener*, 23 BLR at 1-239-40.

20 C.F.R. §718.202(a): The Existence of Pneumoconiosis

On the merits of entitlement, the administrative law judge considered the medical reports of Drs. Perper, Oesterling, and Rosenberg, pursuant to 20 C.F.R. §718.202(a)(4). Dr. Perper diagnosed moderately severe centrilobular emphysema based on his review of the autopsy slides, and opined that it was causally related to coal dust exposure. Director's Exhibit 24 at 34-38. By contrast, Dr. Oesterling diagnosed a "very mild form of emphysema" based on his review of the autopsy slides, and opined that it was due to a "seasonal allergic broncospastic [*sic*] condition" Employer's Exhibit 6 at 32, 37. Based on his review of the medical evidence of record, Dr. Rosenberg stated that he did not know for certain whether the miner's emphysema was related to his coal mine employment, but that his symptoms of cough, sputum production, and wheezing did not represent legal pneumoconiosis[5] because his pulmonary function tests were normal. Employer's Exhibit 1 at 8, Employer's Exhibit 2 at 31. Because Drs. Perper and Oesterling based their opinions on a review of the autopsy slides, the administrative law judge found both of their opinions entitled to probative weight. The administrative law judge found that Dr. Perper's opinion was bolstered by his "clear review of Miner's extensive medical evidence," whereas Dr. Oesterling, by contrast, did not indicate what materials he considered, aside from the miner's autopsy slides. Decision and Order at 16, 18. The administrative law judge therefore found Dr. Perper's opinion entitled to greater weight. *Id*. at 18. Further, the administrative law judge found Dr. Rosenberg's opinion entitled to "less weight," finding it to be equivocal as to the etiology of the miner's emphysema, and finding Dr. Rosenberg's reliance on a pulmonary function study that predated the miner's death by nine years to be unpersuasive.[6]

[5] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] The record reflects that Dr. Rosenberg relied on a May 24, 1996 pulmonary function study, Employer's Exhibit 1 at 3, and that the miner died on July 3, 2005. Director's Exhibit 13.

Employer asserts that Dr. Perper's opinion is legally insufficient to support a finding of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). We disagree. Contrary to employer's assertion, the administrative law judge accurately noted that Dr. Perper attributed the miner's emphysema to coal dust exposure, and that Dr. Perper based his opinion on his review of the autopsy slides, as well as a variety of medical evidence and medical literature, the miner's coal mine work and non-smoking histories, and his chronic pulmonary symptoms. Decision and Order at 16; Director's Exhibit 24-38. Further, as the administrative law judge observed, Dr. Perper discussed how the medical literature, which he referenced, supported his opinion. Decision and Order at 10; Director's Exhibit 24. The administrative law judge, therefore, permissibly found Dr. Perper's opinion entitled to probative weight. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Employer further contends that the administrative law judge failed to provide a valid reason for discounting Dr. Rosenberg's opinion as to the existence of legal pneumoconiosis. Employer's Brief at 15-16. We disagree. Although employer correctly asserts that Dr. Rosenberg based his opinion on the most recent pulmonary function test of record, the administrative law judge acted within his discretion in finding Dr. Rosenberg's reliance on this test from 1996 to be unpersuasive, because it predated the miner's death by nine years. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Moreover, the administrative law judge rationally discounted Dr. Rosenberg's opinion as to the cause of the miner's emphysema, because Dr. Rosenberg stated that he was uncertain as to its etiology.[7] *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); Employer's Exhibit 2 at 31.

We additionally reject employer's assertion that the administrative law judge erred in finding Dr. Perper's opinion to be more persuasive than Dr. Oesterling's opinion. Substantial evidence supports the administrative law judge's findings that, in addition to reviewing the miner's autopsy slides, Dr. Perper considered the miner's exposure histories, chronic symptoms, medical records, and relevant medical literature, and that Dr. Oesterling, by contrast, did not indicate what materials he reviewed aside from the autopsy slides. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Because the administrative law judge has discretion as the trier-of-fact to render credibility determinations, and substantial evidence supports his findings, we affirm the administrative law judge's decision to accord greater weight to Dr. Perper's opinion. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Therefore, we affirm the administrative law

[7] The record reflects that all of the physicians agreed that the miner never smoked. Director's Exhibit 24-34; Employer's Exhibits 2 at 34, 6 at 32.

judge's finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4).[8]

20 C.F.R. §718.205(c): Death Due to Pneumoconiosis

Relevant to 20 C.F.R. §718.205(c), the administrative law judge considered the miner's death certificate, signed by Dr. Dennis, and the medical opinions of Drs. Perper, Rosenberg, and Oesterling. Dr. Dennis stated that pulmonary edema with congestion was the immediate cause of the miner's death, and he attributed these conditions to pulmonary fibrosis, cor pulmonale, hypertensive cardiovascular disease, and anthracosilicosis with simple coal workers' pneumoconiosis. Director's Exhibit 13. Dr. Perper opined that the miner's simple pneumoconiosis and centrilobular emphysema, caused the miner's death and hastened his demise through "pulmonary dysfunction associated with replacement of lung tissue," and by precipitating or aggravating a cardiac arrhythmia. Director's Exhibit 24 at 38. By contrast, Drs. Rosenberg and Oesterling opined that the miner's death was due to heart disease and renal failure, and that coal mine dust exposure did not hasten or contribute to his death. Employer's Exhibits 1-3. Specifically, Dr. Rosenberg stated that, because the miner's pulmonary function test was normal, there was no evidence of a respiratory impairment that could have affected or hastened the miner's cardiac death. Employer's Exhibit 1 at 8; Employer's Exhibit 2 at 29. Similarly, Dr. Oesterling stated that, because there was no evidence of demonstrable disease caused by coal dust exposure, there would have been no functional alteration due to coal dust exposure that could have affected the miner's cardiac death. Employer's Exhibit 3 at 3. Finding that the opinions of Drs. Dennis and Perper were reasoned and documented and that the opinions of Drs. Oesterling and Rosenberg were not well-reasoned, the administrative law judge found that the claimant established that the miner's death was due to pneumoconiosis under Section 718.205(c).

[8] Because 20 C.F.R. §718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis, *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007), the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, based on the medical opinion evidence under 20 C.F.R §718.202(a)(4), is sufficient to support claimant's burden to establish pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005). Thus, we need not address employer's challenge to the administrative law judge's additional finding that the autopsy reports established the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(2). Employer's Brief at 16.

Employer asserts that the administrative law judge erred in crediting Dr. Perper's opinion at 20 C.F.R. §718.205(c), because Dr. Perper did not identify how pneumoconiosis hastened the miner's death. Employer's Brief at 17-18. We disagree.

Contrary to employer's assertion, substantial evidence supports the administrative law judge's finding that Dr. Perper opined that the miner's coal-mine-dust related centrilobular emphysema caused his death and hastened his demise through the mechanisms of pulmonary dysfunction associated with the replacement of lung tissue by centrilobular emphysema, and by precipitating or aggravating a cardiac arrhythmia. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-655 (6th Cir. 2003); Decision and Order at 21; Director's Exhibit 24-38.

We additionally reject employer's assertion that the administrative law judge selectively analyzed the medical opinion evidence as to death causation. Contrary to employer's assertion, the administrative law judge evaluated the credibility of each medical opinion in light of its underlying documentation and the medical reasoning on which it was based. Thus, the administrative law judge found the miner's death certificate, signed by Dr. Dennis, entitled to "some weight" because Dr. Dennis, having conducted the autopsy protocol prior to completing the death certificate, had personal knowledge of the miner from which to assess the cause of death. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 19. Further, the administrative law judge found Dr. Perper's opinion to be "sufficiently well-reasoned and documented" and entitled to "probative weight," because Dr. Perper identified a specific mechanism by which pneumoconiosis hastened the miner's death, citing medical literature that substantiates such a mechanism, and because Dr. Perper reviewed the autopsy slides, the miner's medical records, and considered his non-smoking and employment histories.[9] *See Conley v. Nat'l. Mines Corp.*, 595 F.3d 297, 303 (6th Cir. 2010); *Williams*, 338 F.3d at 518, 22 BLR at 2-655; Decision and Order at 21. By contrast, the administrative law judge found that Dr. Rosenberg's opinion was not well-reasoned, and therefore entitled to "less weight," because Dr. Rosenberg premised his opinion on an old pulmonary function study, and equivocated on the etiology of the miner's emphysema. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). The administrative law judge found that Dr. Oesterling's opinion was entitled to "no weight," because Dr. Oesterling failed to diagnose pneumoconiosis, contrary to the administrative law judge's finding under 20 C.F.R. §718.202(a). *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation*

[9] We reject employer's assertion that Dr. Perper failed to explain how the medical references he cited support his opinion. The administrative law judge accurately observed that Dr. Perper discussed the relevant medical literature within his opinion. Decision and Order at 10, 21; *see Martin*, 400 F.3d at 305, 23 BLR at 2-283.

Coal Co. v. Skukan, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). Because they are supported by substantial evidence, we affirm the administrative law judge's permissible credibility determinations. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We therefore affirm the administrative law judge's finding at Section 718.205(c). Because claimant has established each element of entitlement, we affirm the award of survivor's benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed.[10]

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in part:

I concur in the majority's decision to affirm the administrative law judge's award of benefits. However, I disagree with my colleagues that affirmance of the administrative law judge's finding as to legal pneumoconiosis obviates the need to address his finding of

[10] In light of our affirmance of the award of benefits, we hold that application of the recent amendments to the Act would not alter the outcome of this case. *See* Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).

clinical pneumoconiosis. In finding death due to pneumoconiosis, the administrative law judge relied principally on Dr. Perper's opinion and gave some weight to Dr. Dennis's opinion. Because both physicians cited coal workers' pneumoconiosis on autopsy as contributing to the miner's death,[11] I would address the administrative law judge's findings under 20 C.F.R. §718.202(a)(2).

In finding clinical pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge considered the qualifications and findings of Drs. Perper, Dennis, and Oesterling, and gave the most weight to Dr. Perper's opinion, because it was bolstered by his knowledge of the miner's extensive medical record. Decision and Order at 16. Thus, the administrative law judge did not violate the teachings of *Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993), by mechanically relying on the numerical superiority of repetitive evidence. In *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir 1995), the Sixth Circuit Court of Appeals explained that "*Woodward* teaches that administrative factfinders must not rely solely on the *quantity* of readings on one side or the other . . . " and that *Woodward* is violated when the administrative law judge relies upon the quantity of evidence alone. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80. In the case at bar, the administrative law judge carefully analyzed the evidence and gave the most weight to Dr. Perper's opinion. As the administrative law judge stated, Dr. Perper reviewed a variety of medical evidence and medical literature in addition to the autopsy slides, and he based his opinion on his autopsy findings, the miner's coal mine employment and non-smoking histories, and his lifetime chronic pulmonary symptoms of worsening shortness of breath, cough, and episodes of smothering. Decision and Order at 16; Director's Exhibit 24 at 34.

Although employer correctly asserts that the administrative law judge mischaracterized Dr. Oesterling's autopsy report,[12] such error is harmless in light of the

[11] Dr. Perper stated that the autopsy slides showed mild to moderate simple coal workers' pneumoconiosis and moderately severe centriblobular emphysema. Dr. Perper stated that the miner's coal workers pneumoconiosis and the causally related centrilobular emphysema "were effective causes of death and hastening factors in death." Director's Exhibit 24 at 34-38. Dr. Dennis, the autopsy prosector, diagnosed "[a]nthracosilicosis moderate to severe with simple coal workers' pneumoconiosis." Director's Exhibit 15-3. Dr. Dennis listed "pulmonary edema, congestion" as the primary cause of the miner's death, and "anthracosilicosis with simple coal workers' pneumoconiosis" as an underlying cause of death. Director's Exhibit 13.

[12] The administrative law judge found that Dr. Oesterling failed to address whether the autopsy slides showed coal macules smaller than 0.7 centimeters in diameter; however, employer correctly asserts that Dr. Oesterling specifically stated that he saw no

administrative law judge's valid, alternative finding that unlike Dr. Perper, Dr. Oesterling did not indicate what materials, if any, he considered in addition to the autopsy slides. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Decision and Order at 16, 18; Director's Exhibit 24; Employer's Exhibits 3, 6. Therefore, insofar as the administrative law judge permissibly considered the numerical weight of the evidence, in conjunction with the pathologists' qualifications and the underlying bases for their autopsy reports, I would affirm his finding that the autopsy reports establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2). *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Accordingly, I concur in my colleagues' decision to affirm the administrative law judge's decision awarding benefits.

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REGINA C. McGRANERY
Administrative Appeals Judge

changes of coal workers' pneumoconiosis or macular development on the autopsy slides. Decision and Order at 16; Employer's Exhibit 6 at 25-33.