

BRB No. 01-0568 BLA

RUTH MENSCH)	
(Widow of ALLEN L. MENSCH))	
)	
Claimant-Respondent)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits (Upon Remand by the Benefits Review Board) and the Decision on Director's Motion for Reconsideration of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Edward Waldman (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits (Upon Remand by the Benefits Review Board) and the Decision on Director's Motion for Reconsideration (99-BLA-0304) of Administrative Law Judge Robert D. Kaplan 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).¹ This case is before the Board for the

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

second time. In his initial Decision and Order the administrative law judge noted that the Director conceded the presence of pneumoconiosis arising out of coal mine employment, and 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) (2000). *See* Decision and Order Denying Benefits.

effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

On claimant's appeal,² the Board vacated the administrative law judge's findings regarding death due to pneumoconiosis and remanded the case to the administrative law judge for further consideration. The Board held that the administrative law judge mischaracterized Dr. Colancecco's opinion when he found it equivocal. The Board noted that the administrative law judge found Dr. Kraynak's opinion not reasoned:

as the physician provided bald conclusions and a simplistic proposition that anyone who dies from a coronary condition and also has a breathing impairment caused by pneumoconiosis, the pneumoconiosis was a substantial contributor to death. The administrative law judge also concluded that Dr. Simelaro provided only a conclusory basis for his opinion and therefore it was unreasoned.

Mensch v. Director, OWCP, BRB No. 99-1260 BLA (Oct. 27, 2000)(unpub.), slip op. at 4.

The Board further held that:

no physician of record opined that the reasoning of Drs. Kraynak and Simelaro is contrary to any accepted medical theory. Moreover, both physicians, based on examination and/or review of the record, specifically related the miner's death to pneumoconiosis rather than offering a generalized conclusion. Consequently, the administrative law judge irrationally substituted his own conclusions for those of a physician.

Mensch, slip op. at 4 (citations omitted). The Board affirmed the administrative law judge's finding that Dr. Qureshi's opinion was insufficient to establish that pneumoconiosis contributed to or hastened the miner's death. The Board also advised the administrative law judge to consider the status of the doctor as a treating physicians and the relevant qualification of the physicians in assessing the medical opinion evidence on remand. *See Mensch, supra*.

² Claimant is Ruth Mensch, the widow of Allen L. Mensch, the miner, who died on May 26, 1998, Director's Exhibit 2. The miner filed a claim for benefits on July 23, 1984, and was awarded benefits in a Decision and Order issued on October 2, 1987. Director's Exhibit 9.

On remand, the administrative law judge reconsidered Dr. Colancecco's opinion in light of the Board's decision and determined that Dr. Colancecco unequivocally opined that pneumoconiosis was a significant contributor to the miner's death. 2001 Decision and Order at 1-2. The administrative law judge quoted a portion of the Board's Decision and Order and stated:

Although I previously found that Drs. Kraynak and Simelaro failed to adequately explain the bases for their opinion, it is clear that in this case the Board has overruled these findings. The Board subsequently stated that on remand I should "assess... the reliability of the [physicians'] opinion," "considering the status of the doctor as a treating physician [viz., Drs. Kraynak and Qureshi] and the relevant qualifications of the physicians ... in assessing the reliability of the opinions."

2001 Decision and Order at 2. The administrative law judge considered the relative qualifications of the physicians and considered which physicians treated the miner. The administrative law judge stated:

Director also argues that the opinions of Drs. Kraynak and Simelaro should be rejected because they insufficiently explain the bases for their conclusions. (Director's Brief at 4-5) While I am in sympathy with Director on this score, the Board has already rejected my determinations which are consistent with Director's argument, as noted above.

Under the constraints imposed by the Board in this case, and based on the foregoing discussion, I find that the opinions of Drs. Simelaro, Colancecco, and Kraynak that the miner's death was due to pneumoconiosis outweigh Dr. Perper's contrary opinion. Consequently, I find that Claimant has established that the miner's death was due to pneumoconiosis pursuant to §718.205(c).

2001 Decision and Order at 3.

The Director filed a Motion for Reconsideration asserting that "All the Board's remand order precludes [the administrative law judge] from doing on remand is discrediting Dr. Colancecco's opinion as equivocal, and from discrediting Drs. Kraynak's and Simelaro's underlying medical theory...in the absence of a contrary opinion." Director's Brief in Support of Motion for Reconsideration at 4. In his Decision on Director's Motion for Reconsideration, the administrative law judge stated:

Director's argument is an appealing one. However, I am faced with the Board's rejection of my earlier findings which were based on reasoning which is similar to Director's current argument. Further, as pointed out in my prior post-remand determination, the Board's ruling is something of an enigma.... Consequently, in this case this humbled trial judge does not trust his ability to interpret the board's ruling differently than he has done. Therefore, Director should address his plaint to the Board so that, if necessary, the Board can clarify its ruling.

Decision on Director's Motion for Reconsideration at 2.

On appeal, the Director asserts that "there are viable bases on which to discredit the opinions of Drs. Colancecco, Kraynak and Simelaro which do not run afoul of the Board's remand order." Director's Brief at 6. The Director asserts that the Board should vacate the administrative law judge's Decision and Order on Remand and his Decision on Reconsideration and remand the case to the administrative law judge for further evaluation of the evidence. Claimant has not responded 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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In finding that the Board imposed constraints on his weighing of the evidence, the administrative law judge has misinterpreted our prior holdings and instructions. The Board previously remanded the case to the administrative law judge for further consideration and weighing of the evidence. In no way did the Board prevent the administrative law judge from evaluating the medical opinion evidence. Nor did the Board relieve the administrative law judge of his duty to determine whether the opinions are reasoned and documented or his duty to determine what weight to accord each opinion. *See Mensch, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). We therefore vacate the administrative law judge's Decision and Order Awarding Benefits (Upon Remand by the Benefits Review Board) and his Decision on Director's Motion for Reconsideration.

On remand, the administrative law judge must reconsider and reweigh all of the medical opinion evidence of record to determine whether claimant has carried her burden of establishing that the miner's death was due to pneumoconiosis pursuant to Section

718.205(c). The administrative law judge must review the medical opinions to determine whether they are reasoned and documented, *see Fields, supra*. The administrative law judge is advised that he may not substitute his own opinion for that of the physicians, nor may he discredit the underlying theories of Drs. Kraynak and Simelaro in the absence of contrary medical evidence. *See Mensch*, slip op. at 4; *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). In weighing the medical opinion evidence, on remand, the administrative law judge should also give consideration to the qualifications of the physicians and whether the physician treated the miner. *See Mancia, supra; Clark, supra; Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Accordingly, we vacate the administrative law judge's Decision and Order Awarding Benefits (Upon Remand by the Benefits Review Board) and his Decision on Director's Motion for Reconsideration, and remand the case 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

BETTY JEAN HALL
Administrative Appeals Judge