BRB No. 99-0805 BLA

HELEN MUDERY (Widow of MICHAEL MUDERY) Claimant-Respondent v. NEMACOLIN MINES CORPORATION 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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (99-BLA-0229) of Administrative Law Judge Richard A. Morgan 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). The miner died on November 25, 1997. Director's Exhibit 8. Claimant filed a survivor's claim for benefits in February, 1998.[1] The administrative law judge found that the miner

[1] The miner filed a living miner's claim for benefits in November, 1981. This claim was

was a coal miner for at least seven years. Further, the administrative law judge found that the existence of pneumoconiosis was stipulated, and that the autopsy report and slides, and subsequent physicians' reports supported a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[2] The administrative law judge found that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Finally, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

Employer appeals, arguing that the administrative law judge erred in finding that the miner's pneumoconiosis arose out of coal mine employment, and in finding that the miner's death was due to pneumoconiosis. No response brief has been received from claimant. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the appeal unless specifically requested to do so by the Board.

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 the 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).

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Boyd, supra*.

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finally denied by a claims examiner on December 7, 1982. Director's Exhibit 35.

[2] We affirm the administrative law judge's finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), inasmuch as the parties stipulated to this finding and it is uncontested on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Hearing Transcript at 7.

Employer contends that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c).[3] The administrative law judge found that the miner's autopsy report, as well as all of the post-autopsy medical reports, concluded that the miner's macular coal workers' pneumoconiosis arose out of his coal mine employment. Decision and Order at 14-15. The administrative law judge, therefore, found that the miner's macular coal workers' pneumoconiosis arose out of his coal mine employment. *Id.*

Employer specifically contends that the administrative law judge erred in finding that the miner's autopsy report supports a finding that the miner's pneumoconiosis arose out of his coal mine employment. In his autopsy report, Dr. Ashcraft merely mentioned that the miner was a coal miner with an underground work history of eight years. Director's Exhibit 9. We agree with employer that Dr. Ashcraft's acknowledgment that the miner had exposure to coal dust is insufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment.

Employer also contends that the opinions of Drs. Sinnenberg and Oesterling are insufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment. Dr. Sinnenberg testified that he was unable to distinguish pathologically how much of the miner's simple coal workers' pneumoconiosis was due to coal dust exposure and how much was due to his coke yard exposure. Employer's Exhibit 6. Dr. Oesterling also indicated that he could not make such a distinction. Employer's Exhibit 7.

We agree with employer that the administrative law judge erred in failing to address the significance of the miner's ten years of employment in the coke yards, employment which does not constitute covered coal mine employment. *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Morris v. Director, OWCP*, 6 BLR 1-653 (1983). We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.203(c) and remand the case for further consideration thereunder.

Employer also argues that the administrative law judge erred in finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Under Section 718.205(c)(2), pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Lukosevicz v.*

[3] It is claimant's burden to establish that the miner's pneumoconiosis arose out of coal mine employment since the administrative law judge found that the miner was a coal miner for at least seven years. Decision and Order at 4; 20 C.F.R. §718.203(c).

Director, OWCP, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).[4]

Although the administrative law judge noted that he was not giving complete deference to the opinions of the autopsy prosectors, Drs. Ashcraft and Chikersal, he found that their opinions that the miner's death was due to pneumoconiosis were entitled to great weight "since they had the advantage of viewing the miner's complete pulmonary system." Decision and Order at 16-17; Director's Exhibit 9. The administrative law judge further found that the opinions of the autopsy prosectors were supported by the opinion of Dr. Jaworski, claimant's treating physician. Decision and Order at 15-16; Director's Exhibit 12. The administrative law judge, therefore, found that the evidence was sufficient to establish that the miner's death was due to pneumoconiois pursuant to 20 C.F.R. §718.205(c).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. Director's Exhibits 2, 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Employer avers that while Dr. Ashcraft's report does indicate that simple coal workers' pneumoconiosis contributed to the miner's death, Dr. Ashcraft's report does not use language indicating that coal workers' pneumoconiosis *substantially* contributed to death, as required by the Third Circuit as a prerequisite to entitlement in a survivor's claim. Employer's Brief at 11. Employer cites *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).[5] Employer maintains that the administrative law judge impermissibly substituted his own opinion for that of the prosector by assuming or inferring that the prosector meant that coal workers' pneumoconiosis was a substantially contributing factor in death. Employer's argument does not have merit. The administrative law judge did not err in crediting the opinions of the autopsy prosectors even though they did not specifically state that pneumoconiosis substantially contributed to death. The Third Circuit has held that the regulatory language "substantially contributing cause" encompasses the situation where pneumoconiosis actually hastened the miner's death. *Lukosevicz, supra*, 13 BLR at 2-108.

Further, employer argues that Dr. Ashcraft did not explain the process by which coal workers' pneumoconiosis contributed to death, and therefore Dr. Ashcraft's opinion is not well-reasoned nor well-documented, even if Dr. Ashcraft viewed the gross tissue. Employer adds that this is particularly true in light of the fact that Dr. Ashcraft only found a macular form of coal workers' pneumoconiosis which, as testified to by Drs. Sinnenberg and Oesterling, is the mildest form of the disease. Employer additionally avers that the administrative law judge erred in relying on the prosectors' opinion because they had little or erroneous clinical history and information, while Drs. Oesterling and Sinnenberg had extensive medical records and representative slides. Employer's Brief at 12. We reject employer's argument. The prosectors issued a four-page autopsy protocol that includes final anatomic diagnoses, a clinicopathological summary, a gross description, including an internal examination, and a detailed gross description of the lungs. In addition, the autopsy protocol includes a microscopic description of the lungs. Director's Exhibit 9. The prosectors stated, "This 74-year-old, white male died with changes of atherosclerotic coronary artery disease with focal acute myocardial ischemia. Contributing factors in his death were coal workers' pneumoconiosis, bronchiolitis obliterans with organizing pneumonia and biventricular hypertrophy." *Id.* Thus, the administrative law judge did not err in refusing to discount the opinions of the prosectors as not well-reasoned nor well-documented. *See generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Employer maintains that the administrative law judge erred in relying on Dr. Jaworski's

[5] In *Bonessa* the Third Circuit articulated its 20 C.F.R. §718.204(b) standard. The Court has not suggested that in the context of 20 C.F.R. §718.204(b), "hastening" constitutes "substantial contribution" as the Court held in *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989) under 20 C.F.R. §718.205(c).

opinion because Dr. Jaworski did not even remotely discuss the role of coronary artery disease in the miner's death. Employer's Brief at 8. This contention lacks merit. Dr. Jaworski stated that the miner's "COPD resulted from cigarette smoking as well as occupational exposure to coal dust. In addition to his COPD, the patient was found to have simple coal worker's pneumoconiosis on lung autopsy." Further, Dr. Jaworski stated, "obstructive airway disease which was caused in part by occupational exposure to coal dust and to a much less degree simple coal worker's pneumoconiosis substantially contributed to his total respiratory impairment and eventually his death." Dr. Jaworski also stated that he reviewed the autopsy report and that its final anatomic diagnoses included arteriosclerotic coronary disease by ventricular hypertrophy, and focal acute myocardial ischemia, status post mitral valve replacement. Director's Exhibit 12. We, therefore, reject employer's argument as no more than a request to reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Employer also contends that the administrative law judge erred in discrediting the opinions of Drs. Oesterling and Sinnenberg that the miner had centrilobular emphysema, rather than focal emphysema. Employer's argument regarding what type of emphysema the miner had is not relevant to the disposition of this case. The issue is whether pneumoconiosis, which has been established, caused the miner's death, rather than what type of emphysema the miner had. *See generally Cregger v. United States Steel Corp.*, 6 BLR 1-1219, 1-1222 (1984).

Next, employer argues that the administrative law judge erred in discrediting Dr. Oesterling's opinion on the basis that it was based upon an inflated smoking history. Employer's Brief at 14-15. Employer states that Dr. Oesterling's opinion as to the etiology of emphysema was consistent with that of Dr. Sinnenberg, who also related the emphysema to smoking, even though he found only an 18-pack year smoking history. Further, employer states that Dr. Oesterling did not attribute the miner's death to emphysema. Employer's argument has no merit. The administrative law judge acted rationally in discrediting Dr. Oesterling's opinion because of its inflated smoking history. *See Gouge v. Director, OWCP*, 8 BLR 1-307 (1985). Employer's argument that Dr. Oesterling did not attribute the miner's death to the miner's emphysema has no bearing on the administrative law judge's finding that the miner's death was hastened by coal workers' pneumoconiosis. *See generally Cregger*, *supra* at 1-1222.

Employer also contends that the administrative law judge erred in giving deference to the opinion of Dr. Ashcraft by virtue of his status as the autopsy prosector. Employer, citing *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992), contends that an administrative law judge may credit the prosector over the opinion of one who reviews the slides only if there is evidence that the prosector had an advantage by being able to see the gross tissue. Employer states that there was no evidence that the prosector had such an advantage. We are persuaded by employer's argument in this regard. The administrative law judge must further explain his Section 718.205(c) finding. The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In addition, the administrative law judge should consider the credentials of the doctors. Experts' respective qualifications are important indicators of the reliability of their

opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998).[6]

We next address employer's argument that the administrative law judge erroneously relied upon Dr. Jaworski's opinion in holding that the miner died due to coal workers' pneumoconiosis. Employer's Brief at 6-8. Employer argues that Dr. Jaworski's opinion was not reasoned or documented. Employer avers that no diagnosis of coal workers' pneumoconiosis was made by Dr. Jaworski either in his office notes or during the miner's hospitalizations. Employer contends that it is unclear from Dr. Jaworski's post-death report whether Dr. Jaworski is referring to the miner's coal dust from his coke yard exposure or from his coal mine exposure. Director's Exhibit 12. Employer's argument has merit. The administrative law judge, on remand, must consider whether Dr. Jaworski's opinion was reasoned and documented. *See Fields*, *supra* at 1-22. Employer correctly avers that no diagnosis of coal workers' pneumoconiosis was made by Dr. Jaworski either in his office notes or during the miner's hospitalizations. Director's Exhibit 10; Employer's Exhibit 5. The administrative law judge should also discuss whether Dr. Jaworski's post-death report refers to the effects of coal dust from the miner's coke yard exposure or from his coal mine exposure. *See Wojtowicz*, *supra*.

Finally, employer argues that the administrative law judge erred in failing to discuss the weight given to Dr. Sinnenberg's opinion. Employer's Brief at 9; Employer's Exhibits 1, 6. This argument also has merit. Although the administrative law judge discussed Dr. Sinnenberg's opinion, Decision and Order at 17, he did not discuss the weight given to that opinion. On remand, the administrative law judge must discuss the weight given Dr. Sinnenberg's opinion. *See Wojtowicz*, *supra*.[7]

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[6] In *Urgolites* itself, the Board stated that *Oravetz*, which the administrative law judge in the instant case relied on in support of his decision, was decided on the particular facts of that case. *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992); *U.S. Steel Corp. v. Oravetz*, 686 F.2d 197 (3d Cir. 1982). Thus, we find no inconsistency between *Urgolites* and the decision of the United States Court of Appeals for the Third Circuit in *Oravetz*.

[7] The administrative law judge correctly found that the record contains seven pulmonary

function studies, and stated that "[w]ith the exception of one exercise study performed in 1982, all of the pulmonary function results show a severe restrictive and obstructive defect." Decision and Order at 15. Further, the administrative law judge stated, "the great majority of the arterial blood gas studies also demonstrate the miner's lifetime pulmonary impairment." Decision and Order at 15. Disability during the miner's lifetime is not relevant to the issue of whether the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205.

For the aforementioned reasons, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.203; 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 by the administrative law judge.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge