

BRB No. 05-0969 BLA

HELEN E. CLAAR )  
(Widow of ALDEN H. CLAAR) )  
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 Claimant-Respondent )  
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 v. )  
 )  
 ISLAND CREEK COAL COMPANY ) DATE ISSUED: 08/28/2006  
 )  
 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 L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-5090 and 04-BLA-0016) of Administrative Law Judge Daniel L. Leland on a duplicate miner’s claim consolidated with a survivor’s claim, which were 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). Claimant is the widow of the miner, who died on February 2, 2002. Director’s Exhibit 69. The miner had previously filed a duplicate claim on November 20, 2000. Director’s Exhibit 3. That claim was denied by Administrative Law Judge Michael P. Lesniak on July 19, 2002. Director’s Exhibit 66. Claimant requested modification of the miner’s claim after his death and filed a survivor’s claim on

September 16, 2002. Director's Exhibit 91. In his August 3, 2005 decision, the administrative law judge found that claimant established that the miner was totally disabled due to pneumoconiosis, and that the miner's death was due to pneumoconiosis. Accordingly, benefits were awarded on both claims.

Employer appeals, challenging the administrative law judge's findings as to the cause of the miner's total disability and whether pneumoconiosis hastened the miner's death. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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.<sup>1</sup> 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).

Initially, employer argues that the administrative law judge erred in permitting claimant to obtain post-hearing the deposition of Dr. Begley as employer was not notified of claimant's intent to depose Dr. Begley within 30 days of the hearing held on February 14, 2005. Employer's Brief at 5. Employer concedes, however, that since the administrative law judge discredited Dr. Begley's opinion when he weighed the conflicting medical opinions relevant to claimant's entitlement to benefits, the administrative law judge's error may be deemed harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). *Id.* Based on employer's concession, we decline to address the propriety of the administrative law judge's ruling and turn our attention to his findings on entitlement.

On the merits, employer argues that in both claims the administrative law judge failed to properly consider all of the relevant medical evidence. Employer contends that while the administrative law judge set forth the various findings of the physicians, "[t]he [administrative law judge] either fails to adequately analyze the evidence or reaches findings that contradict his own findings made in other portions of the same decision." Employer's Brief at 7-8. Employer challenges the weight accorded Dr. Perper's opinion relevant to the issues of disability causation and causation of the miners' death. Employer further asserts that the administrative law judge ignored the death certificate and the opinions of employer's medical experts, Drs. Fino and Rosenberg, in his

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's last coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

consideration of the evidence at 20 C.F.R. §718.205(c). We address employers' arguments as they pertain to each of the claims below.

*The Miner's Duplicate Claim:*

In order to establish her entitlement to benefits based on the miner's claim,<sup>2</sup> claimant must prove that the miner suffered from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that the miner was totally disabled due to pneumoconiosis.<sup>3</sup> 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

In addressing the issue of disability causation under Section 718.204(c), the administrative law judge set forth the conflicting medical opinion evidence:

Drs. Schaaf, Perper, and Begley opined that the miner's total disability was due to pneumoconiosis. Dr. Sobieski opined that it is possible the miner has a disability because of coronary artery disease but needs further testing. Dr. Fino opined that the miner was disabled due to cardiac disease and smoking, but not to pneumoconiosis. Dr. Castle opined that it is possible that the miner is disabled due to his coronary artery disease, age, and deconditioning, which are not related to the inhalation of coal mine dust. Drs. Malhotra [sic], Ignacio, and Rosenberg opined that the miner was not totally disabled and Dr. Klemens did not discuss the issue at all.

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<sup>2</sup> The administrative law judge noted that the prior living miner's claim was denied on the ground that the miner failed to establish the existence of pneumoconiosis. Because employer stipulated to the existence of simple coal workers' pneumoconiosis as established by the autopsy evidence, the administrative law judge properly found that claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

<sup>3</sup> In this case, employer stipulated to the presence of simple coal workers' pneumoconiosis, and the administrative law judge determined, based on the autopsy finding of cor pulmonale and the weight of the medical opinions evidence, that claimant had established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iii), (iv). Decision and Order at 24. We affirm the administrative law judge's findings under Section 718.204(b)(2) as those findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order at 24.

Contrary to employer's assertion, the administrative law judge properly exercised his discretion in assigning greatest probative weight to Dr. Perper's opinion compared to the other physicians of record. The administrative law judge properly assigned less probative weight to the opinions of Drs. Sobieski and Castle based on the equivocal nature of their diagnoses.<sup>4</sup> *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 24. Although Dr. Castle accepted the "possibility" that the miner had been totally disabled due to age, deconditioning and coronary artery disease, the administrative law judge permissibly determined that Dr. Castle failed to explain, to the administrative law judge's satisfaction, why the miner was not also disabled due to obstructive lung disease arising out of coal dust exposure. Decision and Order at 24.

We conclude that the administrative law judge properly questioned whether Dr. Rosenberg provided a credible opinion as to whether the miner was totally disabled due to pneumoconiosis, since the doctor disagreed with the other physicians' opinions that the miner suffered disability, and specifically opined that the miner had no significant respiratory impairment. *Id.* Furthermore, the administrative law judge permissibly assigned Dr. Fino's opinion less weight as he found that Dr. Fino failed to adequately explain the basis for his causation opinion:

Dr. Fino acknowledged that the duration of the miner's coal mine employment was sufficient to explain his disability but stated that the 'timeline' of events do [sic] not support it as a cause, without further explanation. Given that Dr. Fino acknowledged that the miner is disabled and that pneumoconiosis can be a progressive disease process, I find this explanation to be insufficient and I accord it less weight.

Decision and Order at 24 (citing Director's Exhibit 61 at p. 21).<sup>5</sup> *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

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<sup>4</sup> The administrative law judge also rejected claimant's medical experts, Drs. Begley and Schaaf, because they did not fully discuss the miner's smoking history and cardiac status, while attributing the miner's impairment to coal dust exposure. Decision and Order at 25.

<sup>5</sup> The record reveals that the miner stopped smoking in the late 1970's and that he stopped working in the mines in 1980. Director's Exhibit 1. At the time of Dr. Fino's examination in 1988, he opined that the miner had no respiratory impairment, but in March 2001, found that the miner was totally disabled by an obstructive respiratory impairment. Although Dr. Fino testified that both smoking and coal dust exposure can be

The administrative law judge properly found that, in contrast to Dr. Fino, Dr. Perper provided a documented and well reasoned opinion that the miner's respiratory impairment was due to a combination of smoking and coal dust exposure, which was entitled to controlling weight. *See Clark*, 12 BLR at 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Although employer argues that Dr. Perper's diagnosis of hypoxemia undermines his opinion, the administrative law judge properly recognized that even Dr. Fino observed that the miner's arterial blood gas studies demonstrated hypoxemia on at least one occasion when his exercise PO<sub>2</sub> value was reduced. Employer's Brief at 9-10; Decision and Order at 26. Moreover, we reject employer's assertion that "Dr. Perper's assessment of chronic impairment due to low arterial oxygen levels conflicts with the [administrative law judge's] resolution that the blood gas studies fail to evidence disability." Employer's Brief at 10. Contrary to employer's contention, although the administrative law judge found that that the miner's objective studies were non-qualifying for total disability under the regulatory criteria, that finding does not preclude the administrative law judge from crediting Dr. Perper's opinion that the miner's objective studies demonstrated a respiratory impairment. The absence of total disability does not prove the absence of a respiratory impairment or otherwise show that the miner's coal dust exposure has not affected his respiratory status.

Furthermore, we reject employer's contention that Dr. Perper's opinion is flawed because he diagnosed that the miner's pulmonary function studies showed obstructive and restrictive respiratory impairment, contrary to the opinions of employer's experts, who interpreted the miner's lung volumes as evidencing no restriction. Since employer's experts are in agreement with Dr. Perper that the miner has, at the very least, an obstructive respiratory defect, the administrative law judge's discretion in crediting Dr. Perper's opinion as to the etiology of that obstruction was properly exercised. Moreover, to the extent that employer argues that Dr. Perper's opinion on causation must be rejected because the doctor attributes the miner's obstructive impairment to coal dust exposure, in the absence of restriction, employer's position is contrary to the Act, which recognizes that pneumoconiosis can be a purely obstructive respiratory disorder, *see* 20 C.F.R. §718.201. Employer's Brief at 9.

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"progressive," Director's Exhibit 61 at p. 26-27, he ruled out coal dust exposure as a causative factor in the miner's totally disabling respiratory impairment, presumably because the miner did not have evidence of respiratory impairment until many years after he left the mines. We affirm the administrative law judge's decision to assign Dr. Fino's causation opinion less weight as Dr. Fino has not explained to the satisfaction of the administrative law judge why the miner's respiratory impairment may be due to a progressive disease process caused by smoking but could not similarly be due to a progressive disease process caused by coal dust exposure.

For these reasons, we affirm the administrative law judge's finding that claimant established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We thus affirm the administrative law judge's award of benefits in the miner's claim.

*The Survivor's Claim:*

To establish entitlement to survivors' benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the irrebutable presumption set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(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); see *Lango v. Director, OWCP*, 104 F.3d 73, 21 BLR 2-12 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

In this case, the administrative law judge found that while pneumoconiosis was not the direct cause of the miner's death, his death was hastened by pneumoconiosis. In so finding, the administrative law judge stated that there were "six" physicians, Drs. Rizkalla, Perper, Begley, Bush, Oesterling and Castle, who rendered opinions as to whether pneumoconiosis contributed to or hastened the miner's death. Decision and Order at 25. The administrative law judge discredited Dr. Begley's opinion, and assigned greatest probative weight to the opinions of Drs. Rizkalla and Perper that the miner's death was hastened by pneumoconiosis. Decision and Order at 26-27. The administrative law judge in turn assigned less probative weight to the contrary opinions of Drs. Bush, Oesterling and Castle that pneumoconiosis did not contribute to or hasten the miner's death. *Id.*

We agree with employer that the administrative law judge misstated the quantity of the evidence, and thus, that his finding at Section 725.205(c) must be vacated. See *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge's analysis of the conflicting evidence at Section 725.205(c) does not take into consideration the opinions of employer's medial experts, Drs. Rosenberg and Fino, who also rendered opinions as to whether pneumoconiosis hastened the miner's death. Dr. Rosenberg opined that the miner's death was due to cardiac arrhythmia related to underlying coronary artery disease. He specifically opined that the miner's pneumoconiosis was too

mild to have resulted in respiratory impairment or to have hastened the miner's death. Employer's Exhibit 2; Decision and Order at 13. Similarly, Dr. Fino opined that regardless of the autopsy finding of pneumoconiosis, the miner would have died at the same time and in the same manner had he never stepped foot in the coal mines. Employer's Exhibit 3. Dr. Fino further opined that coal dust exposure did not cause, contribute to, or hasten the miner's death. *Id.* Because the administrative law judge has failed to consider the opinions of Drs. Rosenberg and Fino, we vacate his findings pursuant to 20 C.F.R. §718.205(c), and remand this case for further consideration as to whether claimant carried her burden of proof to establish that pneumoconiosis hastened the miner's death.

Accordingly, the Decision and Order of the administrative law judge is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge