

BRB No. 06-0282 BLA

BONNIE LEE HATFIELD)	
(Widow of ANSA HATFIELD))	
)	
Claimant-Respondent)	
)	
v.)	
)	
KENTLAND ELKHORN COAL)	
COMPANY)	DATE ISSUED: 12/15/2006
)	
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-Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Randy G. Clark (Clark & Johnson Law Offices), Pikeville, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order awarding survivor's benefits (04-BLA-6526) of Administrative Law Judge Daniel F. Solomon on a survivor's claim¹ filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

¹ Claimant, Bonnie Lee Hatfield, is the widow of the miner, Ansa Hatfield, who died on February 15, 2003. Director's Exhibit 12. Claimant filed her application for survivor's benefits on April 17, 2003. Director's Exhibit 3.

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found, as stipulated by the parties, that the miner worked in qualifying coal mine employment for seventeen years. The administrative law judge further found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b) and that the evidence also established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence was sufficient to establish the existence of pneumoconiosis, arguing that he improperly evaluated the autopsy and medical opinion evidence at 20 C.F.R. §718.202(a)(2). Employer also contends that the administrative law judge erred in finding that the evidence was sufficient to establish death due to pneumoconiosis, arguing that he impermissibly accorded greater weight to the opinions of Drs. Dennis and Bhagrath over the contrary opinions of Drs. Rosenberg and Repsher at 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if the evidence establishes that 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 presumption relating to complicated pneumoconiosis set forth at Section 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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes

entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge credited Dr. Dennis's diagnosis of pneumoconiosis on the autopsy report and supplemental letter, and discredited the opinion of Dr. Caffrey, that the miner did not suffer from pneumoconiosis and died from ischemic gangrenous bowel disease secondary to severe atherosclerosis affecting the blood vessels to the bowel.² Employer contends that the administrative law judge erred in his weighing of Dr. Caffrey's opinion, arguing that the administrative law judge: mistakenly determined that Dr. Caffrey's finding of anthracotic pigment in the lung was a finding of pneumoconiosis; improperly accorded greater weight to Dr. Dennis's report based on his status as the autopsy prosector; incorrectly determined that Dr. Caffrey's disagreement with Dr. Dennis's diagnosis of anthrosilicosis showed hostility to the concept of legal pneumoconiosis; and improperly found that Dr. Caffrey misstated the miner's medical record. Employer's Brief at 10-13. Employer's arguments have merit.

The administrative law judge found Dr. Caffrey's diagnosis of anthracotic pigment in the lungs due to coal dust exposure was "a positive finding of pneumoconiosis." Decision and Order at 7. Contrary to the administrative law judge's finding, Dr. Caffrey clearly stated that the slides showed only anthracotic pigment and that the lesions of pneumoconiosis were not present. Thus, the administrative law judge improperly found that the existence of clinical pneumoconiosis was established by Dr. Caffrey since the presence of anthracotic pigment, by itself, is insufficient to establish the presence of clinical pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111, (6th Cir. 1995); *see also Hapney v. Peabody Coal Co.*, 22 BLR 1-106 (2001)(*en banc*)(Smith and Dolder, JJ., dissenting in part and concurring in part); *Dagnan v. Blue Diamond Coal Mining Co.*, 994 F.2d 1536, 1541, 18 BLR 2-203, 2-209 (11th Cir. 1993); *Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989). Accordingly, we vacate the administrative law judge's finding that the autopsy evidence established the existence of clinical pneumoconiosis and remand the

² Dr. Caffrey reviewed the medical reports, autopsy report and lung tissue slides, and opined that the miner had: acute bronchiolitis with acute bronchopneumonia in the left lung with a small focus in the right lung; a mild to moderate amount of centrilobular emphysema; acute passive congestion of the lungs; and a mild amount of anthracotic pigment within the lung tissue and in the hilar lymph node tissue with focal fibrosis. Employer's Exhibit 6. Dr. Caffrey stated that he also did not agree with Dr. Dennis's diagnosis of pneumoconiosis, and that "the autopsy slides definitely do not show the lesions necessary to make a diagnosis of black lung disease." *Id.*

case for reconsideration of the evidence of the existence of pneumoconiosis. *Hapney*, 22 BLR 1-104.

In addition, an administrative law judge must provide an adequate rationale for deferring to the autopsy prosector's opinion over those of reviewing physicians. *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-22-23 (1992); see *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Here, the administrative law judge gave "greater weight" to Dr. Dennis's opinion than to Dr. Caffrey's opinion because Dr. Dennis performed the autopsy. Decision and Order at 7. In so finding, the administrative law judge did not explain the rationale for his conclusion that Dr. Dennis's ability to perform the autopsy gave him an advantage over Dr. Caffrey in determining whether pneumoconiosis was present, since both pathologists relied on the microscopic views of the slides. See *Urgolites*, 17 BLR at 1-23. Therefore, on remand the administrative law judge should reconsider the opinions and explain the rationale for his findings. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Urgolites*, 17 BLR at 1-23.

Moreover, the administrative law judge noted that Dr. Caffrey's "defensive posture" with respect to Dr. Dennis's diagnosis of anthrosilicosis, based on Dr. Caffrey's statement that in his experience Dr. Dennis "most always" finds pneumoconiosis, showed hostility to the concept of legal pneumoconiosis. Decision and Order at 7-8. The administrative law judge went on to conclude that Dr. Dennis's diagnosis, in light of the presence of anthracotic material "by all accounts," was better supported by the data than Dr. Caffrey's diagnosis. Decision and Order at 8. As employer maintains, the administrative law judge improperly found Dr. Caffrey's statements hostile to the Act, since the basis for discrediting the doctor is not valid, as neither physician diagnosed legal pneumoconiosis. 20 C.F.R. §718.201; see *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); *Jones v. Kaiser Steel Corp.*, 8 BLR 1-339 (1985); *Wetherill v. Green Construction Co.*, 5 BLR 1-248, 1-252 (1982) see also *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Furthermore, we are unclear why the administrative law judge found that Dr. Caffrey misstated the miner's medical record based on a diagnosis of "black lung" listed in a February 1, 1999, report. The record indicates that Dr. Caffrey acknowledged in his report that the "records in several places mention 'black lung.'" Employer's Exhibit 6.

In light of the above-referenced errors, and because the administrative law judge relied on his finding that pneumoconiosis was established in evaluating whether claimant established that the miner's death was due to pneumoconiosis, we also vacate the administrative law judge's findings at 20 C.F.R. §718.205(c) and remand this case for him to reconsider all of the medical opinion evidence thereunder, and to consider specifically the sufficiency of Drs. Dennis's and Bagrath's reports to establish that the miner's death was due to pneumoconiosis pursuant to the standards set forth by the United States Court of Appeals for the Sixth Circuit in *Williams*, 338 F.3d 501, 22 BLR 2-625 and *Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge