BRB No. 99-0301 BLA

ALDONA MAE KLEE (Widow of JEROME L. KLEE) Claimant-Respondent v. PEABODY COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,) UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Supplemental Decision and Order Granting Attorney Fees, and Order Denying Reconsideration of Attorney Fee Award of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Vernon L. Plummer, II (Plummer Law Offices, P.C.), Shelbyville, Illinois, for claimant.

Richard A. Dean and Richard Davis (Arter & Hadden, LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-BLA-0243) of Administrative Law Judge Gerald M. Tierney on a survivor's claim[1] 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). Employer also appeals the administrative law judge's Supplemental Decision and Order Granting Attorney Fees and Order Denying Reconsideration of Attorney Fee Award. The administrative law judge credited the miner with at least thirty years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). The administrative law judge also found that claimant met her burden of proof to establish that pneumoconiosis hastened the miner's death under 20 C.F.R. §718.205(c)(2) pursuant to *Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge committed reversible error in weighing the medical opinion evidence at Section 718.205(c). Claimant responds, and seeks affirmance of the decision below. Employer has filed a reply brief in which it reiterates its contentions. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's

[1]Claimant, the miner's widow, filed her claim for benefits on May 21, 1996. Director's Exhibit 1. The miner's death certificate, completed by Dr. Slifer, indicates that the miner died on May 4, 1996 due to acute congestive cardiac failure, due to or as a consequence of chronic obstructive pulmonary disease and anthracotic pneumoconiosis (both nodules & diffuse excessive). The death certificate lists "malignant lesions in mediastinal lymph node & spleen, hypertrophy of the right ventricle secondary to COPD" under "Other significant conditions contributing to death but not resulting in the underlying cause given in Part 1." Director's Exhibit 8.

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 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 in a survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis.[2] *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under Section 718.205(c)(2), claimant must establish that pneumoconiosis was a substantially contributing cause or factor in the miner's death. *See Railey, supra*. Pneumoconiosis will be considered to be a substantially contributing cause of the miner's death where it hastens death. *Id.*

Employer contends that the administrative law judge provided no valid reason in crediting the opinions of Drs. Slifer and Jones to find that claimant met her burden to establish death due to pneumoconiosis under *Railey*.

Dr. Slifer performed the autopsy and diagnosed "congestive cardiac failure, acute" as the immediate cause of the miner's death, due to "chronic obstructive pulmonary disease" and "anthracotic pneumoconiosis, extensive (both nodular & diffuse)." Director's Exhibit 9 at 1. He explained,

> The primary findings at autopsy are listed under the final pathological diagnoses. However, the thickening of the right ventricular wall and the presence of extensive obstructive pulmonary disease secondary to both nodular and diffuse fibrosis which in turn contained large quantities of anthracotic pigment are the primary causes of this patient's death. It is my feeling that death came about from acute congestive failure brought on by chronic obstructive pulmonary disease which in turn was the product of both diffuse and nodular anthracotic pneumoconiosis.

[2]The administrative law judge found, "The x-ray evidence is negative but the autopsy evidence conclusively establishes the presence of the disease and the Employer has conceded that the autopsy evidence establishes pneumoconiosis (Employer's Post-Hearing Brief at pg. 11)." Decision and Order at 13. Inasmuch as no party to the appeal challenges the administrative law judge's finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

> The presence of a malignant lesion played no role in his death, and the presence of coronary artery disease probably played little role in his death, and the presence of coronary artery disease probably played little role in his death other than the ischemia which resulted from poor ventilation may have been accentuated by the presence of coronary artery disease. In summary then, I believe that this patient's death resulted from acute congestive failure brought on by chronic obstructive pulmonary disease which was in turn a product of anthracotic pneumoconiosis.

Director's Exhibit 9. Dr. Jones, who is Board-certified in Clinical and Anatomic Pathology as well as Forensic Pathology, reviewed the autopsy slides and other medical evidence. In his consultative and pathology report, he opined,

> Coal workers' pneumoconiosis played a significant role in the causation and hastening of Mr. Klee's death. Mr. Klee's coal workers' pneumoconiosis significantly weakened his pulmonary function leading to hypoxia (low oxygen partial pressure - pO2) which decreased his vital functions, lead to cor pulmonale and acute congestive heart failure. Therefore, coal workers' pneumoconiosis was significantly responsible for Mr. Klee's death.

Claimant's Exhibit 1.

The administrative law judge noted that Dr. Slifer performed the autopsy and had a chance to view the entire respiratory system. Decision and Order at 15. Contrary to employer's contention, the administrative law judge properly accorded more weight to Dr. Slifer's opinion over the physicians who merely reviewed the autopsy slides or did not review the slides at all, and the administrative law judge did not give a "blanket preference" to Dr. Slifer based on his status as the autopsy prosector. *See Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990). The record shows that Drs. Naeye, Kleinerman, Hutchins, and Caffrey reviewed the autopsy slides while Drs. Renn, Tuteur and Fino did not. Director's Exhibit 28; Employer's Exhibits 1, 2, 4, 5, 7, 9, 11, 13-18. Moreover, the administrative law judge noted that Drs. Slifer and Jones are pathologists while Drs. Renn, Tuteur and Fino are not. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Further, the administrative law judge found, within his discretion, that Dr. Jones' opinion was consistent with Dr. Slifer's opinion and supports a finding that the miner's death was due to pneumoconiosis, *Railey, supra*, and that Dr. Jones was highly qualified, *Dillon, supra*; *Dixon, supra*, and rendered an opinion which was both well reasoned and documented, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v.*

Island Creek Coal Co., 10 BLR 1-19 (1987).

Employer also contends that the administrative law judge provided no valid reason for according less weight to the opinions of Drs. Naeye, Kleinerman, Hutchins, Caffrey, Renn, Fino and Tuteur, upon which employer relies to defeat a finding that the miner's death was due to pneumoconiosis under Section 718.205(c). In weighing the opinions of Drs. Naeye, Kleinerman, Caffrey, Fino and Tuteur, the administrative law judge found,

> Several physicians relied on pulmonary function studies and/or blood gas studies performed in 1981 and 1985, after the miner quite (sic) coal mining,[3] to conclude that pneumoconiosis did not hasten the miner's death including Drs. Naeye, Kleinerman, Caffrey, Fino and Tuteur. The reason these physicians relied on these tests is because they believe that simple pneumoconiosis does not progress once a miner leaves the coal mining industry. This belief obviously affected their opinion on whether pneumoconiosis contributed to the miner's death. Because the test results were normal, although questionably valid, the physicians concluded that the pneumoconiosis found in the miner's lungs on autopsy would not have been disabling and could not have hastened his death.

Decision and Order at 13. The administrative law judge then indicated that the Act and the regulations are premised upon the idea that pneumoconiosis is a progressive and irreversible disease, and that the United States Court of Appeals for the Seventh Circuit recognized this premise as a legislative fact in *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997). The administrative law judge thus accorded less weight to the opinion of these physicians "who believe that simple pneumoconiosis does not progress once a miner leaves the coal mining industry." Decision and Order at 14.

[3]The administrative law judge correctly found that the miner left coal mine employment in January 1982. Director's Exhibits 1, 3, 6; Decision and Order at 3. Hence, the administrative law judge's indication that the 1981 study was performed subsequent to the miner's departure from the mines is erroneous.

Contrary to the administrative law judge's finding, only Dr. Naeye opined that simple pneumoconiosis does not advance, absent further exposure. Specifically, Dr. Naeye testified that simple pneumoconiosis does not advance after a miner leaves coal mine employment, Employer's Exhibit 14 at 14. Dr. Naeye further testified that the miner had no significant pulmonary dysfunction at the time he left the mines, as evidenced by normal test results. "So – and since simple [coal workers' pneumoconiosis] doesn't advance subsequently, you know, that was it. And there's no way that you can attribute his death to the fact that he had simple coal workers' pneumoconiosis." Employer's Exhibit 14 at 13, 14, 22, 23, 34, 35.[4] The administrative law judge properly found that this opinion is contrary to the premise of the Act and implementing regulations that pneumoconiosis is a progressive and irreversible disease, 20 C.F.R. §725.309; *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988), and is contrary to the decision of the Seventh Circuit in *Spese*.[5]

Employer correctly argues, however, that the administrative law judge mischaracterized the opinions of Drs. Kleinerman, Caffrey, Fino and Tuteur. Contrary to the administrative law judge's indication, these physicians did not express a belief that simple pneumoconiosis does not progress once a miner leaves coal mine employment. (Dr. Kleinerman) Director's Exhibit 28; (Dr. Caffrey) Employer's Exhibits 5, 13; (Dr. Fino) Employer's Exhibits 9, 18 at 13-17, 20-22; (Dr. Tuteur) Employer's Exhibits 11, 17. The administrative law judge's mischaracterization of the record constitutes reversible error. *See* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Moreover, given this record, the administrative law judge substituted his opinion for that of the medical experts in finding, "This belief *obviously* affected their opinion on whether pneumoconiosis contributed to the miner's death." (emphasis added) Decision and Order at 13; *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Employer contends that the administrative law judge further erred in discrediting Dr.

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[4] In light of this testimony, we reject employer's argument that the fact that Dr. Naeye believes that pneumoconiosis does not advance absent further exposure is irrelevant to the cause of death inquiry.

[5]Employer asserts that it is a well established medical fact that simple pneumoconiosis is not progressive. In support of its assertion, employer cites to a document which is not in the record. Employer's Brief at 14. We reject employer's assertion for the reasons discussed herein. Further, the Board's scope of review is limited to the record as developed before the administrative law judge. 20 C.F.R. §802.301.

Naeye's assertion that the lung tissue taken by Dr. Slifer on autopsy was not representative of the lungs as a whole. Employer's Exhibit 14 at 12. Contrary to employer's contention, the record supports the administrative law judge's finding that Dr. Naeye had no affirmative proof that Dr. Slifer took a selective sample of lung tissue as asserted. Specifically, on cross-examination Dr. Naeye defended his assertion based on his personal opinion alone and did not offer any supporting evidence. Employer's Exhibit 14 at 32-33.

Employer next argues that the administrative law judge erred in determining that Dr. Kleinerman did not adequately explain why pneumoconiosis did not contribute to the miner's death. The administrative law judge found,

> [Dr. Kleinerman] stated several times in his report that it did not contribute. He cited a single 1985 blood gas study and noted that the results were normal four years after the miner retired and concluded that there was no documented evidence of impaired respiratory or pulmonary function at the time of the miner's retirement from coal mine work. Dr. Kleinerman thus implied that if pneumoconiosis was not disabling at the time the miner retired, it would not have been disabling at death and therefore did not contribute. However, Dr. Kleinerman did not specifically make that connection and did not explain further. Therefore, I give less weight to Dr. Kleinerman's opinion because he implied that pneumoconiosis does not progress once exposure ceases and he did not adequately explain why he concluded that the miner's pneumoconiosis did not contribute to his death.

Decision and Order at 14. Contrary to the administrative law judge's indication, Dr. Kleinerman rendered no findings implying that if the miner's pneumoconiosis was not disabling at the time he retired from the mines, it would not have been disabling at the time of his death and thus did not contribute to his death. *See* Director's Exhibit 28. Rather, Dr. Kleinerman definitively opined, "In my opinion and with reasonable medical certainty the simple coal workers' pneumoconiosis present in Mr. Klee's lung tissue did not cause his death nor was it a substantially contributing factor leading to his death. Death resulted from acute congestive heart failure which was superimposed on and complicated by renal failure or uremia." *Id.*

Employer also argues that the administrative law judge erred in finding that Dr. Caffrey's opinion is hostile to the Act. A medical opinion is deemed contrary to the spirit of the Act if the physician forecloses all possibility that simple pneumoconiosis can be totally disabling. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985). In the instant case, Dr. Caffrey answered in the affirmative when asked by counsel on deposition whether he believed that pneumoconiosis does not cause total disability as a rule. Employer's Exhibit 13 at 40. However, Dr. Caffrey further

testified that by itself coal workers' pneumoconiosis "is normally in most of the time not a symptomatic or disabling disease." Inasmuch as the physician did not *foreclose* all possibility that simple pneumoconiosis can be totally disabling, the administrative law judge erred in finding that Dr. Caffrey's opinion is hostile to the Act. *Searls, supra; Butela, supra*.

Employer further challenges the administrative law judge's weighing of Dr. Hutchins' opinion. Dr. Hutchins testified that in addition to reviewing the autopsy and lung tissue slides, he reviewed the reports of Drs. Renn, Kleinerman, Fino, Tuteur, Jones and Naeye. Employer's Exhibit 16 at 13-14. In his report, he noted, "Chest radiographs were not interpreted as showing evidence of pneumoconiosis." Employer's Exhibit 2. Dr. Hutchins found mild simple coal workers' pneumoconiosis based on the lung tissue slides. Employer's Exhibits 2, 16 at 29. He opined that neither coal workers' pneumoconiosis nor coal dust exposure contributed to any pulmonary or respiratory impairment or disability that the miner may have had, nor did that play any role in or hasten the miner's death. Employer's Exhibit 2, 16 at 33-34. Dr. Hutchins also testified that diagnosing coal workers' pneumoconiosis by pathology is more specific and more sensitive in picking up early changes than might be true of the radiograph. Employer's Exhibit 16 at 7-8. In the miner's case, Dr. Hutchins' definition of coal workers' pneumoconiosis was the identification of typical macula, with deposits of anthracotic pigment in the lung tissue with associated reticular fibrosis producing perimacular emphysema. *Id.* at 9-10, 36-37. Dr. Hutchins agreed that the regulations provide a broader definition of pneumoconiosis that the one he had been using. *Id.* at 35-36. He opined that apparently, from the reports he read, the miner did not have pneumoconiosis diagnosed radiographically although it is present in a mild degree on pathologic examination. *Id.* at 38. In this regard, he opined that it would be very unlikely that if the patient's coal workers' pneumoconiosis was only detected by pathology and not by radiograph, that it would be functionally significant. *Id.* at 38-39, 69.

> With regard to Dr. Hutchins' opinion the administrative law judge found, [Dr. Hutchins] also mentioned the negative x-rays but it is not clear from Dr. Hutchins's report or deposition which x-rays he reviewed. It is clear from the definition of pneumoconiosis that Dr. Hutchins gave and from his report and testimony that the negative x-rays played an important role in his opinion that pneumoconiosis did not contribute to the miner's death. If he reviewed and relied upon the most recent x-rays, then his opinion deserves less weight for the reason stated above. If he reviewed and relied on the older x-rays, then his opinion also deserves less weight because he did not explain how negative x-rays from 1985 meant that pneumoconiosis could not have contributed to the miner's death in 1996.

Decision and Order at 15. Contrary to the administrative law judge's indication, and as

employer correctly argues, the record shows that Dr. Hutchins relied on the lung tissue slides as well as the miner's medical history to form his opinion and only referenced the history of negative x-rays in reporting what medical reports he had reviewed. Thus, the record does not support the administrative law judge's finding that the fact that the miner had a history of negative x-rays played an important role in Dr. Hutchins' opinion regarding the cause of the miner's death. *See* Employer's Exhibit 16 at 33-35.

Employer next contends that the administrative law judge accepted Dr. Jones' opinion without evaluating it. Dr. Jones opined, "Congestive heart failure (cor pulmonale) superimposed on Mr. Klee's chronic obstructive pulmonary disease (coal workers' pneumoconiosis) led to his respiratory failure and death." Claimant's Exhibit 1 at 1, 2. Dr. Jones further found, "The findings indicate that there was sufficient respiratory impairment to make coal workers' pneumoconiosis a significant aggravating and hastening factor related to his death." *Id.* at 2. Employer asserts that Dr. Jones' opinion is not credible because he relied on a finding of the existence of cor pulmonale, a condition which is not relevant to the cause of death standard enunciated in *Railey*, and because there is much evidence contradicting the existence of cor pulmonale. Employer argues that Dr. Jones' report is "also suspect because he found no evidence of coronary artery disease. Once again, this was a finding at odds with that found by all the other experts." Employer's Brief at 26.

Employer's contentions lack merit. It is within the discretion of the administrative law judge to determine the credibility of the medical evidence. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In the instant case, the administrative law judge found, within his discretion, that Dr. Jones was highly qualified, *Dillon, supra; Dixon, supra*, and that his opinion is both well reasoned and documented. *Clark, supra*; *Fields, supra*. Moreover, while employer correctly contends that there is evidence contradicting a diagnosis of cor pulmonale, this evidence does not render Dr. Jones' opinion not creditworthy. In fact, Dr. Jones recognized that the miner's medical record included opinions which differed from his, and listed such opinions in his report. Claimant's Exhibit 1.

In light of the foregoing, we vacate the administrative law judge's finding at Section 718.205(c)(2), and remand the case for reconsideration of the relevant evidence thereunder.

Employer also challenges the administrative law judge's award of an attorney's fee. The pertinent facts are as follows: By cover letter dated December 10, 1998, claimant's counsel sought a fee of $19,167.20 for 104 hours of work at a rate of $175 per hour, plus

$967.20 in expenses. Employer's counsel (Arter & Hadden)[6] submits that he received a copy of claimant's counsel's fee petition on December 17, 1998. Employer's counsel took no action until January 4, 1999, when he filed Employer's Motion for Enlargement of Seven Days to Respond and to Hold Fee Proceeding in Abeyance Pending Responses to Discovery Requests. Therein, employer's counsel represented that due to holiday vacations, the attorney in charge of responding to the fee petition did not become aware of the fee petition until returning from vacation on January 4, 1999. The administrative law judge denied employer's counsel's motion "because the Decision and Order Awarding Benefits was clear as to the time limits, and the Employer did not provide good cause for an extension of time. Therefore, the Employer's objections to the fee petition were not considered." Order Denying Reconsideration of Attorney Fee Award dated April 7, 1999. By Supplemental Decision and Order Granting Attorney Fees dated February 2, 1999, the administrative law judge disallowed $266.70 in non-compensable clerical expenses. The administrative law judge ultimately approved a fee of $18,900.50, constituting the requested fee, minus $266.70 in the disallowed expenses. Employer moved for reconsideration, and on April 7, 1999, the administrative law judge denied employer's motion. The administrative law judge indicated that his decision remained the same and that employer's counsel had not provided good cause for reconsideration of his untimely objections to the fee petition.

On appeal, employer's counsel recites his objections to the fee award. Employer's counsel argues that the administrative law judge's order approves compensation for non-compensable clerical tasks, for time when no services were provided and for duplicate entries, at an unsupported and unreasonably high hourly rate and for an unreasonable number of hours generally. Claimant responds, and asserts that employer has failed to preserve its right to file an appeal of the fee award. Claimant also contends that employer's counsel's contention that the fee compensates for time when no services were performed is not properly raised for the first time on appeal. Claimant further argues that there is no evidence of any "irrational or abusive decision making by the administrative law judge which merits reversal of his decision." Claimant's Brief at 6. Employer replies that the issue of compensable hours was before the administrative law judge as the administrative law judge has an obligation to ensure that claimant's counsel provides the necessary documentation for all hours claimed. In this regard, employer argues, "Finally, there is no practical reason for the Board not to consider this issue because [employer's] failure expressly to raise it before the ALJ has not made any difference. The ALJ refused to consider *any* of [employer's] reconsideration arguments simply because [employer's] initial response to Mr. Plummer's fee petition was late." (emphasis provided). Employer's Reply Brief at 5.

[6]Claimant's counsel mailed a copy of his fee petition to employer's then counsel, Scott A. White. Arter & Hadden entered an appearance on behalf of the employer by cover letter dated January 27, 1999.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). In *Abbott*, the Board held that all objections to a fee petition must be raised prior to the fee award. Otherwise, the opposing party waives any objection and cannot later appeal the fee award. *Id.* In the instant case, the record shows that employer did not timely object to the fee petition and employer so concedes. Pursuant to *Abbott*, we hold that employer thereby waived any objection to the fee petition and cannot now appeal the fee award. *Id.* Inasmuch as there is no proper appeal of the administrative law judge's fee award before the Board, the fee award of $18,900.50 stands as issued.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated in part and the case is remanded for further consideration consistent with this opinion. The administrative law judge's attorney fee award stands. Counsel is entitled to fees for all necessary services rendered claimant at each level of the adjudicatory process even if he was unsuccessful at a particular level, so long as he is ultimately successful in prosecuting the claim. 33 U.S.C. §932(a); *Clark v. Director, OWCP*, 12 BLR 1-211 (1986).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge