

BRB No. 98-0399 BLA

VIRGINIA G. KURCABA	)	
(Widow of GEORGE F. KURCABA)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order on Remand of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (93-BLA-0456) of Administrative Law Judge Jeffrey Tureck denying benefits on a 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, a miner's duplicate claim now being advanced by the miner's widow, is before the Board for the second time. We discussed fully this claim's lengthy procedural history in our previous decision on appeal. *Kurcaba v. Consolidation Coal Co.*, BRB No. 94-2606 BLA at 1-2 (May 31,

1995)(unpub.) We now focus only on those procedural aspects relevant to the arguments raised in this appeal.

In a Decision and Order issued on June 3, 1994, Administrative Law Judge Jeffrey Tureck (the administrative law judge) accepted employer's concession that the autopsy evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), and noted that a different administrative law judge in an earlier decision found that the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). [1994] Decision and Order at 2; [1990] Decision and Order at 8. However, the administrative law judge concluded that the medical evidence developed after the April 16, 1992 autopsy of the miner failed to establish that the miner's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, he denied benefits.

On appeal, the Board held that the administrative law judge erred by limiting his inquiry to the evidence developed since the autopsy. [1995] *Kurcaba*, slip op. at 3-4. Therefore, the Board vacated his Section 718.204(b) finding. Further, because some of the physicians whose opinions the administrative law judge credited disbelieved the miner's reported smoking history and opined that smoking caused his disabling respiratory impairment, the Board instructed the administrative law judge to resolve the conflicting evidence regarding the miner's cigarette smoking history. *Id.* Accordingly, the Board remanded the miner's claim for the administrative law judge to make a specific finding regarding the miner's smoking history and to consider all of the relevant evidence regarding the cause of his disability.<sup>1</sup>

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<sup>1</sup> At this stage of the proceedings, a survivor's claim denied by the administrative law judge was associated with the miner's claim. The Board rejected claimant's sole allegation of error in the administrative law judge's analysis of the survivor's claim and affirmed the otherwise unchallenged denial of the survivor's claim. [1995] *Kurcaba*, slip op. at 4-5. Subsequently, the Board denied the parties' motions for reconsideration of its decision remanding the miner's claim. *Kurcaba v.*

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*Consolidation Coal Co.*, BRB No. 94-2606 BLA (Aug. 13, 1997)(Order *en banc*)(unpub.).

On remand, the administrative law judge again declined to discuss the pre-autopsy disability causation evidence. The administrative law judge stated that the pre-autopsy evidence was “no longer probative” because the autopsy diagnosis of pneumoconiosis “fundamentally changed the complexion of the medical evidence.” [1997] Decision and Order on Remand at 1. As he did in his previous decision, the administrative law judge accorded determinative weight to Dr. Kleinerman's opinion that the miner's pneumoconiosis did not contribute to his total respiratory disability. [1997] Decision and Order on Remand at 2. The administrative law judge then considered some but not all of the evidence regarding the miner's cigarette smoking history, found that the miner's and the widow's testimony on this issue was incredible, and concluded that the miner smoked “at least a third of a pack of cigarettes daily for between 35 and 40 years.” *Id.* The administrative law judge found that “such a lengthy smoking history adds to the weight of Dr. Kleinerman's opinion, since it provides a clear basis for the miner's disabling emphysema.” *Id.* Accordingly, the administrative law judge again denied benefits.

On appeal, claimant contends that the administrative law judge failed to comply with the Board's remand instructions. Claimant's Brief at 4-5. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this case.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

It is established that the miner had pneumoconiosis arising out of coal mine employment and suffered from a totally disabling respiratory impairment. The sole issue remaining on the merits is whether his disability was due to pneumoconiosis. See 20 C.F.R. §718.204(b). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that to be entitled to benefits, a miner must establish that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990). The record contains medical reports dating from 1979 to 1993 which conflict regarding whether the miner's respiratory disability was due to pneumoconiosis. In determining whether the administrative law judge's Section 718.204(b) finding is supported by substantial evidence, we must first address “whether all of the relevant evidence has been analyzed and whether the [administrative law judge] has sufficiently explained his rationale in crediting certain evidence.” *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323, 2-326 (4th Cir. 1998).

After reviewing the administrative law judge's analysis pursuant to Section 718.204(b), we conclude that he failed to comply with the Board's instructions to analyze all of the relevant evidence. In addition, we are at a loss to understand the administrative law judge's explanation that the autopsy rendered all of the preceding evidence unworthy of discussion. In this duplicate claim, which reached the administrative law judge as a request for modification of a prior denial, the administrative law judge concluded that the diagnosis of pneumoconiosis by autopsy established that modification was appropriate. [1994] Decision and Order at 2; see *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Accordingly, the administrative law judge was required to examine the entire record to determine whether entitlement was established, but failed to do so. The record prior to the autopsy contained conflicting evidence regarding disability causation and this conflict in the evidence continued after the autopsy. Director's Exhibits 7, 12, 16, 17; Employer's Exhibits 1-11. We know that the administrative law judge on remand credited Dr. Kleinerman's 1993 opinion "regardless of the other medical evidence in the record," [1997] Decision and Order on Remand at 2, but it is not enough for us to merely ask whether the administrative law judge has selected an item or items of evidence that support his finding; we must also determine whether he has considered all of the relevant evidence in making that selection. See *Hicks, supra*. Because the administrative law judge failed to analyze all of the relevant evidence presented and the Board is not empowered to weigh the evidence, see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), we must vacate the administrative law judge's finding at Section 718.204(b) and remand this case for further consideration.

In so doing, we recognize that this record contains many exhibits, but we note also that the parties filed a joint stipulation of the medical evidence which serves as a road map of (but not a substitute for) the many exhibits in the record. Further, for the administrative law judge's benefit on remand, we describe generally the disability causation and smoking history evidence.

Prior to the autopsy, Dr. Haymond, who is Board-certified in Internal Medicine and who treated the miner for approximately fifteen years, opined that based upon his examination and testing he believed that the miner was disabled in part by pneumoconiosis. Director's Exhibit 17. Dr. Haymond explained his opinion at his deposition, *Id.*, but this testimony was not discussed by the administrative law judge because it predated the autopsy. Dr. Bechtold examined and tested the miner in 1987 and opined that his severe pulmonary disease was most likely due to a combination of tobacco and coal dust exposure. *Id.* By contrast, Drs. Lapp, Kress, Morgan, and Renn opined that the miner was disabled due to the effects of cigarette

smoking.<sup>2</sup> Director's Exhibits 16, 17. At that time, none of these four physicians believed that the miner had pneumoconiosis. Dr. Morgan stated that he doubted that the miner's recorded smoking history was accurate. Director's Exhibit 17. Most of these physicians' credentials are in the record.

After the autopsy, Dr. Stead, the prosector, noted in his April 16, 1992 autopsy report that although pneumoconiosis did not cause the miner's death, the pneumoconiosis was severe enough to have contributed to significant disability while the miner was alive. Director's Exhibit 7. Subsequently, Dr. Haymond wrote in an October 21, 1992 letter that the autopsy confirmed his view that the miner had pneumoconiosis and was totally disabled due to pneumoconiosis for years before his death.<sup>3</sup> Director's Exhibit 12. By contrast, Drs. Kleinerman, Hansbarger, Hutchins, Morgan, Renn, and Fino reviewed the evidence and opined that the miner's respiratory disability was unrelated to his pneumoconiosis. Employer's Exhibits 1-4, 6-9, 11. Drs. Kleinerman, Hansbarger, and Hutchins stated in part that the pneumoconiosis was simply too mild to have contributed in any way to the miner's disability. Employer's Exhibits 1, 1-B, 2, 7, 9. Dr. Kleinerman also opined that although the miner's smoking history as variously recorded was relatively small--anywhere from four to ten pack years--it was sufficient to cause the degree of emphysema and bronchitis suffered by the miner. Employer's Exhibit 9 at 22-23. Drs. Morgan, Renn, and Fino expressed their doubts that the miner's smoking history had been reported accurately and opined that his respiratory disability resulted from emphysema and bronchitis due to smoking. Employer's Exhibits 3, 4, 6, 8, 11. These physicians' credentials are in the record.

Additionally, the record contains several different smoking histories set forth in

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<sup>2</sup> Dr. Hendrick opined that the miner had a moderate impairment unrelated to coal mine dust exposure but did not attribute it to a particular cause. Director's Exhibit 16.

<sup>3</sup> In his prior decision, the administrative law judge discounted this opinion letter as unexplained, but without considering the explanation that Dr. Haymond offered in his 1989 deposition. [1994] Decision and Order at at 5.

testimony, examination reports, and consultation reports. The miner testified in 1980 that he smoked one pack of cigarettes every three days for approximately sixteen years and quit in 1958. [1980] Hearing Transcript at 30-31. In 1989, the miner testified that he smoked one pack every three days for eight to ten years and quit in 1958 or 1959. [1989] Hearing Transcript at 22-25. In 1993, the miner's widow testified that he had smoked two or three cigarettes a day for the first eight to ten years of their marriage and quit in 1959 or 1960. [1993] Hearing Transcript at 28. Dr. Hendrick recorded a smoking history of one pack a day from 1940 until 1960, while Dr. Bechtold recorded a history of one pack every three to four days for ten years, ending in 1958. Director's Exhibits 16, 17. Dr. Renn recorded a history of smoking ¼ to ½ of a pack per day from 1946 to 1958, with a two-year hiatus. Director's Exhibit 17. During the miner's several hospitalizations in the 1980's and early 1990's, Drs. Haymond, Abrahams, and Jaworski recorded a history of smoking one pack every four days for eight to ten years, which had ceased approximately thirty years previously. Director's Exhibit 7, 17. However, in a February 13, 1989 treatment record, Dr. Haymond noted that the miner had not smoked for eight years and later testified that he believed that the miner quit smoking in the early 80's. Director's Exhibit 17. The miner testified that Dr. Haymond was mistaken in this regard. [1989] Hearing Transcript at 25. At his deposition, Dr. Kleinerman calculated what he believed to be the miner's pack-year history, assuming that the miner smoked for a longer period than was generally recorded, Employer's Exhibit 9 at 22-23, while Drs. Morgan, Renn, and Fino also discussed the import of the varying, recorded smoking histories. Director's Exhibits 16, 17; Employer's Exhibits 3, 4, 6, 8, 11.

This is the evidence which must be analyzed on remand. In view of the administrative law judge's response to our previous order remanding this case, we believe that "review of this claim requires a fresh look at the evidence." *Hicks*, 138 F.3d at 537, 21 BLR at 2-343. Accordingly, we remand this case to the Office of Administrative Law Judges for assignment to another administrative law judge, who must consider all of the relevant evidence to determine whether the miner's pneumoconiosis was a contributing cause of his disabling respiratory impairment. See 20 C.F.R. §718.204(b); *Robinson, supra*. If he or she finds that it is, the administrative law judge must then determine the date of onset of total disability due to pneumoconiosis.<sup>4</sup> See *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins*

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<sup>4</sup> We reject as meritless claimant's contention that Dr. Kleinerman did not address disability causation. Claimant's Brief at 11; Employer's Exhibits 1, 7, 9. Further, we find no error in the administrative law judge's issuance of his Decision and Order on Remand without the benefit of briefs on remand. Claimant's Brief at 3. Claimant had three months after the issuance of the Board's Order on Reconsideration within

*v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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which to request permission to file a brief on remand with the administrative law judge, but the record contains no such request. See 29 C.F.R. §18.6(c).