

BRB No. 08-0813 BLA

I.S.)	
(Widow of C.S.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
UNITED STATES STEEL MINING)	DATE ISSUED: 08/26/2009
COMPANY)	
)	
and)	
)	
UNITED STATES STEEL CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Kary B. Wolfe and Timothy M. Davis (Walston Wells & Birchall, LLP), Birmingham, Alabama, for employer.

Rita Roppolo (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2006-BLA-5568) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge) rendered 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). After determining that employer was the properly named responsible operator herein, the administrative law judge credited the miner with thirty-six years of qualifying coal mine employment, and adjudicated this survivor’s claim, filed on May 18, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b),¹ and that pneumoconiosis was a substantially contributing cause of the miner’s death pursuant to 20 C.F.R. §718.205. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge’s weighing of the autopsy evidence and medical opinion evidence at Section 718.202(a)(2), (4), and his finding that pneumoconiosis was a substantially contributing cause of the miner’s death at Section 718.205(c). Claimant, the miner’s widow, has not responded to this appeal. The Director, Office of Workers’ Compensation Programs (the Director), has filed a response brief, urging remand of this case.²

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).

In order to establish entitlement to survivor’s benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out

¹ The administrative law judge cited 20 C.F.R. §718.203(a), but applied the presumption at 20 C.F.R. §718.203(b).

² We affirm, as unchallenged on appeal, the administrative law judge’s finding that employer is the properly designated responsible operator herein, his findings regarding the length of the miner’s coal mine employment, and his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Transcript at 14.

of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see 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). 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 also Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Employer first challenges the administrative law judge's finding that Dr. Blake's autopsy report was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), and argues that Dr. Blake's diagnosis is entitled to little weight because his report was prepared specifically for the purpose of evaluating claimant's black lung status and was based on an incorrect smoking history. Employer maintains that the administrative law judge mischaracterized the opinion of Dr. Goldstein, that Dr. Blake's description of his autopsy findings does not support a diagnosis of pneumoconiosis, and asserts that Dr. Goldstein's opinion was well-reasoned and entitled to greater weight based on his qualifications as a Board-certified internist and pulmonologist. Employer's Brief at 10-19. Some of employer's arguments have merit.

Initially, we reject employer's contention that Dr. Blake's autopsy opinion should be discounted because "[the doctor] was specifically hired to find pneumoconiosis." Employer's Brief at 14. The Board has held that evidence prepared in anticipation of litigation may be credited by the administrative law judge, and that without specific evidence in the record indicating that a report is unfairly slanted in favor of the party presenting it, the administrative law judge should consider that report as equally reliable as the other reports of record. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991)(*en banc*); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-732 (1985). As employer has made no specific allegations of bias, asserting only that Dr. Blake was hired by claimant "to evaluate black lung status," the administrative law judge could properly find that Dr. Blake's autopsy report was reliable. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Melnick*, 16 BLR at 1-35-36; *see generally Cochran v. Consolidated Coal Co.*, 16 BLR 1-101, 1-105 (1992). We also reject employer's assertion that more weight should be given to Dr. Goldstein's opinion based on his qualifications as a Board-certified internist and pulmonologist.⁴ Employer's Brief

⁴ Contrary to employer's assertion, the Director maintains that the autopsy prosector, Dr. Blake, is better qualified to render an opinion on the autopsy findings, as he is Board-certified in forensic, anatomic and clinical pathology. *See Claimant's Exhibit 4.*

at 14, 17-18, 21. The administrative law judge is not required to defer to the physicians with superior qualifications; rather, when analyzing the medical opinions, the administrative law judge should address the impact of the physicians' comparative credentials on his weighing of the evidence. See *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-67 (2004)(*en banc*).

We find merit, however, in employer's argument that the administrative law judge mischaracterized Dr. Goldstein's opinion.⁵ In finding the existence of pneumoconiosis established at Section 718.202(a)(2), the administrative law judge credited the autopsy protocol of Dr. Blake, which indicated that the immediate cause of death was "pulmonary fibrosis and advanced emphysema, features of simple coal workers' pneumoconiosis by gross, microscopic and special polarization microscopy," and found that the proximate causes of death were a "combination of coronary artery occlusive disease and multiple remote myocardial infarct," as well as "striking compromise from extreme pulmonary edema, interstitial fibrosis with anthracosilicosis." Dr. Blake noted "an extreme degree of anthracotic pigmentation throughout both the lungs which also display a moderate degree of bullous emphysema" on gross examination. Claimant's Exhibit 4. Upon microscopic study, Dr. Blake reported "striking bullous emphysema, . . . mild to moderate anthracosis, as well as an extensive degree of consolidated fibrosis with extreme anthracosis" in the upper left lobe on slide number five. The upper lobe sections on slide one indicated that anthracosis was not particularly prominent, and the lower lobe sections showed extensive interstitial fibrosis and no large nodules present. After gross and microscopic study, Dr. Blake concluded that the "focally fibrotic and extremely emphysematous lungs would be consistent with the histology expected from coal worker's [sic] pneumoconiosis." Claimant's Exhibit 4. The administrative law judge considered the contrary opinion of Dr. Goldstein, that the autopsy protocol did not describe findings consistent with pneumoconiosis, but concluded that "Dr. Goldstein [did] not dispute the finding of anthracosis [on autopsy, but only] that the anthracosis is due to coal mine dust exposure." Decision and Order at 20. Noting that "anthracosis" is

⁵ On October 18, 2006, Dr. Goldstein opined that the miner did not have pneumoconiosis and that his death was not related in any way to his occupational exposure. Employer's Exhibit 2. On December 6, 2006, Dr. Goldstein reviewed the autopsy report of Dr. Blake, and testified that it would be very unusual for simple pneumoconiosis to appear twenty years after retirement, but even if the miner had pneumoconiosis, there is no way that it would be related to the miner's cause of death. Dr. Goldstein opined that the miner's death was either totally or partially due to lung disease, but it was not occupational lung disease. Rather, it was due to chronic obstructive pulmonary disease (COPD) and emphysema most likely related to the miner's smoking history, as well as to coronary artery disease, atrial fibrillation and heart failure. Employer's Exhibit 4 at 30, 44.

contained within the regulatory definition of pneumoconiosis,⁶ the administrative law judge determined that the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2), as:

It would appear, therefore, that Dr. Goldstein agrees that anthracosis is present, a finding also made by the autopsy prosector and supported by the treatment records. . . Even assuming that Dr. Goldstein's opinion were not sufficient to establish the presence of anthracosis, it is to be noted that his opinion is not, in fact, based on a review of autopsy slides but on the autopsy report. I find his opinion outweighed by that of the autopsy prosector.

Decision and Order at 12. The administrative law judge, however, did not explain how the treatment records supported the autopsy prosector's finding of anthracosis, and he misinterpreted Dr. Goldstein's deposition testimony. Dr. Goldstein explained that the autopsy description of the lungs revealed moderate to heavy anthracotic pigmentation, which "does not describe anything other than anthracosis . . . and anthracosis means dust in the lungs . . . [i]t does not necessarily give you a diagnosis of any specific disease." Employer's Exhibit 4 at 33. Dr. Goldstein noted further that "I do not see any description of coal macules, . . . [which] are what you'd expect to see in somebody that has coal workers' pneumoconiosis." Employer's Exhibit 4 at 38. Because it appears that Dr. Goldstein defined "anthracosis" as anthracotic pigmentation of non-specific etiology, rather than as a disease process arising out of coal mine employment consistent with the regulatory definition of anthracosis, we vacate the administrative law judge's findings at Section 718.202(a)(2), and remand this case for the administrative law judge to reassess the relevant evidence in determining whether it is sufficient to establish the existence of pneumoconiosis by autopsy evidence thereunder. As the record contains conflicting accounts of the miner's smoking history,⁷ the administrative law judge, on remand,

⁶ Section 718.201 defines pneumoconiosis as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairment, arising out of coal mine employment, and provides, in pertinent part, that "this definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201.

⁷ Dr. Blake recorded that the miner was a non-smoker, Claimant's Exhibit 4; Dr. Goldstein relied on "a major, major smoking history," starting during World War II and continuing, Employer's Exhibit 4 at 35-36; claimant testified that the miner was a non-smoker with a remote smoking history, quitting over fifty years ago, Hearing Transcript at 17, 20; and various treatment records indicate that the miner was a non-smoker and/or a former smoker, Director's Exhibits 10, 11.

should also determine the extent of the miner's smoking and discuss its effect on the credibility of the medical opinions of record.

Employer next asserts that the administrative law judge erred in finding that the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In evaluating the relevant evidence, the administrative law judge determined that the "treatment records consistently find coal workers' pneumoconiosis and document a long history of lung disease," and that the report of Dr. Pannocchia,⁸ the miner's treating physician, "substantiates the finding of coal workers' pneumoconiosis[,] while Dr. Goldstein finds anthracosis to be present." Decision and Order at 14. The administrative law judge concluded that the treatment records and the post-mortem evidence of record were the most persuasive, and outweighed any contrary evidence. Decision and Order at 14. As discussed *supra*, however, Dr. Goldstein's opinion does not support a finding of pneumoconiosis. Employer also correctly argues that, although the treatment records document multiple pulmonary conditions, including COPD and emphysema, the physicians did not attribute these conditions to dust exposure in coal mine employment, as required to meet the regulatory definition of legal pneumoconiosis. Employer's Brief at 15, 17; *see* 20 C.F.R. §718.201. Additionally, notations of coal workers' pneumoconiosis in the treatment records were generally reported "by history,"⁹ Director's Exhibits 10, 11, and Dr. Pannocchia did not diagnose pneumoconiosis or attribute any of the miner's pulmonary conditions to coal dust exposure until over a year after the miner's death. Director's Exhibit 10; Claimant's Exhibit 3; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Consequently, we vacate the administrative law judge's findings at Section 718.202(a)(4) for a reevaluation and weighing of the evidence in determining whether claimant has established the existence of pneumoconiosis thereunder. On remand, the administrative law judge is also instructed to determine whether Dr. Goldstein's opinion, that the miner's emphysema was not due to coal dust exposure because disabling emphysema is only related to coal mine work when the miner suffers from complicated pneumoconiosis, is inconsistent with the revised regulations, as

⁸ Dr. Pannocchia, the miner's treating physician, is Board-certified in family practice with additional qualifications in geriatric medicine. On June 30, 2006, Dr. Pannocchia opined that, at the time of his death on February 6, 2005, the miner had multiple medical problems, the most severe of which were COPD with pulmonary emphysema, coronary artery disease, and congestive heart failure. He stated that the miner's death was directly related to the coal mines and exposure to the coal dust. Claimant's Exhibit 3.

⁹ Although Dr. Banick's later treatment records noted "CWP confirmed by biopsy," Director's Exhibit 11, no supporting biopsy evidence is contained in the record herein.

asserted by the Director. Employer's Exhibit 4 at 27, 34, 40; *see* 65 Fed. Reg. 79,938-43 (Dec. 20, 2000).

Lastly, employer challenges the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Employer contends that the administrative law judge erred in crediting the conclusory opinion of Dr. Pannocchia, rendered over a year after the miner's death, that the miner's death was directly related to coal dust exposure, and Dr. Blake's autopsy finding, that the immediate cause of the miner's death was pulmonary fibrosis and advanced emphysema as features of coal workers' pneumoconiosis, over the contrary opinion of Dr. Goldstein, that the miner's death was unrelated to his occupational coal dust exposure. Employer's Brief at 19-21. As we have vacated the administrative law judge's finding of the existence of pneumoconiosis at Section 718.202(a)(2), (4), we must also vacate his finding of death due to pneumoconiosis at Section 718.205(c), for a readjudication of the issue on remand, if reached. Additionally, the administrative law judge should determine whether Dr. Goldstein's opinion, that "simple coal workers' pneumoconiosis does not lead to death . . . because [t]here's not enough problem there," is inconsistent with the regulations, as asserted by the Director. Employer's Exhibit 4 at 28; *see* 20 C.F.R. §§718.202, 718.205; *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge