BRB Nos. 12-0637 BLA
and 13-0230 BLA

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| GERALDINE LEFLER<br>(Widow of and o/b/o RAYMOND LEFLER) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| OLD BEN COAL COMPANY | ) | |
| and | ) | |
| | ) | DATE ISSUED: 08/22/2013 |
| SAFECO INSURANCE COMPANY | ) | |
| Employer/Carrier-<br>Respondents | ) | |
| 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 Denying Benefits and Decision and Order on Second Remand Denying Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand Denying Benefits (2004-BLA-05786) and the Decision and Order on Second Remand Denying Benefits (2006-BLA-05974) of Administrative Law Judge Robert B. Rae rendered on a miner's subsequent claim, filed on September 9, 2002, and a survivor's claim, filed on January 27, 2003, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for the third time.[2]

In the most recent appeal, the Board held that Administrative Law Judge Jeffrey Tureck erred in weighing the autopsy and medical opinion evidence in both claims, relevant to the existence of simple pneumoconiosis and, thus, vacated Judge Tureck's findings at 20 C.F.R. §718.202(a)(2), (4). *Lefler v. Old Ben Coal Co.*, BRB No. 10-0499 BLA (May 16, 2011) (unpub.), slip op. at 7-8. Because the Board concluded that Judge Tureck erred in weighing the evidence on the issue of pneumoconiosis, the Board also vacated Judge Tureck's finding, in the miner's claim, that claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and his finding, in the survivor's claim, that claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). *Id*. Further, because Judge Tureck erred in his evaluation of the pathology evidence relevant to whether the miner had complicated pneumoconiosis, the Board vacated Judge Tureck's finding that claimant was unable to invoke the irrebuttable presumptions of total disability and death due to pneumoconiosis at 20 C.F.R. §718.304. *Id*. at 7-8. Thus, the Board vacated the denial of benefits in both claims, and remanded the case for further consideration.

On remand, due to Judge Tureck's retirement, the case was reassigned to Administrative Law Judge Robert B. Rae (the administrative law judge). In his Decision and Order on Remand Denying Benefits in the miner's claim, issued on August 6, 2012, the administrative law judge found that claimant did not establish that the miner had either simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.304, or that his totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In his Decision and Order on Second Remand Denying Benefits in the survivor's claim, also issued on August 6, 2012, the

[1] Claimant is the widow of the miner, Raymond Lefler, who died on September 26, 2002. Director's Exhibit 13.

[2] The procedural history of both claims is set forth in the Board's prior decisions. *Lefler v. Old Ben Coal Co.*, BRB No. 10-0499 BLA (May 16, 2011) (unpub.); *G.L.* [*Lefler*] *v. Old Ben Coal Co.*, BRB No. 08-0792 BLA (Aug. 26, 2009) (unpub.). As the Board noted in its last decision, recent amendments to the Act are not applicable to either claim, because the claims were filed before January 1, 2005. *Lefler*, BRB No. 10-0499 BLA, slip op. at 2 n.3.

administrative law judge found that the evidence did not establish the existence of either simple or complicated pneumoconiosis under 20 C.F.R. §§718.202(a), 718.304, or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On appeal, claimant contends that the administrative law judge erred in his evaluation of the medical opinion and pathology evidence in both claims, in finding that claimant failed to establish the existence of complicated pneumoconiosis and, therefore, failed to establish invocation of the irrebuttable presumptions of total disability and death due to pneumoconiosis at 20 C.F.R. §718.304. Employer/carrier responds, urging affirmance of the administrative law judge's denials of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response to claimant's appeals.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

## I. THE MINER'S CLAIM

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled and that his disability was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

On remand, the administrative law judge reconsidered the medical opinions of Drs. Perper and Naeye, both of which contained pathology slide reviews, relevant to the

[3] Claimant does not challenge the administrative law judge's finding that the miner did not suffer from simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Thus, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Because the miner's coal mine employment was in Illinois, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

existence of simple and complicated pneumoconiosis, as instructed.[5] Dr. Perper diagnosed "[c]oal workers' pneumoconiosis, primarily of the interstitial pulmonary fibrosis type, with macules, micronodules and two adjacent macronodules measuring in aggregate more than 2.0 cm and consistent with complicated coal workers' pneumoconiosis." Director's Exhibit 50 at 27. Dr. Perper additionally stated that he saw silica crystals in the areas of fibrosis. Claimant's Exhibit 11 at 19. In contrast, Dr. Naeye opined that the miner had idiopathic pulmonary fibrosis, rather than simple or complicated pneumoconiosis, because tiny silica crystals are the only component of coal mine dust that causes fibrosis, and there was a "near absence" of such crystals in the miner's lungs. Employer's Exhibit 18 at 28, 54. Although Dr. Naeye observed the presence of lesions that he stated were large enough to qualify as complicated pneumoconiosis, he opined that the miner did not have complicated pneumoconiosis because the lesions were not associated with toxic silica. Employer's Exhibit 18 at 39-40.

The administrative law judge discounted the opinion of Dr. Perper, and concluded that claimant failed to establish the existence of any form of pneumoconiosis. Specifically, the administrative law judge found that Dr. Perper's opinion was undercut by his failure to address the computerized tomography (CT) scan and chest x-ray evidence, all of which was negative for simple and complicated pneumoconiosis, and by his failure to comment on, or respond to, Dr. Naeye's statement that a certain level of magnification is required to properly identify the presence of pneumoconiosis. Decision and Order on Remand at 13; Decision and Order on Second Remand at 13. The administrative law judge further found that Dr. Perper did not address the lack of a gross description of the lungs by the autopsy prosector, Dr. Johnson, or its impact, if any, on the relative credibility of the autopsy results. The administrative law judge also found that Dr. Perper failed to explain how pneumoconiosis could cause the rapid progression of fibrotic disease seen in the miner. *Id.* Finally, the administrative law judge questioned Dr. Perper's expertise, noting that, while Dr. Perper is a renowned pathologist, he works in an urban setting and does not deal primarily with cases involving coal worker's pneumoconiosis. *Id.*

Claimant argues that Dr. Perper's opinion is sufficient to establish the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(b). Claimant's Brief at 2-6. Claimant, however, alleges no error in regard to the administrative law judge's determination to discount Dr. Perper's opinion because he did not discuss the negative x-ray and CT scan evidence, or explain what level of magnification is needed to detect

[5] The administrative law judge also considered, and discounted, Dr. Caffrey's opinion that the miner had only simple pneumoconiosis. No party challenges this aspect of the administrative law judge's decision.

pneumoconiosis. Because the Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Moreover, claimant does not take issue with the administrative law judge's determination to discount Dr. Perper's opinion because he did not address whether the autopsy prosector's failure to provide a gross description of the lungs affected the credibility of the autopsy results, or explain how the rapid progression of the miner's fibrotic disease was consistent with a diagnosis of pneumoconiosis. Rather, claimant asserts that she should be allowed to supplement the record so that Dr. Perper may now address those issues. Claimant's Brief at 2.

It is well established that an administrative law judge is not bound to accept the opinion of any medical expert, but may weigh the medical evidence and draw his or her own inferences, *see Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). For the foregoing reasons, we affirm the administrative law judge's finding that claimant failed to establish that the miner suffered from complicated pneumoconiosis, pursuant to 20 C.F.R. §§718.304. If claimant has additional evidence she wishes to submit that she believes will address the shortcomings in Dr. Perper's opinion that were found by the administrative law judge, she may file a request for modification with the district director, pursuant to 20 C.F.R. §725.310.

## II. THE SURVIVOR'S CLAIM

To establish entitlement to survivor's benefits, claimant must prove 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In a survivor's claim filed on or after January 1, 1982, and before January 1, 2005, death will be considered to be 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 death was caused by complications of pneumoconiosis, or if the irrebuttable presumption related to complicated pneumoconiosis, provided 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 the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Peabody Coal*

*Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992).

Claimant raises the same arguments in the survivor's claim that she made in the miner's claim, asserting that Dr. Perper's opinion is sufficient to establish the existence of complicated pneumoconiosis, thus entitling claimant to the irrebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.304. Moreover, the opinions of Drs. Naeye and Perper submitted in the survivor's claim are the same as those submitted in the miner's claim. Because we have affirmed the administrative law judge's determination to discount the opinion of Dr. Perper, the only physician to diagnose the miner with complicated pneumoconiosis, we also affirm the administrative law judge's findings, in the survivor's claim, that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304, or death due to pneumoconiosis under 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits in the miner's claim, and Decision and Order on Second Remand Denying Benefits in the survivor's claim, are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge