

BRB No. 98-1500 BLA

MARY MACHAK)	
(Widow of ALBERT MACHAK))	
)	
Claimant-Respondent)	
)	
v.)	
)	
FLORENCE MINING COMPANY)	DATE ISSUED: <u>8/12/99</u>
)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Tulowitski & Bilonick), Ebensburg, Pennsylvania, for claimant.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: SMITH and BROWN, Administrative Appeal Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1918) of Administrative Law Judge Michael P. Lesniak awarding benefits 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). The administrative law judge credited the miner with forty-six years of coal mine employment and noted that employer conceded the existence of pneumoconiosis arising out of coal mine employment, Hearing Transcript at 7-8. Decision and Order at 2, 4. Applying the regulations at 20 C.F.R. Part 718, the administrative law

judge found that claimant¹ established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), citing *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Decision and Order at 8-10. Accordingly, benefits were awarded. On reconsideration, the administrative law judge found the date of entitlement to be July, 1996. Order Granting Reconsideration at 1.

On appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.205(c). Employer's Brief at 3-14. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.²

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.205(c), the administrative law judge accorded the "most weight" to the opinion of Dr. Rizkalla, the autopsy prosector, who found that the miner's simple coal workers' pneumoconiosis was a substantial contributing factor in his death, because this physician "had an opportunity to examine the Miner's lung tissue." Decision and Order at 9. The administrative law judge found the contrary opinions of Drs. Perper, Fino, Oesterling, and Sinnenberg to be entitled to "less weight as they do not contain a

¹Claimant is Mary Machak, widow of Albert Machak, who filed her claim for benefits on September 20, 1996. Director's Exhibit 1. The miner previously filed two claims for benefits on October 30, 1973 and January 5, 1983, which were finally denied on May 15, 1980 and June 24, 1992, respectively. Director's Exhibits 27, 30.

²We affirm the administrative law judge's findings regarding length of coal mine employment and the date of entitlement as they are unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

statement as to whether the tissue samples are representative of the total lung condition [or] whether they were stored properly,” as required by *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 BLR 1-103, 1-109 (1979). Decision and Order at 9. The administrative law judge also found Dr. Perper’s opinion to be entitled to less weight because it is not well reasoned or well documented. *Id.* Conversely, the administrative law judge found the opinions of Drs. Schaaf and Mittal to be well reasoned and well documented inasmuch as these physicians agree with the findings of the prosector. *Id.* Thus, the administrative law judge concluded that claimant established that the miner’s death was caused by pneumoconiosis. *Id.*

First, employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Perper, Fino, Oesterling, and Sinnenberg because these physicians did not comply with the standards outlined in *McLaughlin*. Employer’s Brief at 4-6. As support for its position, employer points to the Board’s later opinion in *Kerstetter v. Director, OWCP*, 9 BLR 1-42 (1986), in which the Board specifically held that *McLaughlin* does not establish a mandatory standard governing the reinterpretation of lung tissue samples. Employer’s Brief at 5. Employer further asserts that the quality of the slides was not an issue in this case inasmuch as the autopsy prosector testified regarding the slides’ quality.³ Employer’s Brief at 5-6.

Second, employer asserts that the administrative law judge irrationally applied the *McLaughlin* standard. Employer’s Brief at 6-8. Specifically, employer points out that neither Dr. Fino nor Dr. Sinnenberg reviewed the autopsy slides, and, therefore, neither physician could have commented as to the quality or representation of the slides. Employer’s Brief at 6. Employer further states that Dr. Oesterling, who did review the slides, commented that they “were of excellent technical quality and were more than adequate for interpretation,” Director’s Exhibit 21. Employer’s Brief at 7-8.

³Dr. Rizkalla stated that he followed the Archives of Pathology protocol in sampling, that the sampling represented random, different areas of the lung, and that the slides were technically proper, technically acceptable, and sufficient in number. Claimant’s Exhibit 2 at 18-19.

Employer's assertions have merit. It is not mandatory that a physician who reviews the autopsy slides comment on the quality of these slides, especially when their quality has not been questioned. *See Kerstetter, supra*. Rather, as the Board has held in *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992), an administrative law judge may not mechanically, without a valid explanation, accord greater weight to the opinion of the autopsy prosector over the contrary opinions of the reviewing pathologists simply on the grounds that the prosector had the benefit of performing a gross examination on the miner's lungs. Therefore, the administrative law judge improperly accorded greater weight to Dr. Rizkalla's opinion over the opinions of the physicians who reviewed the autopsy slides by not providing an adequate rationale for doing so.⁴ *See Urgolites, supra; Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Additionally, for the reasons employer asserts, the administrative law judge's basis for according less weight to the opinions of the physicians who did not review the slides is irrational. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see also Wojtowicz, supra; Tenney, supra*. Accordingly, we vacate the administrative law judge's Section 718.205(c) finding and remand this case for him to reconsider the relevant medical opinion evidence pursuant to this subsection. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Lukosevicz, supra; see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Additionally, employer asserts that the administrative law judge erred in finding Dr. Perper's opinion to be unreasoned and undocumented. Employer's Brief at 10-14. The administrative law judge found Dr. Perper's opinion to unreasoned and undocumented because he found that this physician who stated that the miner suffered from a severe lung disease due to pneumoconiosis "failed to adequately explain how such a severe lung condition did not contribute to the Miner's demise. . . given the fact that the Miner died from a pulmonary condition." Decision and Order at 9. Contrary to employer's assertions, the administrative law judge properly accorded less weight to Dr. Perper's opinion on the grounds that this physician inadequately explained his findings. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-

⁴The administrative law judge accorded greater to the opinions of Drs. Schaaf and Mittal because "they are in agreement with the findings of the prosector." Decision and Order at 9. However, because the administrative law judge's crediting of Dr. Rizkalla's opinion is flawed, *see discussion, supra*, his analysis regarding these two opinions is also undermined. Therefore, we vacate administrative law judge's findings regarding the opinions of Drs. Schaaf and Mittal as well.

149 (1989)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); see also *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673, 1-675 (1983).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge