

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0205 BLA

LORETTA I. MEADE)
(Widow of JAMES MEADE))
)
 Claimant-Respondent)
)
 v.)
)
 TALMAN, INCORPORATED)
)
 and)
)
 AMERICAN RESOURCES INSURANCE) DATE ISSUED: 12/13/2016
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 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 of Adele Higgins Odegard,
Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg,
Kentucky, for claimant.

Tighe A. Estes (Fogle Keller Purdy PLLC), Lexington, Kentucky, for
employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2010-BLA-05592) of Administrative Law Judge Adele Higgins Odegard awarding benefits on a survivor's claim¹ filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In her initial Decision and Order, the administrative law judge credited the miner with a total of 22.32 years of coal mine employment. Finding that the miner worked in underground coal mine employment for 13.4 years and that the conditions in his surface mine employment were not substantially similar to those in an underground mine, the administrative law judge determined that claimant, the miner's widow, was not entitled to invocation of the rebuttable presumption that the miner was totally disabled due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge found that while claimant failed to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, she established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's determinations regarding the length of the miner's coal mine employment, that complicated pneumoconiosis was not established pursuant to Section 718.304, and that the existence of clinical pneumoconiosis arising out of coal mine employment was established pursuant to Sections 718.202(a)(2) and 718.203(b) as unchallenged. In addition, the Board affirmed the administrative law judge's determinations that the miner's work for employer satisfied the regulatory definition of a miner pursuant to 20 C.F.R. §725.202 and that employer was the properly designated responsible operator.

Addressing the merits of entitlement, however, the Board vacated the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis at Section 718.205(c). The Board held that the administrative law

¹ The miner's claim for benefits, filed on September 8, 1978, was finally denied by the district director on May 1, 1980. The miner died on November 25, 2008, Director's Exhibit 18, and claimant, the miner's widow, filed her survivor's claim on June 23, 2009. Director's Exhibit 2.

judge did not adequately explain why she found that Dr. Dennis' opinion was well-reasoned and supported by the medical evidence of record, or why she found that his gross examination of the miner's lung tissue gave him an advantage over Dr. Caffrey, a reviewing pathologist, in providing a more credible assessment regarding the existence of pulmonary emboli. Because the record contains evidence of congestive heart failure, the Board further held that the administrative law judge erred in finding that Dr. Caffrey's opinion that the miner had congestive heart failure was unsupported by the record. Accordingly, the Board vacated the award of benefits and remanded the case for further consideration. *Meade v. Talman, Inc.*, BRB No. 12-0379 BLA (Apr. 30, 2013) (unpub.). Subsequently, employer filed a Motion for Reconsideration, which the Board denied. *Meade v. Talman, Inc.*, BRB No. 12-0379 BLA (Nov. 5, 2013) (unpub. Order).

While the case was pending on remand, employer submitted a request that the administrative law judge take official notice that Dr. Dennis agreed to surrender his license to practice medicine before the Kentucky Board of Medical Licensure for a period of not less than two years pursuant to an Agreed Order of Surrender dated January 17, 2013. By Order dated April 25, 2014, the administrative law judge granted employer's request and "informed the parties that [she] would take official notice of the Agreed Order of Surrender pertaining to Dr. Dennis' medical license." Decision and Order on Remand at 5.

On remand, the administrative law judge found that the documents concerning the surrender of Dr. Dennis' medical license did not influence her weighing of his opinion. Addressing the merits of the case, the administrative law judge again accorded determinative weight to Dr. Dennis' opinion, and found that claimant affirmatively established that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205. Accordingly, the administrative law judge again awarded benefits.

In the present appeal, employer contends that the administrative law judge erred in finding that the opinion of Dr. Dennis was more credible than that of Dr. Caffrey with regard to the autopsy evidence. Employer also argues that the administrative law judge erred in crediting the opinion of Dr. Dennis over the contrary opinions of Drs. Caffrey and Broudy in finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not intend to participate in this appeal.

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.² 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, 363 (1965).

Employer initially challenges the administrative law judge’s failure to assign less weight to the opinion of Dr. Dennis based on the suspension of Dr. Dennis’ license to practice medicine by the Kentucky Board of Medical Licensure on January 17, 2013. Employer avers that Dr. Dennis’ “dishonorable, unethical, [and] unprofessional conduct of character likely to deceive, defraud or harm the public” clearly undermines the veracity of any pathological report Dr. Dennis rendered. Employer’s Brief at 6. Similarly, employer maintains that because Dr. Dennis engaged in fraudulent behavior and immoral acts, “the integrity of his practice as a pathologist” is tainted, contrary to the administrative law judge’s determination. *Id.*

The administrative law judge stated that she considered the evidence of record pertaining to Dr. Dennis’ conduct,³ and “note[d] that the alleged misconduct occurred in 2011 and 2012, several years after Dr. Dennis performed the autopsy on the Miner” in this case. Decision and Order on Remand at 5. In evaluating the credibility of Dr. Dennis’ opinion, the administrative law judge determined that the documentation regarding Dr. Dennis’ conduct did not relate to his integrity in practicing pathological medicine, in administering autopsies, or in preparing autopsy reports. Additionally, the administrative law judge observed that the documents did not demonstrate that Dr. Dennis “lied or impeded the state licensing authority’s investigation” of this matter. *Id.* The administrative law judge concluded, therefore, that neither the Agreed Order to Surrender nor the allegations of professional misconduct affected the credibility of Dr. Dennis’ opinion. *Id.*

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner’s coal mine employment was in Kentucky and Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director’s Exhibits 1, 3.

³ The evidence relevant to Dr. Dennis’ misconduct consists of an Emergency Order of Suspension dated August 17, 2012 and an Agreed Order to Surrender dated January 17, 2013, both of which were issued by the Kentucky Board of Medical Licensure. The Emergency Order of Suspension and Agreed Order to Surrender alleged that between March 2011 and April 2012, Dr. Dennis improperly prescribed controlled substances to one or more patients, and engaged in inappropriate conduct with one of those patients.

The administrative law judge is charged with determining the credibility of witnesses, and her findings must be upheld if they are supported by substantial evidence. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Under the facts of this case, we hold that the administrative law judge permissibly found that the allegations against Dr. Dennis and the suspension of his medical license, for reasons unrelated to this case or his expertise in pathology, did not diminish the credibility of his autopsy report.

Employer next maintains that the administrative law judge disregarded the Board's remand instructions requiring her to address the credentials of the physicians. Specifically, employer argues that the administrative law judge erred in finding that Dr. Caffrey is not a Board-certified pathologist because Dr. Caffrey's curriculum vitae, which employer attached to its brief on remand, demonstrates that Dr. Caffrey was certified with the American Board of Pathology and holds a lifetime certification with that institution. Employer acknowledges that the administrative law judge declined to admit Dr. Caffrey's curriculum vitae into evidence, but argues that she relied on an incorrect assumption that Dr. Caffrey lacks Board certification, resulting in her assignment of less weight to his opinion. Employer's Brief at 4-5.

The administrative law judge acknowledged that she had the discretion to re-open the record to receive additional evidence on remand. Decision and Order on Remand at 5; *see White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1985). However, as employer "did not submit a motion to re-open the record, but rather merely appended Dr. Caffrey's curriculum vitae to the brief," Decision and Order on Remand at 5 n.10, the administrative law judge permissibly declined to admit this document into the record.⁴ *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989) (en banc). Employer does not challenge the administrative law judge's exclusion of Dr. Caffrey's curriculum vitae from the record, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), but now requests that "the Court take Judicial Notice . . . that certificate holders prior to 01/01/2006, such as Dr. Caffrey, hold lifetime certification with the American Board of Pathology." Employer's Brief at 4 n.1. Initially, we reject employer's request to take official notice of the evidence pertaining to Dr. Caffrey's credentials. Each party has the burden to establish the credentials of its experts. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-140 (1990). A review of the record reflects that employer never requested that the administrative law judge take official notice of this

⁴ The administrative law judge noted that "Dr. Caffrey's professional qualifications [were] not of record" during her original adjudication of this case, and that she presumed he is a pathologist, albeit not Board-certified, "based on his letterhead." Decision and Order on Remand at 4 n.7; Decision and Order at 14 n.16.

evidence. Therefore, employer's request is not properly before us. *See Maddaleni*, 14 BLR at 1-139, *citing* Administrative Procedure Act (APA), 5 U.S.C. §556 (e), as incorporated into the Act by 30 U.S.C. §932 (a). In this case, the administrative law judge properly determined that, although the record indicated that both Dr. Dennis and Dr. Caffrey are pathologists, "only Dr. Dennis, according to the record, holds a Board certification in this discipline." Decision and Order on Remand at 5. Consequently, the administrative law judge permissibly accorded greater weight to Dr. Dennis' opinion, "based on his greater professional credential." *Id.*; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Lastly, employer asserts that the administrative law judge provided invalid reasons for finding that Dr. Dennis' opinion that pneumoconiosis was a substantially contributing cause of the miner's death was more credible than the contrary opinions of Drs. Caffrey and Broudy that the miner's death was unrelated to pneumoconiosis. Employer's Brief at 7-8. We disagree.

In evaluating the conflicting medical opinions, the administrative law judge acknowledged the Board's directive on remand to address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. Decision and Order on Remand at 3 n.4, *citing Meade, slip op.* at 8. She determined that, in his gross description, Dr. Dennis, the autopsy prosector, described a pulmonary embolism measuring ten by seven by five centimeters in the miner's left lung and an embolus in the right lung measuring seven by ten by five centimeters. He also identified various microscopic slides showing pulmonary congestion, edema, emphysema, simple pneumoconiosis, and areas of pulmonary embolus formation. Dr. Dennis concluded that pneumoconiosis restricted the miner's airflow and his ability to exchange carbon dioxide for oxygen, resulting in hypoxia and the pulmonary embolus which caused his death. Decision and Order on Remand at 7-8; Director's Exhibits 20, 21.

The administrative law judge determined that Dr. Dennis' opinion could not be reconciled with that of Dr. Caffrey.⁵ Dr. Caffrey reviewed the autopsy report and stated

⁵ Pursuant to the Board's remand instructions, the administrative law judge assessed whether Dr. Caffrey's conclusion that the miner had congestive heart failure was supported by the record. The administrative law judge acknowledged that the record contained evidence that the miner had congestive heart failure, but correctly found that Dr. Caffrey did not render an opinion as to whether this condition contributed to the miner's death. Decision and Order on Remand at 7.

that he could not identify any ante-mortem pulmonary embolus or thromboembolus on the slides, although he agreed that the slides showed acute passive congestion, pulmonary edema, emphysema and simple pneumoconiosis. Employer's Exhibit 1 at 2, 4. Noting that Dr. Caffrey did not indicate whether the slides showed post-mortem pulmonary emboli or no pulmonary embolus at all, whereas Dr. Dennis examined the miner's lungs *in situ* and provided precise measurements and locations of emboli on gross examination, the administrative law judge permissibly found that Dr. Dennis, a Board-certified pathologist, was more credible than Dr. Caffrey, whose qualifications were not contained in the record. Decision and Order on Remand at 5-6; see *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-23 (1992); *Gruller v. BethEnergy Mines, Inc.*, 16 BLR 1-3 (1991); *Dillon*, 11 BLR at 1-114.

The administrative law judge further found that Dr. Dennis' opinion was bolstered by Dr. Broudy's opinion that the miner's "acute massive pulmonary embolism...certainly was a major factor in his death if not the sole cause of his death," as well as by the notation in the miner's hospitalization records by Drs. Ebeo and Hilario that the miner's "grave condition could be related to pulmonary embolism." Decision and Order on Remand at 6; Director's Exhibit 30. Similarly, the administrative law judge found that Dr. Dennis' conclusion that the miner's pneumoconiosis caused hypoxia and "significantly contributed to his death by restricting his air flow and ability to exchange carbon dioxide for oxygen," Director's Exhibit 21, was supported by the miner's medical records. The administrative law judge noted that the miner's final hospitalization records documented respiratory failure and hypoxia immediately prior to his death, and that his 2007 post-surgical treatment records showed that the miner had "experienced respiratory failure (and hypoxia) on at least one occasion in the past." Decision and Order on Remand at 8; Director's Exhibit 30. Hence, the administrative law judge reasonably concluded that Dr. Dennis' opinion that the miner's pneumoconiosis was a contributing factor to pulmonary embolus formation, which directly caused his death, was well-reasoned, supported by objective medical evidence, and entitled to greater weight than the contrary opinion of Dr. Caffrey. See *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

With respect to Dr. Broudy's opinion that "[a]t most [the miner had] microscopic coal workers [sic] pneumoconiosis which would not have been expected to cause or contribute to his death," Director's Exhibit 31, the administrative law judge noted that Dr. Broudy reviewed the miner's medical treatment records and Dr. Dennis' autopsy report. Decision and Order on Remand at 7-8. Since Dr. Broudy did not refute Dr. Dennis' assertion that pneumoconiosis contributed to the development of the miner's hypoxia and pulmonary embolus formation, or explain why it was incorrect, the administrative law judge permissibly found that the opinion of Dr. Dennis was more persuasive and entitled to greater weight. *Id.*; see *Consolidation Coal Co. v. Worrell*, 27

F.3d 227, 18 BLR 2-290 (6th Cir. 1994). As the administrative law judge's findings and inferences are supported by substantial evidence, we affirm her finding that claimant established that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding survivor's benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge