

BRB No. 08-0226 BLA

L.M. )  
(Widow of R.M.) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
OLGA COAL COMPANY )  
 ) DATE ISSUED: 12/29/2008  
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 Awarding Benefits – On Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits – on Remand (2004-BLA-5781) of Administrative Law Judge Thomas M. Burke 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). This case is before the Board for the second time.<sup>1</sup> In its prior Decision and Order, the Board vacated the

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<sup>1</sup>Claimant, L.M.M., is the widow of the miner, R.M., who died on January 6, 2002. Director's Exhibits 4, 11. Claimant filed a survivor's claim on September 9, 2002.

administrative law judge's finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). [*L.M.M.*] v. *Olga Coal Co.*, BRB No. 05-0839 BLA (Aug. 21, 2006) (unpub.). The Board held that the administrative law judge did not provide a valid basis for discounting the opinions of Drs. Baker and Alford, that the miner's death was due to pneumoconiosis, and remanded the case for reconsideration of the evidence relevant to Section 718.205(c). *Id.* The Board instructed the administrative law judge to consider the validity of the opinions of Drs. Baker and Alford<sup>2</sup> in accordance with the Administrative Procedure Act (APA), 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). *Id.*

On remand, the administrative law judge found that the opinions of Drs. Baker and Alford were well-reasoned and well-documented and sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b) and 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 alleges that the administrative law judge erred in finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), based upon the opinions of Drs. Alford, Baker and Purdum. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Worker's Compensation Programs, has declined to participate in this appeal.<sup>3</sup>

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Director's Exhibit 4. The full procedural history of this case is found in the Board's prior Decision and Order. [*L.M.M.*] v. *Olga Coal Co.*, BRB No. 05-0839 BLA (Aug. 21, 2006) (unpub.), slip op. at 1-2.

<sup>2</sup> The Board held both that the administrative law judge mischaracterized Dr. Baker's report, by finding that Dr. Baker's diagnosis of "legal" pneumoconiosis was based on a May 30, 1997 pulmonary function study that is not in the record, and that he incorrectly determined that Dr. Alford offered no support for his opinion that the miner suffered from pneumoconiosis. [*L.M.M.*], slip op. at 4. n.7. The Board instructed the administrative law judge to reconsider whether the opinions of Drs. Baker and Alford were sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.201, and that pneumoconiosis was a contributing cause of the miner's death. *Id.*

<sup>3</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of sixteen years of coal mine employment and that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20

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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act 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, claimant must establish 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Pursuant to Section 718.205(c), the administrative law judge considered the death certificate, records from the miner's terminal hospitalization and the medical opinions of Drs. Purdum, Alford, Baker and Fino. Decision and Order at 5-9. Dr. Taylor prepared the death certificate and identified the immediate cause of death as "coronary disease/valvular heart disease." Director's Exhibit 11. Dr. Taylor also listed liver failure and renal failure as conditions contributing to the immediate cause of death. *Id.* The hospital records, which pertain to the miner's final admission for treatment of exacerbation of cirrhosis of the liver, contain notes prepared by Dr. Lohrmann. Dr. Lohrmann examined the miner seven days before his death and indicated that the miner "had been on the transplant list, but most recently has been removed from that list secondary to the ongoing quandary about his heart." Claimant's Exhibit 6. Dr. Lohrmann further stated "[the miner's] heart was not good enough to do the liver transplant, but not bad enough to do surgery to fix his heart to get him ready to do the

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C.F.R. §§718.202(a)(1), (4), 718.203(b). *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 5.

<sup>4</sup> Since the miner's last coal mine employment was in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-201 (1989) (*en banc*); Director's Exhibit 2.

liver transplant. His liver was too bad to do the heart. It was an ongoing viscous [sic] circle.” *Id.*

Dr. Purdum, a Board-certified gastroenterologist, began treating the miner in November 1998 for cirrhosis of the liver. Claimant’s Exhibit 4. In a letter dated September 4, 2003, Dr. Purdum stated:

[The miner] had progressive liver failure over time, which was complicated by coronary artery disease. He was also known to have worsening pulmonary disease and ultimately became medically not a candidate for transplantation. Only a transplant would have provided him the opportunity for long-term survival. Spirometry dating back to May 1997 confirmed moderate to severe pulmonary disease . . . [The miner] ultimately had multiple medical problems which prevented him from being transplanted.

*Id.*

Dr. Alford submitted reports dated May 29, 1997, August 27, 2002 and a letter dated October 16, 2002, as well as his treatment notes and the miner’s objective test results. Claimant’s Exhibit 5. In his May 29, 1997 report, Dr. Alford, who is a Board-certified pulmonologist, diagnosed “a combination of black lung and possible asbestosis” and possible sleep apnea. *Id.* In his August 27, 2002 report, Dr. Alford indicated that the miner’s pulmonary function studies showed severe restrictive lung disease and a decreased DLCO, which measures the diffusing capacity of the lungs for carbon monoxide. Dr. Alford also noted that, beginning in January 2001, the miner was being treated by Dr. Petrozza for cryptogenic cirrhosis and was placed on the liver transplant list. *Id.* In a letter dated October 16, 2002, Dr. Alford stated:

Although [the miner] was placed on a transplant list to receive a liver transplant, his significant pulmonary disease, made him a poor candidate for liver transplantation. Had he been able to receive a liver transplant, he would probably still be living. We believe that the black lung disease precluded his receiving a liver transplant, and thus contributed significantly to his early demise.

Claimant’s Exhibit 5.

Dr. Baker, a Board-certified pulmonologist, reviewed the record and prepared a report dated February 3, 2005. Claimant’s Exhibit 1. Dr. Baker diagnosed both clinical and legal pneumoconiosis, based on sixteen years and two months of coal mine work, a positive x-ray dated December 14, 1990, and the results of a May 30, 1997 pulmonary

function study that he found were consistent with a moderate restrictive defect. *Id.* Dr. Baker determined that the miner's pulmonary disease was related to his coal dust exposure. He stated:

It would appear that while [the miner] did die of coronary artery disease and valvular heart disease[,] . . . his lung disease probably increased his oxygenation difficulties and increased his shortness of breath and made it more difficult for him to survive for a longer period of time. I cannot quantitate [sic] how much longer he would have lived if he did not have lung disease and had only the coronary artery disease and/or valvular heart disease, but I feel certain that his death was hastened by the combination of cardiac and pulmonary diseases.

*Id.* Dr. Baker further indicated that “[i]t was also felt from reviewing the records that with his lung problem, he would be a poor candidate for liver transplantation, [and] thus did not [get] the opportunity to improve and/or get better.” *Id.*

Dr. Fino reviewed the miner's work history, a positive reading of an x-ray dated November 30, 1990, pulmonary function studies performed on March 22, 1994, the death certificate, and Dr. Alford's August 27, 2002 report and October 16, 2002 letter. Employer's Exhibit 1. Dr. Fino concluded that the results of the pulmonary function studies were “normal,” and that the medical records were insufficient to determine the presence or absence of a coal mine dust-related disease. *Id.* Dr. Fino further stated:

There is insufficient medical evidence based on the information reviewed to ascertain the exact cause of death. However, I would note that the medical record review dated 8/27/02 and the medical letter dated 10/16/02 did not provide any objective evidence that lung disease, regardless of etiology, caused, contributed to, or hastened [the miner's] death.

*Id.*

The administrative law judge considered this evidence at Section 718.205(c) and determined that the death certificate and hospital treatment notes “do not identify pulmonary function problems as contributors to the [miner's] death.” Decision and Order at 5. With respect to the medical opinion evidence, the administrative law judge found that Drs. Purdum, Alford and Baker “all identified [the miner's] pulmonary disease as a factor in his death” because it was “a key factor in his inability to receive a liver transplant,” which, “presented the only viable long term hope for [the miner].” *Id.* at 6, 7. The administrative law judge noted that because Drs. Purdum and Alford had treated the miner for his pulmonary and liver conditions respectively, they “could observe their patient's deterioration over time” and that “it was necessary for both physicians to be

aware of and consider [the miner's] pulmonary condition.” *Id.* The administrative law judge concluded, therefore, that their awareness of the necessity of a liver transplant “was borne out of first-hand knowledge.” *Id.* at 7.

The administrative law judge also indicated that, in compliance with the Board's remand instructions, he had considered the equivocal language that appeared in the reports of Drs. Alford and Baker. With respect to Dr. Alford, the administrative law judge found that he did not “equivocate when he stated that the black lung disease precluded [the miner] from receiving a liver transplant.” Decision and Order at 8. Similarly, the administrative law judge determined that Dr. Baker's ultimate conclusion regarding the cause of the miner's death was not equivocal, as Dr. Baker had stated “I feel certain that [the miner's] death was hastened by the combination of cardiac and pulmonary diseases.” *Id.*, quoting Claimant's Exhibit 1.

With respect to Dr. Fino's opinion, the administrative law judge stated:

Dr. Fino's opinion on the cause of death suffers from the same problem as his opinion on the existence of pneumoconiosis. He offered his opinion on an incomplete record, that is, he failed to consider evidence relevant to [the miner's] medical condition at the time of death. He did not have the benefit of reviewing the December 1990 film that was also universally read as positive for pneumoconiosis, and, while he had one pulmonary function study that showed normal pulmonary capacity, he did not consider later pulmonary function tests that evidenced a pulmonary deficit.

*Id.* at 7. The administrative law judge also found that “Dr. Fino's opinion on causation is weakened by the fact that he failed to diagnose the disease that the other physicians found to be a factor in [the miner's] death, that is, pneumoconiosis.” *Id.* Based upon his findings with respect to relevant medical evidence, the administrative law judge determined that the opinions of Drs. Alford and Baker as supported by the opinion of Dr. Purdum, “lead to a conclusion that claimant has proven by a preponderance of the evidence that [the miner's] death was substantially contributed to by pneumoconiosis.” *Id.* at 8.

Employer argues that the administrative law judge erred in determining that the opinions of Drs. Purdum, Alford and Baker established that coal workers' pneumoconiosis hastened the miner's death because it prevented him from receiving a liver transplant. Employer maintains that the connection “is far too tenuous to establish entitlement to benefits under the applicable law,” and that it “requires many assumptions,” including “the assumption that pneumoconiosis/lung disease alone prevented [the miner] from receiving a liver transplant,” and that the transplant “actually would have prolonged the miner's life.” Employer's Brief at 5. Employer also argues

that the administrative law judge did not adequately consider the equivocal language of the medical opinions of Drs. Alford and Baker.

These contentions are without merit. In the present case, the administrative law judge was required to address conflicting medical opinions regarding whether pneumoconiosis played a role in the miner's death. As fact-finder, the administrative law judge is granted broad discretion in assessing the relative probative value of the medical opinion evidence and the Board cannot substitute its determinations for those rendered by the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). We hold that the administrative law judge acted within his discretion as fact-finder in determining that Dr. Fino's opinion "cannot suffice as substantial evidence" under Section 718.205(c). Decision and Order at 7, quoting *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006). The administrative law judge rationally found that Dr. Fino's opinion was based on an incomplete record, as he did not consider information relevant to the miner's medical condition at the time of death, including a December 1990 x-ray that was "universally read as positive for pneumoconiosis," and a 1997 pulmonary function study that showed a pulmonary impairment. *Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 7; Employer's Exhibit 1. In addition, the administrative law judge permissibly determined that "Dr. Fino's opinion on causation is weakened" because, contrary to the administrative law judge's finding at Section 718.202(a), which employer has not challenged on appeal, Dr. Fino did not diagnose pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-709 (4th Cir. 1995); Decision and Order at 7; Employer's Exhibit 1. We affirm, therefore, the administrative law judge's discrediting of Dr. Fino's opinion on the issue of death due to pneumoconiosis pursuant to Section 718.205(c).

Regarding the administrative law judge's weighing of the opinions of Drs. Purdum, Alford and Baker at Section 718.205(c), we hold that the administrative law judge did not abuse his discretion as fact-finder in determining that this evidence was sufficient to establish that pneumoconiosis hastened the miner's death. The United States Court of Appeals for the Fourth Circuit has held that a claimant can establish that pneumoconiosis was a contributing cause of the miner's death if it hastened the miner's death in any way. *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996); *see also Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-2-93. In *Piney Mountain Coal v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), the court considered whether the administrative law judge erred in determining that a physician's opinion that

pneumoconiosis “could be considered a complicating factor” was sufficient to establish that pneumoconiosis hastened the miner’s death. 176 F.3d at 763, 21 BLR at 2-605. Observing that “[c]laimants need not prove entitlement beyond a doubt, but rather by a simple preponderance of the evidence,” 176 F.3d at 763, 21 BLR at 2-604, the court held that substantial evidence supported the administrative law judge’s action. 176 F.3d at 764, 21 BLR at 2-605. The court indicated that it was reasonable to understand the physician’s use of a qualifying term as “acknowledging the uncertainty inherent in medical opinions, while nevertheless offering a positive opinion about [the miner’s] cause of death.” 176 F.3d at 763, 21 BLR at 2-605. The court further noted that the “full context” of the physician’s opinion revealed that he set forth additional conclusions regarding the cause of the miner’s demise with more certitude and that these conclusions were either corroborated, or uncontradicted, by the remaining evidence of record. 176 F.3d at 763, 21 BLR at 2-605-606.

Consistent with the court’s reasoning in *Mays*, we affirm the administrative law judge’s determination that pneumoconiosis hastened the miner’s death. The administrative law judge’s ultimate conclusion under Section 718.205(c) was premised upon four factual findings that are either unchallenged on appeal, or are rational and supported by substantial evidence. The administrative law judge initially found, based upon a preponderance of the x-ray and medical opinion evidence, that the miner had both clinical and legal pneumoconiosis. Decision and Order at 4-5. We have affirmed this finding as unchallenged on appeal. Slip op. at 2 n.3. The administrative law judge further determined that the opinions of Drs. Alford and Baker included credible diagnoses of a pulmonary impairment, based upon the results of pulmonary function studies obtained on May 30, 1997, and that Dr. Baker’s attribution of this impairment to coal dust exposure was adequately reasoned and documented. Decision and Order at 4. Because employer has not challenged this aspect of the administrative law judge’s weighing of the opinions of Drs. Alford and Baker, we affirm the administrative law judge’s findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge also found that “a liver transplant presented the only viable long term hope for [the miner]” and that the miner’s pulmonary disease “render[ed] him ineligible to receive” a liver. Decision and Order at 8. These findings are supported by substantial evidence, as Drs. Purdum, Alford, and Baker all opined that at the time of his hospitalization for exacerbation of cirrhosis, a liver transplant was necessary for the miner to survive and Drs. Alford and Baker indicated that the miner could not undergo the procedure due to his pulmonary condition.<sup>5</sup> In addition, the

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<sup>5</sup> Dr. Purdum stated “[o]nly a transplant would have provided him the opportunity for long-term survival.” Claimant’s Exhibit 4. Dr. Alford reported that “[h]ad he been able to receive a liver transplant, [the miner] would probably still be living. We believe that the black lung disease precluded his receiving a liver transplant, and thus contributed



administrative law judge rationally determined that the opinions of Drs. Purdum and Alford in this regard were supported by their familiarity with the miner's pulmonary condition and their opportunity to observe the miner's deterioration. *Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *see also Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994); *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992); Decision and Order at 7.

We also reject employer's contention that the administrative law judge did not adequately address the equivocal language in the opinions of Drs. Alford and Baker. The administrative law judge acknowledged that Dr. Alford indicated that the miner "probably" would still be living if he had received a liver transplant. Decision and Order at 8; Claimant's Exhibit 5. The administrative law judge rationally found, however, that any ambiguity in Dr. Alford's opinion was remedied by the preceding sentence in his letter dated October 16, 2002, in which Dr. Alford stated that he was "certain" that "although [the miner] was placed on a transplant list to receive a liver transplant, his significant pulmonary disease made him a poor candidate for liver transplantation." *Mays*, 176 F.3d at 763, 21 BLR at 2-605; Decision and Order at 8; Claimant's Exhibit 5. Similarly, although Dr. Baker opined that the miner's "lung disease probably increased his oxygenation difficulties and increased his shortness of breath and made it more difficult for him to survive for a longer period," the administrative law judge permissibly found Dr. Baker's overall opinion unequivocal, based upon his statement that "I feel certain that [the miner's] death was hastened by the combination of cardiac and pulmonary diseases." *Mays*, 176 F.3d at 763, 21 BLR at 2-605; Decision and Order at 8; Claimant's Exhibit 1.

Finally, there is no merit in employer's allegation that Dr. Lohrmann's hospital treatment notes establish that the administrative law judge's finding under Section 718.205(c) is not supported by substantial evidence. Dr. Lohrmann reported that a liver transplant was problematic given the miner's renal insufficiency and heart disease, but did not identify pneumoconiosis or pulmonary disease as conditions preventing the miner from receiving a liver transplant. Claimant's Exhibit 6. Employer maintains that the administrative law judge did not address whether, in light of Dr. Lohrmann's statements, the miner's "renal insufficiency, heart disease and other medical problems" would have precluded a liver transplant, regardless of the miner's pulmonary condition. Employer's Brief at 6. The administrative law judge, within a proper exercise of his discretion, found

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significantly to his early demise." Claimant's Exhibit 5. Dr. Baker stated "[i]t was also felt from reviewing the records that with his lung problem, [the miner] would be a poor candidate for liver transplantation, [and] thus did not [get] the opportunity to improve and/or get better." Claimant's Exhibit 1.

that the treatment records concerning the miner's death, including Dr. Lohrmann's notes, are not inconsistent with the conclusion that pneumoconiosis hastened the miner's death, albeit as a secondary not a primary cause of death. *Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335; *Akers*, 131 F.3d at 441; Decision and Order at 7. We affirm, therefore, the administrative law judge's finding that claimant established, by a preponderance of the evidence, that the miner's death was hastened by pneumoconiosis as required under Section 718.205(c). *Mays*, 176 F.3d at 763, 21 BLR at 604; *Richardson*, 94 F.3d at 164, 21 BLR at 2-378; *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-2-93.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits – On Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge