BRB No. 02-0167 BLA

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| KATHLEEN MATNEY<br>(Widow of EDEAM M. MATNEY) | ) | |
| 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 Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (01-BLA-0483) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) 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).[1] The administrative law judge initially

[1]The 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 20 C.F.R. Parts 718, 722, 725, and 726. All citations to

found that claimant[2] established the existence of pneumoconiosis which arose out of the miner's coal mine employment. The administrative law judge also found that claimant met her burden to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c) and pursuant to *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Specifically, the administrative law judge found that the miner's pneumoconiosis hastened the miner's death, by crediting the reports of Dr. Perper, a reviewing pathologist, and Dr. Scott, a treating physician. The administrative law judge also credited the autopsy report rendered by Dr. Segen, the autopsy prosector. On appeal, employer contends that the administrative law judge erroneously shifted to employer the burden of proof, requiring employer to rule out coal workers' pneumoconiosis as a contributing cause of the miner's death. Employer further alleges reversible error in the administrative law judge's weighing of the medical evidence relevant to the cause of the miner's death.[3] Claimant responds, and seeks affirmance of the decision below. 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 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).

Employer contends that the administrative law judge shifted to employer the burden of

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the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant, the miner's widow, filed the instant claim for benefits on June 27, 2000. Director's Exhibit 1. The miner's death certificate indicates that he died on September 3, 1999 due to pulmonary embolism and end stage renal disease. Director's Exhibit 16.

[3]Employer does not appeal from the administrative law judge's's finding that the miner had pneumoconiosis which arose out of his coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

proof by requiring that employer rule out pneumoconiosis as a contributing cause of the miner's death, when he stated that although each of employer's experts concluded that pneumoconiosis played no role in the miner's death, employer's experts "failed to provide a valid rationale to exclude the possibility that pneumoconiosis is the cause of [the miner's] death." Decision and Order at 21. Employer's contention lacks merit. Notwithstanding the fact that the administrative law judge made this statement, he expressly and repeatedly correctly placed the burden of proof on *claimant* to establish that the miner's pneumoconiosis substantially contributed to, or hastened, the miner's death, which the administrative law judge found was undisputedly due to giant cell carcinoma with tumor, related necrosis and pulmonary edema. *Id.* at 2-4, 12, 14, 21, 26.

Employer next contends that Dr. Perper's medical opinion,[4] linking the miner's centrilobular emphysema and chronic obstructive pulmonary disease to his coal mine employment, is not credible because it is based on theory and unsubstantiated by any objective evidence. Employer asserts that the administrative law judge failed to recognize

[4]Dr. Perper opined that the miner's coal workers' pneumoconiosis with associated centrilobular emphysema was a substantial contributory cause of the miner's death. Director's Exhibit 10. Dr. Perper also found that the autopsy findings revealed that the miner had at least three potential co-existent causes of death, namely severe acute bronchopneumonia, lung cancer and significant coal workers' pneumoconiosis with associated centrilobular emphysema. *Id.* Dr. Perper further opined that centrilobular emphysema can be caused by exposure to coal mine dust and coal workers' pneumoconiosis and concluded that coal workers' pneumoconiosis was a "substantial contributory cause" of the miner's disability both directly and through the associated centrilobular emphysema through hypoxemia. *Id.* Dr. Perper also indicated that a growing body of literature substantiated a causal connection between exposure to mixed coal mine dust and coal workers' pneumoconiosis and the development of lung cancer. *Id.*

that Dr. Perper was unable to link "anything in the miner's own history with the *possibilities* that these various conditions *could* be related to pneumoconiosis." Employer's Brief at 32 (emphasis in original). Employer argues that by crediting Dr. Perper's opinion, the administrative law judge accorded claimant a presumption of entitlement.

The administrative law judge credited Dr. Perper's opinion as he determined that it was reasoned and documented, and contained a description of the material Dr. Perper examined on the autopsy slides. Decision and Order at 17. The administrative law judge rejected employer's argument that Dr. Perper incorrectly linked the miner's centrilobular emphysema to his coal dust exposure based on employer's assertion that the evidence does not show that the miner's pneumoconiosis caused the miner any impairment during his life. The administrative law judge stated:

> I find this argument irrelevant to [the miner]. Pulmonary function studies and arterial blood gas findings made at the time of examination may not accurately reflect the Miner's condition upon his demise. Actually blood gasses performed by Dr. Rosser and at the Buchannan Hospital on September 2 are positive, but since they were made during an acute period, they are not very valuable. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998). There may have been a time lapse when such findings could not have been made. There is proof the Miner had worsening shortness of breath (CX 1, CX 2, EX 1).
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> Moreover, this argument adds another layer of proof [that] is not required by the law and regulations. 20 C.F.R. §718.205(c) sets forth, in part pertinent that proof may include:
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> > (2) Where pneumoconiosis was a substantially contributing cause or *factor* leasing to the miner's death or where the death was caused by *complications of pneumoconiosis* [ ]
>
> Emphasis added. Case law requires that the "hastening" standard must be applied.

Decision and Order at 19.

The administrative law judge also found that a review of the literature cited by Dr. Zaldivar does not impeach the literature cited by Dr. Perper in support of his opinion that pneumoconiosis can cause emphysema. Decision and Order at 22. In this regard, the administrative law judge noted that emphysema may fall within the regulatory definition of pneumoconiosis if it is related to coal mine employment. *Id.* at 24, 25. The administrative law judge further noted that hypoxemia was indicated in the Buchannan and Holston

[Hospitals'] records, which was "consistent with Dr. Perper's rendition of the causal events and his theory concerning emphysema. It is logical that Dr. Perper's opinion considers the record evidence that [the miner had] shortness of breath that was worsening with time." Decision and Order at 25, *see also* Decision and Order at 22. The administrative law judge further credited Dr. Perper's opinion as based on sufficient information. *Id*. With regard to the cause of the miner's cancer, the administrative law judge found:

> Dr. Perper sets forth that the pneumoconiosis combined with a history of cigarette smoking to establish the cancer. He sets forth articles and medical authority for this proposition. Moreover, a review of the fifteen references cited by Dr. Naeye do not support impeachment of Dr. Perper's opinion. There may be a split of opinion, but I do not accept that Dr. Naeye's view is more rational tha[n] Dr. Perper's. Dr. Naeye and Dr. Bush attack the opinion and the underlying literature, but I accept that Dr. Perper is more logical than either, in part because some of the literature he submitted is the policy of the United States Department of Health and Human Services and the Department of Labor.

Decision and Order at 25, 26. The administrative law judge concluded that Dr. Perper's opinion was entitled to more weight than the opinions of employer's experts because Dr. Perper's opinion is more logically reasoned and substantiated by objective medical evidence.[5] *Id.* at 26. In finding that claimant met her burden under 20 C.F.R. §718.205(c), the administrative law judge also credited the June 4, 2001 opinion of Dr. Scott who indicated that it was his impression that the miner's "chronic obstructive pulmonary

[5]The administrative law judge discussed the relative qualifications of the physicians of record. *See* Decision and Order at 12, 13. The administrative law judge found that Drs. Perper, Naeye, Bush and Oesterling are Board-certified pathologists and that Drs. Zaldivar, Jarboe, Hippensteel and Robinette are Board-certified in internal medicine and pulmonary medicine. The administrative law judge also found that the qualifications of Drs. Santos and Scott, as well as those of Dr. Segen, the autopsy prosector, are not contained in the record. *Id.* at 12, 13. The administrative law judge indicated that he placed no weight on the opinion of Dr. Forehand, who is Board-certified in pediatrics in allergy and immunology and who examined the miner during his lifetime in 1994 and 1995, Claimant's Exhibit 4. *Id.* In further analyzing the credibility of the evidence, the administrative law judge also indicated that he was not persuaded by the numerical superiority of employer's experts. *Id.* at 21. The administrative law judge's consideration of the qualitative and quantitative nature of the evidence is consistent with the decisions of the United States Court of Appeals of the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

disease/coal workers' pneumoconiosis was a major factor in his demise." Claimant's Exhibit 1. The administrative law judge specifically found that while Dr. Scott was not a pathologist he was a treating physician and was "competent" to render an opinion as he had treated the miner over time. Decision and Order at 24.

Employer argues that Dr. Perper's opinion is not credible and should not have been credited by the administrative law judge. Employer argues that the administrative law judge failed to recognize that Dr. Perper was unaware of the miner's smoking history; that Dr. Perper failed to analyze claimant's normal and "super-normal" pulmonary function study results; that Dr. Perper ignored the fact that the pneumoconiosis present in the miner's lungs was mild, and that Dr. Perper failed to explain how any of the objective data accounts for the miner's death.

Employer's contentions lack merit. The administrative law judge properly credited Dr. Perper's opinion that the miner's coal workers' pneumoconiosis with associated centrilobular emphysema was a "substantial contributory cause" of the miner's death, Director's Exhibit 10, and found that claimant established that the miner's pneumoconiosis hastened the miner's death. 20 C.F.R. §718.205(c). The administrative law judge found, within his discretion, that Dr. Perper's opinion, including his opinion that *this* miner's centrilobular emphysema was due to his pneumoconiosis and coal mine employment, was 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). Specifically, the administrative law judge found that Dr. Perper's opinion was supported by the physician's findings on examination of the autopsy tissue slides and by the medical literature cited, *Id.*, and was consistent with other evidence of record, *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, the administrative law judge properly determined that the record contains proof that the miner experienced worsening shortness of breath, *see* Claimant's Exhibits 1, 2, Employer's Exhibit 1, and that Dr. Perper reasonably opined that the miner's coal workers' pneumoconiosis with associated centrilobular emphysema was a "substantial contributory cause" of the miner's disability. *See Clark, supra*; Director's Exhibit 10. Further, insofar as employer lists reasons why the administrative law judge should not have credited Dr. Perper's opinion, employer's arguments are rejected as they amount to a request that the Board reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Based on the foregoing, we reject employer's assertion that the administrative law judge credited Dr. Perper's opinion without evaluating it.

Employer next contends that the administrative law judge improperly discredited the opinions of Drs. Zaldivar, Hippensteel, Bush, Naeye and Oesterling, that the miner's coal workers' pneumoconiosis neither contributed to the miner's death nor disabled him during his lifetime, *see* Employer's Exhibits 2-8, 10, 11, based on the administrative law judge's finding that these physicians were influenced by the fact that the objective evidence shows a

lack of functional pulmonary impairment in 1997, two years prior to the miner's death. Employer argues that the administrative law judge erroneously found that the pulmonary function study evidence and blood gas study evidence, as of 1997, provided no insight on the issue of whether pneumoconiosis contributed to the miner's death. Employer asserts:

> The undisputed evidence of worsening *shortness of breath* relied upon heavily by the Administrative Law Judge (D&O at 19, 20) does not dispute or invalidate the information available to the experts by the 1997 objective studies: worsening shortness of breath does not prove - or even support an assumption of - worsening pneumoconiosis or worsening pulmonary impairment due to pneumoconiosis.

Employer's Brief at 34 (emphasis in original). Employer also asserts that the administrative law judge irrationally discredited employer's experts' opinions stating that there was "insufficient" pneumoconiosis in the miner's lungs to have contributed to his death based on the administrative law judge's erroneous assumption that "some" or "any" pneumoconiosis in the miner's lungs is presumed to be sufficient to hasten death. Employer argues that the objective evidence in this case showing that pneumoconiosis compromised "no more than a small percentage of the miner's lungs is unquestionably more probative, and more rationally linked to the analysis in this case, than the invalid assumption that 'some' or 'any' pneumoconiosis in the miner's lungs is presumed to hasten death." Employer's Brief at 34. Employer further argues that the administrative law judge substituted his opinion for that of the medical experts when he accorded less weight to the credible medical opinions of Drs. Zaldivar, Hippensteel and Jarboe regarding the cause of the miner's death, based on the administrative law judge's findings that these physicians did not sufficiently acknowledge the importance of the pathological evidence or consider the pulmonary function testing of record, the miner's history of shortness of breath and the autopsy report. Employer asserts that there is no evidence that the miner was functionally impaired due to pneumoconiosis and asserts that rather, the objective evidence dated between 1985 and 1997 supports a finding that the miner was not impaired due to pneumoconiosis.

Employer's contentions lack merit. The administrative law judge found that the opinions of Drs. Naeye and Oesterling, finding that the autopsy tissue slides either were not or may not have been representative of the miner's lungs, were unsubstantiated and contrary to the autopsy report in which the autopsy prosector, Dr. Segen, discussed all four quadrants of the miner's lungs and diagnosed coal workers' pneumoconiosis. *Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984); Director's Exhibit 8. The administrative law judge further permissibly found that the opinions of Drs. Zaldivar, Bush, Naeye, Hippensteel and Oesterling were based, in part, on the faulty premise that the miner's objective studies must establish that he was functionally affected by pneumoconiosis during his lifetime in order for claimant to establish that the miner's pneumoconiosis was severe enough to have contributed

to or hastened the miner's death. The administrative law judge found, *inter alia*, that the regulations impose no such requirement on a claimant who seeks to prove death due to pneumoconiosis under 20 C.F.R. §718.205(c). 20 C.F.R. §718.205(c); Decision and Order at 19, 20. The administrative law judge rationally determined, moreover, that it was not reasonable to extrapolate from the non-qualifying results of objective studies performed in 1997, the cause of the miner's death which occurred two years later in 1999. *Id.* at 20. Further, the administrative law judge properly found that the record contains evidence that the miner had pneumoconiosis as early as October 1985 and that his shortness of breath increased over time through mid-1999, *see* Director's Exhibit 23; Claimant's Exhibits 1, 2, and, therefore, that the contrary opinions expressed by employer's experts were refuted by the record. We thus hold that substantial evidence supports the administrative law judge's determination that *this* miner's pneumoconiosis progressed. *See* 20 C.F.R. §718.201(c). The administrative law judge also correctly stated that simple pneumoconiosis is legally and medically competent to hasten death under the Act and regulations, and found that the miner had pneumoconiosis. 20 C.F.R. §§718.201, 718.205(c); Employer's Exhibit 20 at 10 (Dr. Naeye's deposition testimony); Decision and Order at 12.

Based on the foregoing, we affirm the administrative law judge's conclusion that Dr. Perper's opinion, that the miner's simple coal workers' pneumoconiosis was a "substantial contributory cause" of the miner's death, *see* Director's Exhibit 10, is entitled to more weight than the contrary opinions expressed by employer's experts. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence, including the medical opinions of Drs. Perper and Scott, supports the administrative law judge's finding that claimant established death due to pneumoconiosis under 20 C.F.R. §718.205(c), we affirm the administrative law judge's finding and the award of survivor's benefits in the instant case.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH

Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge