

BRB No. 04-0249 BLA

JUSTINA KOHAN)
(Widow of PETER A. KOHAN))
)
 Claimant-Petitioner)
)
 v.)
)
 BETHENERGY MINES, INC.)
) DATE ISSUED: 12/14/2004
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of Decision and Order – Denying Benefits of Daniel L. Leland,
Administrative Law Judge, United States Department of Labor

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

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, L.L.C.),
Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order-Denying Benefits (03-BLA-5233) of
Administrative Law Judge Daniel L. Leland, on a survivor's claim for benefits 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 noted
that because employer stipulated that the miner had worked for forty years in coal mine

¹ Claimant is Justina Kohan, the widow of Peter A. Kohan, the miner, who died
on May 23, 2000. Director's Exhibit 6.

employment and employer stipulated that the miner had pneumoconiosis arising out of coal mine employment, the only issue in this case is the cause of the miner's death. The administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and denied benefits.

On appeal, claimant asserts that the administrative law judge did not provide valid reasons for rejecting the evidence she submitted and for according greater weight to the evidence submitted by employer. Employer responds, asserting that the administrative law judge has properly weighed the evidence regarding the cause of the miner's death and urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death.² 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203,

² 20 C.F.R. §718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- ...
- (5) 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)(1)-(3), (5).

718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. See 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

The administrative law judge accorded greater weight to the opinions of Drs. Hurwitz and Bush, than to the contrary opinions of Drs. Goldblatt and Perper, and therefore concluded that pneumoconiosis was not a contributing cause of the miner's death.³ Decision and Order at 5. On appeal, claimant asserts that the administrative law judge failed to provide rational explanations for rejecting the opinions of Drs. Goldblatt and Perper and claimant contends that the administrative law judge gave no valid reason for finding the opinions of Drs. Hurwitz and Bush to be persuasive.

³ Dr. Perper, who is Board-certified in Anatomic, Surgical and Forensic Pathology, opined that the miner had simple coal workers' pneumoconiosis, and associated centrilobular emphysema, resulting from his occupational exposure to coal mine dust, which contributed significantly to and hastened his death. Claimant's Exhibit 1. Dr. Perper opined that "primarily his death was respiratory in nature." Director's Exhibit 8; Claimant's Exhibit 1. Dr. Goldblatt, who is Board-certified in Anatomic and Clinical Pathology, performed the miner's autopsy with Dr. Zhang. In the clinicopathological summary to his autopsy report, Dr. Goldblatt stated that the miner died due to severe coronary artery disease and he stated that the immediate cause of death is possible cardiac arrhythmia. He noted additional findings including coal workers' pneumoconiosis and colonic adenocarcinoma. Director's Exhibit 7. After reviewing additional medical records, Dr. Goldblatt opined that significant chronic lung disease, due in large part to the miner's coal workers' pneumoconiosis, played a significant role in accelerating the miner's death. Director's Exhibit 9. In a 2003 deposition, Dr. Goldblatt opined that the miner's pneumoconiosis contributed to the miner's death. Claimant's Exhibit 2. Dr. Bush, who is Board-certified in Anatomic and Clinical Pathology and Medical Microbiology, reviewed the miner's death certificate and autopsy slides. It is Dr. Bush's opinion that the miner's death resulted from cardiovascular disease. Director's Exhibit 16; Employer's Exhibit 5. Dr. Hurwitz, who is Board-certified in Internal Medicine and Cardiovascular Disease, reviewed the miner's medical records and opined that he died of progressive congestive heart failure. Dr. Hurwitz opined that the miner's occupationally acquired pulmonary disease played no role in mediating his death. Director's Exhibit 16. When he was deposed, Dr. Hurwitz stated that the miner's cardiac condition was responsible for the sudden onset of hypoxia, heart failure and death. Employer's Exhibit 4.

As an initial matter, we agree with claimant that the administrative law judge has not provided a valid basis for his reliance on the opinion of Dr. Bush. The administrative law judge merely states “I find Dr. Bush’s opinion is also entitled to great weight.” Decision and Order at 5. The Administrative Procedure Act (APA), requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because the administrative law judge has not provided any explanation for finding that Dr. Bush’s opinion is entitled to greater weight, in violation of the APA, we vacate this finding. *See Wojtowicz*, 12 BLR at 1-165.

Turning to the administrative law judge’s findings regarding Dr. Goldblatt’s opinion, we affirm the administrative law judge’s finding that Dr. Goldblatt’s opinion lacks credibility and is therefore entitled to little weight. The administrative law judge reasonably questioned the prosecutor’s change in opinion regarding the cause of the miner’s death based on the prosecutor’s review of the miner’s medical records. *See* Decision and Order at 5; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *see also Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984).

We also affirm the administrative law judge’s finding that Dr. Hurwitz’s opinion is credible and entitled to greater weight as the administrative law judge reasonably determined that this opinion is well documented and reasoned, *see* Decision and Order at 5; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989), and consistent with the medical evidence, *see Clark*, 12 BLR 1-149; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). In addition, it was permissible for the administrative law judge to favorably note that Dr. Hurwitz is a Board-certified cardiologist, given the relevance of his credentials to his opinion, which focuses on the miner’s cardiac condition. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Warman v. Pittsburg and Midway Coal Mining Co.*, 4 BLR 1-601 (1982), *aff’d*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988).

However, we cannot affirm the administrative law judge’s findings with regard to Dr. Perper’s opinion. The administrative law judge accorded less weight to Dr. Perper’s opinion after finding that Dr. Perper did not explain how he determined that the miner’s centrilobular emphysema was caused by his forty years of coal mine employment, rather than his forty years of cigarette smoking. In addition, the administrative law judge found that Dr. Perper was “the only pathologist to find *significant* emphysema.” Decision and Order at 5 (emphasis added). The administrative law judge has not considered all of Dr. Perper’s opinion, in particular Dr. Perper’s statement that the miner’s coal workers’

pneumoconiosis contributed to the miner's death. Director's Exhibit 8; Claimant's Exhibit 1. Since the administrative law judge has not considered the entirety of Dr. Perper's opinion, we vacate the administrative law judge's findings regarding Dr. Perper's opinion, and remand the case for further consideration by the administrative law judge. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). In addition, we note that the administrative law judge's statement that Dr. Perper is the "only pathologist to find significant emphysema," Decision and Order at 5, is not supported by the record. In his written opinion, Dr. Perper describes "moderate to severe centrilobular emphysema" Director's Exhibit 8 (at page 20), and in his deposition Dr. Perper notes that the miner had "substantial centrilobular emphysema." Claimant's Exhibit 1 at 10. Dr. Goldblatt, who, like Dr. Perper, is a pathologist, stated that the miner's coal workers' pneumoconiosis "was an important factor in producing *significant pulmonary emphysema*." Director's Exhibit 9 (emphasis added). Thus, contrary to the administrative law judge's finding, Dr. Perper is not the only pathologist to diagnose significant emphysema.⁴ Because the administrative law judge has mischaracterized portions of the record, we vacate his findings regarding Dr. Perper's opinion and remand the case for further consideration of this medical opinion. *See Tackett*, 7 BLR 1-703. Consequently, we vacate the administrative law judge's finding that the evidence does not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).⁵

⁴ As the administrative law judge noted, in addition, Dr. Bush opined that there was localized central lobular emphysema, which was mild in degree, and which he considered an "insignificant finding." Employer's Exhibit 5; *see also* Director's Exhibit 16.

⁵ It was proper for the administrative law judge to consider the underlying basis of the coroner's conclusions regarding the cause of the miner's death, which the coroner provided in the death certificate, and we affirm the administrative law judge's finding that the death certificate does not constitute a reasoned medical opinion. *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge