

BRB No. 07-0930 BLA

H.C.)	
(Widow of A.C.))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 08/29/2008
)	
CONSOLIDATION COAL COMPANY)	
)	
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 on Remand – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (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 on Remand – Awarding Benefits (2004-BLA-05090) of Administrative Law Judge Daniel L. Leland on a survivor’s 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). This case is before the Board for a

second time.¹ The Board previously vacated the administrative law judge's award of survivor's benefits because his "analysis of the conflicting evidence at [20 C.F.R. §]718.205(c) [did] not take into consideration the opinions of employer's experts, Drs. Rosenberg and Fino," who opined that the miner's death was not hastened by pneumoconiosis.² [*H.C.*] v. *Island Creek Coal Co.*, BRB No. 05-0969 BLA, slip op. at 6 (Aug. 28, 2006) (unpub.). The Board, therefore, remanded the case for further consideration pursuant to 20 C.F.R. §718.205(c). On remand, the administrative law judge incorporated his prior credibility determinations with respect to the opinions of Drs. Rizkalla, Perper, Begley, Bush, Oesterling, and Castle. He also reviewed the opinions of Drs. Fino and Rosenberg, but found that they did not alter his finding that the miner's death was hastened by pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

Employer appeals, challenging the administrative law judge's finding that pneumoconiosis hastened the miner's death, and his weighing of the conflicting medical evidence at Section 718.205(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

¹ Claimant is the widow of the miner who died on February 2, 2002. Director's Exhibit 69. The miner filed a duplicate claim on November 20, 2000, which was denied by Administrative Law Judge Michael P. Lesniak on July 19, 2002. Director's Exhibits 3, 66. On behalf of the miner, claimant requested modification of the denial of benefits in the miner's claim. Claimant also filed a survivor's claim for benefits on September 16, 2002. Director's Exhibit 91. In a Decision and Order dated August 3, 2005, Administrative Law Judge Daniel L. Leland (the administrative law judge) found that the evidence was sufficient to establish that the miner was totally disabled due to pneumoconiosis, and that the miner's death was hastened by pneumoconiosis. Accordingly, benefits were awarded on both claims. Employer appealed, and the Board affirmed the administrative law judge's award of benefits in the miner's claim, but vacated the award of benefits in the survivor's claim and remanded the case for further consideration at 20 C.F.R. §718.205(c). [*H.C.*] v. *Island Creek Coal Co.*, BRB No. 05-0969 BLA, slip op. at 6-7 (Aug. 28, 2006) (unpub.). This appeal concerns the administrative law judge's findings on remand with respect to the survivor's claim.

² The Board noted that, in finding that pneumoconiosis hastened the miner's death, the administrative law judge considered the opinions by Drs. Rizkalla, Perper, Begley, Bush, Oesterling and Castle, but that he failed to address the opinions of Drs. Rosenberg and Fino. [*H.C.*], slip op. at 6.

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.³ 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).

After consideration of the administrative law judge's Decision and Order On Remand – Awarding Benefits, the briefs of the parties, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that the miner's death was hastened by pneumoconiosis. We specifically reject employer's assertion that the administrative law judge did not properly weigh the conflicting medical opinions pursuant to Section 718.205(c).

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, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if 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).

Before we address the administrative law judge's findings, it is necessary to briefly summarize the medical evidence as to the cause of the miner's death. In this case, the record reflects that the miner was admitted to Windber Medical Center on February 2, 2002, in cardiac arrest, and died shortly thereafter. Employer's Exhibit 104. The miner's death certificate was completed by Dr. Gray, the miner's treating physician, who listed the immediate causes of death as acute myocardial infarction and longstanding coronary artery disease. Director's Exhibit 101.

Dr. Rizkalla, a Board-certified pathologist, performed the autopsy and diagnosed severe atherosclerotic coronary artery disease, moderate emphysema, due in part to

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

smoking and coal dust exposure, and simple micronodular coal workers' pneumoconiosis. Director's Exhibit 67. Dr. Rizkalla also diagnosed cor pulmonale based on his observation that the right ventricle of the miner's heart was dilated and thickened to twice its normal size. *Id.* According to Dr. Rizkalla, the miner's death was caused by severe atherosclerotic heart disease, which narrowed the blood vessels and reduced the quantity of blood moving through the arteries. Employer's Exhibit 5. He explained that the miner's emphysema and pneumoconiosis also reduced blood oxygen saturation to the heart, thereby precipitating cardiac arrhythmia, which, in turn, led to the miner's death. *Id.*

Dr. Perper, a Board-certified pathologist, prepared several reports based on his review of the miner's treatment records, the autopsy report and slides, and other medical evidence. Director's Exhibits 75, 82, 126. Dr. Perper diagnosed coal workers' pneumoconiosis, centrilobular emphysema, and cor pulmonale. Dr. Perper opined that the miner's coal workers' pneumoconiosis and emphysema, the latter of which was also due, in part, to coal dust exposure, had substantially contributed to the miner's death. Director's Exhibit 82. He explained that the miner's respiratory condition caused pulmonary insufficiency (cor pulmonale) and hypoxemia, which, in turn, triggered or aggravated an arrhythmia, on the background of severe heart disease, and resulted in the miner's death. *Id.*

Dr. Bush, a Board-certified pathologist, reviewed the autopsy slides, and prepared a consultative report. Director's Exhibit 72. He opined that the miner had a mild degree of coal workers' pneumoconiosis and centrilobular emphysema due to smoking, neither of which caused any significant respiratory impairment during the miner's lifetime. *Id.* Dr. Bush further opined that pneumoconiosis did not cause, contribute to, or hasten the miner's death.⁴ *Id.*

Dr. Oesterling, a Board-certified pathologist, reviewed the miner's autopsy slides and prepared a consultative report. Director's Exhibit 73. He diagnosed mild macular and microdular coal workers' pneumoconiosis, which he opined was too mild to have

⁴ Dr. Bush did not specifically address in his written report the autopsy finding of cor pulmonale, but during his deposition, he opined that the miner did not suffer from cor pulmonale; the doctor attributed the enlarged right ventricle to heart disease and not to a respiratory condition. Employer's Exhibit 8 at 54-56, 82. Dr. Bush stated that, based on his review of the autopsy slides, he did not have any explanation for the diagnosis that the miner suffered with a disabling respiratory impairment prior to his death, but suggested that the miner's age may have influenced his decreased pulmonary function. *Id.* at 91-93. Dr. Bush concluded that the miner died as a result of heart disease, unrelated to any respiratory condition.

altered pulmonary function or to have in any way caused or contributed to death. *Id.* Dr. Oesterling indicated that he disagreed with Dr. Rizkalla's diagnosis of cor pulmonale, and stated that it was his opinion that the miner's right ventricle was enlarged as a result of heart disease and obesity. *Id.* Dr. Oesterling diagnosed that the miner's death was due entirely to heart disease. *Id.*

The autopsy protocol and medical record were also reviewed by Drs. Begley, Castle, Rosenberg, and Fino, who are Board-certified in pulmonary medicine. Dr. Begley opined that the miner's death was hastened by pneumoconiosis. Claimant's Exhibit 1. He explained that the miner's pneumoconiosis caused a progressive decline in pulmonary function and significant arterial hypoxemia, which worsened the miner's cardiac ischemia and, therefore, hastened the miner's death from a heart attack. *Id.*

In contrast, Dr. Castle attributed the miner's death to a sudden heart attack, unrelated to either coal workers' pneumoconiosis or emphysema. Employer's Exhibit 1. Dr. Castle stated that there was no evidence in the record to indicate that the miner had any significant hypoxemia during his lifetime, or at the time of death, which could have caused his fatal arrhythmia. *Id.* Dr. Rosenberg similarly opined that the miner's mild pneumoconiosis would not have been associated with significant respiratory impairment. Employer's Exhibit 2. According to Dr. Rosenberg, the miner's death was due to a heart attack brought on by sudden arrhythmia caused by heart disease. *Id.* He opined that the miner's death was neither caused nor hastened by pneumoconiosis. *Id.* Lastly, Dr. Fino opined that the miner's pneumoconiosis did not hasten his death. Dr. Fino specifically discounted Dr. Perper's finding of hypoxemia and Dr. Perper's explanation as to the etiology of the miner's arrhythmia. *Id.* Dr. Fino opined that the miner would have died at the same time had he never stepped foot in the coal mines. *Id.*

In his prior Decision and Order, the administrative law judge weighed six of the eight medical opinions. The administrative law judge found that, in terms of the qualifications of the pathologists, Dr. Perper was "the most qualified with respect to experience, academic appointments and published research." Decision and Order (Aug. 3, 2005) at 27. He gave controlling weight to the opinions of Drs. Perper and Rizkalla, that the miner suffered from cor pulmonale and that his death was hastened by pneumoconiosis, over the contrary opinion of Dr. Oesterling, that the miner did not have cor pulmonale and that his death was unrelated to pneumoconiosis. The administrative law judge also rejected the opinions of Drs. Bush and Castle, that the miner's death was not hastened by pneumoconiosis, because he found that they did not adequately address the autopsy findings of cor pulmonale, prior to concluding that claimant's respiratory condition had no effect on his cardiac arrhythmia and death due to a heart attack.⁵ Based

⁵The administrative law judge assigned Dr. Begley's opinion, that pneumoconiosis contributed to the miner's death, less weight because he found that Dr. Begley "appeared unfamiliar with the miner's history" of a previous heart attack and smoking. Decision

on these credibility determinations, the administrative law judge concluded that the miner's death was hastened by pneumoconiosis and awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding at Section 718.205(c) because he failed to weigh the opinions of Drs. Rosenberg and Fino. In his Decision and Order on Remand, the administrative law judge incorporated his prior findings with regard to the weight he accorded the opinions of Drs. Rizkalla, Perper, Begley, Bush, Oesterling and Castle. Decision and Order on Remand at 2. The administrative law judge specifically found that the opinions of Drs. Perper and Rizkalla "best synthesize all of the evidence of record as they specifically account for the miner's autopsy finding of cor pulmonale and explain how [the miner's] hypoxemia from coal workers' pneumoconiosis and centrilobular emphysema combined with his weakened condition due to atherosclerotic heart disease, [to cause] an arrhythmia resulting in sudden death." *Id.* at 3. The administrative law judge found the opinions of Drs. Rosenberg and Fino, that the miner's death was not hastened by pneumoconiosis, to be unpersuasive in comparison to the opinions of Drs. Perper and Rizkalla. Therefore, the administrative law judge found that that claimant had satisfied her burden of proof pursuant to Section 718.205(c).

In this appeal, employer contends that the administrative law judge erred in "mechanically discrediting" the death certificate. Employer's Brief at 19. This contention is without merit. Although the administrative law judge observed that a death certificate, standing alone, was "an unreliable report of the miner's condition[.]" he acknowledged that the death certificate identified the immediate cause of the miner's death as a heart attack, and further found that the record, as a whole, supported a finding that pneumoconiosis did not directly cause the miner's death. Decision and Order (Aug. 3, 2005) at 25, citing *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Under the circumstances of this case, because the death certificate did not mention pneumoconiosis or otherwise address whether pneumoconiosis hastened the miner's death, we reject employer's assertion that the administrative law judge did not properly consider the death certificate pursuant to Section 718.205(c).

Employer also challenges the administrative law judge's finding that Dr. Perper's opinion "best synthesizes all of the evidence of record." Decision and Order on Remand at 3. Employer asserts that there are multiple inconsistencies between Dr. Perper's

and Order on Remand at 26. The administrative law judge also determined that Dr. Castle's opinion was less credible since he did not discuss the autopsy finding of cor pulmonale or address "any effect it may have had on the miner's cardiac function and death." *Id.* at 27.

assessment of the miner's respiratory impairment and the actual medical record, which were not considered by the administrative law judge. Employer's Brief at 7. Employer maintains that Dr. Perper's opinion is flawed because: 1) Dr. Perper diagnosed the miner's pulmonary function studies as showing both a restrictive and obstructive respiratory impairment, while the more qualified pulmonary experts, Drs. Fino, Rosenberg and Castle, found only obstruction; 2) Dr. Perper's assessment of chronic impairment due to low arterial oxygen levels conflicts with the administrative law judge's finding, in the miner's claim, that the blood gas studies were non-qualifying for total disability; and 3) Dr. Perper's diagnosis of hypoxemia conflicts with the opinion of Dr. Fino, who, as a pulmonary specialist, was taught to interpret clinical studies. Employer's Brief at 7-9.

Employer's arguments with respect to Dr. Perper are identical to those raised in the prior appeal, which were rejected by the Board. [*H.C.*], slip op. at 3. In fact, the Board specifically affirmed the administrative law judge's crediting of Dr. Perper's opinion, that the miner suffered from hypoxemia and was totally disabled by a respiratory or pulmonary impairment, as reasoned and documented. *Id.*, slip op. at 3 n.3. Because employer has not set forth any valid exception to the law of the case doctrine, *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's decision was either clearly erroneous or resulted in manifest injustice, we reject employer's assertion that the administrative law judge erred in relying on Dr. Perper's opinion.⁶ See *U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Furthermore, we reject employer's assertion that the administrative law judge "failed to meaningfully consider the opinions of Drs. Oesterling, Fino and Rosenberg"

⁶ Employer also reiterates arguments, raised in the prior appeal, that the administrative law judge erred in rejecting Dr. Castle's opinion that the miner's respiratory impairment was not attributable to pneumoconiosis. Employer's Brief at 13. Because we previously affirmed the administrative law judge's credibility finding with regard to Dr. Castle's opinion on the issue of disability causation at 20 C.F.R. §718.204(c), and we have affirmed the administrative law judge's finding that the miner was totally disabled due to pneumoconiosis during his lifetime, we decline to further address employer's arguments. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

that the miner's death was not hastened by pneumoconiosis.⁷ Employer's Brief at 20. Contrary to employer's assertion, the administrative law judge acted within his discretion in finding Dr. Oesterling's opinion, that the miner's death was not hastened by pneumoconiosis, to be reasoned and documented, but ultimately unpersuasive, in view of the contrary findings of Drs. Perper and Rizkalla as to the presence of cor pulmonale.⁸ Decision and Order (8-3-05) at 27. Dr. Oesterling opined that the miner did not have cor pulmonale and attributed the miner's right coronary hypertrophy to complications from obesity. Contrary to employer's contention, the administrative law judge acted within his discretion in rejecting Dr. Oesterling's opinion, that the miner did not have cor pulmonale, because he found Dr. Rizkalla's contrary opinion to be more persuasive.⁹ Because the administrative law judge properly found that Dr. Oesterling's opinion as to the cause of the miner's death, was influenced by his erroneous belief that the miner did not have cor pulmonale, we affirm the administrative law judge's decision to accord Dr. Oesterling's opinion less weight at Section 718.205(c). *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Similarly, we affirm the administrative law judge's treatment of Dr. Rosenberg's opinion. Dr. Rosenberg opined that the miner's death was unrelated to pneumoconiosis because the miner had no significant respiratory impairment. However, because the administrative law judge had already determined, in his prior decision, that the miner was totally disabled by pneumoconiosis, the administrative law judge reasonably questioned the credibility of Dr. Rosenberg's opinion as to the cause of the miner's death, and assigned it less weight at Section 718.205(c). *See Lango*, 104 F.3d at 577, 21 BLR at 2-20-21; *Clark*, 12 BLR at 1-151; Decision and Order on Remand at 3.

⁷ We affirm, as unchallenged by the parties on appeal, the administrative law judge's decision to accord the opinions of Drs. Bush, Begley and Castle less weight at 20 C.F.R. §718.205(c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁸ Dr. Begley also diagnosed cor pulmonale, although his opinion on the issue of the cause of the miner's death was given less weight by the administrative law judge at Section 718.205(c). Claimant's Exhibit 3.

⁹ Dr. Rizkalla disagreed with Dr. Oesterling that the miner's right ventricular hypertrophy was caused by obesity. Employer's Exhibit 5. Dr. Rizkalla explained that normal fatty infiltration is expected as the right ventricle may contain some fatty cells or some adipose tissue infiltrating between the muscle fibers, but that the "fat infiltration will not increase the thickness [of the ventricular wall as seen in this case] up to eight millimeters[,] which is twice the normal [size]." *Id.* at 64-65.

Finally, we discern no error in the administrative law judge's findings with respect to Dr. Fino's opinion at Section 718.205(c). Dr. Fino attributed the miner's arrhythmia to his longstanding heart condition and opined that pneumoconiosis played no role whatsoever in the miner's death.¹⁰ As noted by the administrative law judge, however, "Dr. Fino's opinion is flawed because he asserted that the miner did not have hypoxemia at the time of his death, but Dr. Perper[,] as well as other physicians[,] concluded that the miner was hypoxic at the time of his death." Decision and Order on Remand at 3. Since the administrative law judge permissibly found the underlying premise of Dr. Fino's opinion, that the miner did not have hypoxemia, to be against the weight of the medical opinion evidence, we affirm the administrative law judge's finding that Dr. Fino's opinion was entitled to less weight at Section 718.205(c).¹¹ See *Lango*, 104 F.3d at 577, 21 BLR at 2-20-21; *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Trumbo*, 17 BLR at 1-88-89.

The question of whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge. See *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1997). The Board is not empowered to

¹⁰ Employer asserts that the administrative law judge erred in stating that Drs. Rosenberg and Fino "lack expertise on the cause of death possessed by pathologists." Decision and Order on Remand at 3; Employer's Brief in Support at 6. While we agree that a pulmonologist is not, *per se*, less qualified than a pathologist to render an opinion as to whether pneumoconiosis hastened death, we consider the administrative law judge's error to be harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as he cited additional valid grounds for his credibility determinations, namely that the opinions of Drs. Rosenberg and Fino, in comparison to the opinion of Dr. Perper, are not as well supported by the objective evidence of record. Decision and Order on Remand at 3.

¹¹ Dr. Fino opined that the miner's arterial blood gas study results showed normal PO₂ values during his lifetime, except for one episode of acute hypoxemia demonstrated by the test dated December 14, 2000, which reflects a drop in the PO₂ value, with exercise, from 69 to 65. Dr. Rizkalla disagreed with the opinion that the miner had no hypoxemia and explained that, while the miner's lifetime values may be considered normal for a person with no heart disease, given the miner's narrow blood vessels due to coronary artery disease (as demonstrated by the autopsy finding of ninety percent occlusion of the right coronary artery), even a minimum reduction of oxygen saturation coming to the heart can precipitate an arrhythmia and lead to death. Employer's Exhibit 5 at 23-26. Dr. Oesterling indicated that the miner had at least mild hypoxemia throughout his life, with more acute episodes occurring prior to his cardiac infarctions. Employer's Exhibit 7 at 48-49. Dr. Perper also opined that the miner's arterial blood gas studies showed mild hypoxemia. Director's Exhibit 126 at 23.

reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge properly rendered his credibility determinations in this case, we affirm his finding that the opinions of Drs. Perper and Rizkalla are sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c). *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Lango*, 104 F.3d at 577, 21 BLR at 2-201.

Accordingly, the Decision and Order on Remand – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge