

BRB No. 04-0406 BLA

BERNICE A. KACZKOWSKY	)	
(Widow of WILLIAM A. KACZKOWSKY)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL	)	DATE ISSUED: 02/09/2005
CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (03-BLA-5385) of Administrative Law Judge Daniel L. Leland denying benefits on a claim filed pursuant to the provisions of

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<sup>1</sup>Claimant is the surviving spouse of the deceased miner who died on December 5, 2000. Director's Exhibit 12.

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>2</sup> This case involves a survivor’s claim filed on November 9, 2001.<sup>3</sup> After noting that the parties stipulated that the miner had forty-six years of coal mine employment, the administrative law judge found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis. The administrative law judge also found that the miner’s pneumoconiosis arose out of his coal mine employment. The administrative law judge, however, found 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). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in 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). Employer responds in support of the administrative law judge’s denial of benefits.<sup>4</sup> The Director, Office of Workers’ Compensation Programs, has not filed a

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<sup>2</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup>The miner filed claims for benefits on June 27, 1973, September 15, 1976, January 2, 1980 and September 29, 1983. Director’s Exhibits 1, 2. In a Decision and Order dated November 20, 1990, Administrative Law Judge Daniel L. Leland adjudicated the miner’s 1983 claim. Director’s Exhibit 2. After finding that there had been a material change in conditions since the denial of the miner’s previous claim, Judge Leland found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Judge Leland also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, Judge Leland denied benefits. *Id.* There is no indication that the miner took any further action in regard to his 1983 claim.

<sup>4</sup>Employer also contends that claimant has “failed to identify a single genuine error committed by the [administrative law judge] in denying this claim.” Employer’s Brief at 10. We disagree. Claimant’s statements sufficiently raise substantive issues and identify specific errors on the part of the administrative law judge in determining that the evidence is insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

response brief.<sup>5</sup>

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant argues that the administrative law judge committed numerous errors in finding the evidence insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because the instant survivor’s claim was filed after January 1, 1982, claimant must establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>6</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner’s death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a “substantially

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<sup>5</sup>Because no party challenges the administrative law judge’s finding that the evidence is sufficient to establish the existence of pneumoconiosis, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The issue of whether the miner’s pneumoconiosis arose out of the miner’s coal mine employment is not a contested issue in this case. See Director’s Exhibit 31.

<sup>6</sup>Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner’s death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner’s death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) 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).

contributing cause” of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

The administrative law judge credited the opinions of Drs. Caffrey and Branscomb that the miner’s pneumoconiosis did not contribute to his death, Employer’s Exhibits 1, 2, 5, 6, over the contrary opinions of Drs. Perper and Goldblatt.<sup>7</sup> Decision and Order at 4-5; Director’s Exhibit 14; Claimant’s Exhibits 1, 3-8.

Claimant initially argues that the administrative law judge erred in his consideration of Dr. Perper’s opinion. The administrative law judge discredited Dr. Perper’s opinion that hypoxemia was an indirect cause of the miner’s death because he found that the record did “not include any blood gas studies demonstrating hypoxemia.” Decision and Order at 5. Contrary to the administrative law judge’s characterization of the record, Dr. Perper, during a November 3, 2003 deposition, explained that his finding of hypoxemia was based upon the miner’s July 12, 2000 arterial blood gas study results.<sup>8</sup> Claimant’s Exhibit 7 at 15. The administrative law judge questioned Dr. Perper’s reliance upon the results of the miner’s July 12, 2000 arterial blood gas study, noting that the study produced non-qualifying results. Decision and Order at 5. The administrative law judge erred in discrediting Dr. Perper’s opinion on this basis. Test results which exceed the applicable table values may be relevant to the overall evaluation of a miner’s condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In this case, Dr. Perper interpreted the miner’s non-qualifying July 12, 2000 arterial blood gas study as revealing hypoxemia.

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<sup>7</sup>Dr. Owens completed the miner’s death certificate. Dr. Owens listed the immediate causes of the miner’s death as cardiac arrhythmia, CHF, and ASCVD. Director’s Exhibit 12. Dr. Owens also listed cancer of the prostate, COPD and pneumoconiosis as “other significant conditions.” *Id.* Dr. Owens did not indicate whether the “other significant conditions” contributed to the miner’s death.

<sup>8</sup>The miner’s Emergency Room Record on July 12, 2000 lists the results of an arterial blood gas study. *See* Employer’s Exhibit 3. The miner’s pCO<sub>2</sub> value was recorded as 29 and his pO<sub>2</sub> value was recorded as 76. *Id.* During a November 3, 2003 deposition, Dr. Perper opined that these results demonstrated that the miner was “clearly hypoxemic.” Claimant’s Exhibit 7 at 15. Dr. Perper noted that the low pCO<sub>2</sub> value was an indication that the miner was hyperventilating at the time of the test. *Id.* Dr. Perper explained that the miner’s pO<sub>2</sub> result would have probably been even lower had the miner not been hyperventilating at the time of the test. *Id.*

Claimant also argues that the administrative law judge erred in discrediting Dr. Perper's opinion because he found that it was "amazingly similar, if not identical," to opinions that Dr. Perper had expressed in numerous other cases he had heard. Decision and Order at 5. The administrative law judge stated:

As in these other cases, Dr. Perper finds that the decedent has hypoxemia which precipitated or aggravated a fatal cardiac arrhythmia. The similarity of his conclusions to those in numerous other proceedings undermines his credibility in this proceeding.

Decision and Order at 5.

An administrative law judge may not base his conclusions about the credibility of a physician's opinion on his assessment of the credibility of similar opinions offered by that physician, and seen by the administrative law judge, in other cases. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). The administrative law judge, therefore, erred in discrediting Dr. Perper's opinion on this basis.

Claimant also contends that the administrative law judge erred in finding Dr. Goldblatt's opinion insufficient to support a finding that the miner's death was due to pneumoconiosis. Claimant argues that the administrative law judge erred in finding that Dr. Goldblatt changed his opinion regarding the cause of the miner's death. *See* Decision and Order at 4. We agree. Dr. Goldblatt has consistently opined that the miner's death was due to an acute myocardial infarction. The administrative law judge accurately notes that Dr. Goldblatt did not "implicate coal workers' pneumoconiosis or emphysema as causes of death" in his autopsy report. Decision and Order at 4. However, in his autopsy report, Dr. Goldblatt did not elaborate upon the causes of the miner's acute myocardial infarction.<sup>9</sup> Director's Exhibit 13. Dr. Goldblatt also did not indicate what role, if any,

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<sup>9</sup>Dr. Goldblatt performed the miner's autopsy on December 6, 2000. In an "Autopsy Protocol" dated January 16, 2001, Dr. Goldblatt diagnosed an acute myocardial infarction, severe coronary artery disease, diffuse interstitial myocardial fibrosis, cardiomegaly and status post coronary artery bypass graft. Director's Exhibit 13. Dr. Goldblatt's final anatomic diagnoses also included: micronodular simple coal workers' pneumoconiosis, pulmonary hypertension, severe pulmonary emphysema and a pulmonary embolism. *Id.* In the "Clinicopathological Summary" portion of his report, Dr. Goldblatt stated that:

This 86-year old white male coal miner died due to acute myocardial infarction. Additional findings include micronodular simple coal workers'

the miner's pneumoconiosis played in regard to his acute myocardial infarction. *Id.* Dr. Goldblatt subsequently addressed this issue in a letter dated October 15, 2001, explaining that the miner's acute myocardial infarction was secondary to severe coronary artery disease.<sup>10</sup> Claimant's Exhibit 1. Dr. Goldblatt, however, further opined that the miner's significant chronic lung disease, which he attributed in large part to the miner's coal workers' pneumoconiosis, also played a significant role in accelerating the death of the miner. *Id.* Dr. Goldblatt explained that the miner's chronic lung disease decreased the oxygen supplied to the heart muscle enhancing significant myocardial ischemia.<sup>11</sup> *Id.*

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pneumoconiosis and pulmonary emphysema. The manner of death is natural.

Director's Exhibit 13.

<sup>10</sup>In a letter dated October 15, 2001, Dr. Goldblatt stated that:

My review of the histologic slides confirms the presence of simple coal workers' pneumoconiosis and pulmonary emphysema. In light of [the miner's] history as a lifelong non-smoker, coal workers' pneumoconiosis was certainly the most important contributing factor in producing significant pulmonary emphysema. Although right ventricular hypertrophy is not yet present, cor pulmonale can be diagnosed by the microscopic finding of pulmonary arterial hypertrophy that is prominently present in the histological sections. Right ventricular hypertrophy is a later finding which may be absent, as it is in this case. The presence of acute myocardial infarction secondary to severe coronary artery disease in the heart was a primary factor in producing his demise. However, significant chronic lung disease which in this case is due in large part to coal workers' pneumoconiosis, played a significant role in accelerating the death of [the miner.] Chronic lung disease decreases the oxygen supplied to the heart muscle enhancing significant myocardial ischemia.

Based on these reports and observations, I support the medical assertion that coal workers' pneumoconiosis was a significant contributing factor in hastening the death of [the miner].

Claimant's Exhibit 1.

<sup>11</sup>Dr. Goldblatt further explained his basis for attributing the miner's death to pneumoconiosis during a June 4, 2003 deposition. Dr. Goldblatt stated:

Consequently, contrary to the administrative law judge's characterization, the record does not support his finding that Dr. Goldblatt changed his opinion regarding the cause of the miner's death after being contacted by claimant's attorney.

The administrative law judge also erred in discrediting Dr. Goldblatt's opinion because the weight of the evidence from the miner's claim did not demonstrate the existence of a totally disabling pulmonary impairment. Decision and Order at 4. Like Dr. Perper, Dr. Goldblatt interpreted the results of the miner's September 12, 2000 arterial blood gas study as revealing abnormal lung function. Claimant's Exhibit 8 at 6-9. Dr. Goldblatt opined that the miner's September 12, 2000 arterial blood gas study revealed hypoxemia. *Id.* at 9. The fact that the administrative law judge did not find the evidence supportive of a totally disabling respiratory impairment when he adjudicated the miner's claim in 1990 does not undermine Dr. Goldblatt's assessment of the results of the miner's September 12, 2000 arterial blood gas study.

We also agree with claimant's contention that the administrative law judge erred in his consideration of the opinions of Drs. Caffrey and Branscomb. The administrative law judge found, without explanation, that the opinions of Drs. Caffrey and Branscomb were "well reasoned and consistent and...entitled to great weight." Decision and Order at 5. Consequently, the administrative law judge's analysis of whether the evidence is

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[The miner] had significant, severe, chronic lung disease. He had no history of smoking or any other particular proclivity to have severe lung disease. The only thing that he had in his history which would explain this disease of his lung is his exposure to coal dust as 40 years in underground coal mining.

The chronic lung disease led him to become hypoxic. It decreased the oxygen supplied to the blood. The chronic lung disease due to coal workers' pneumoconiosis destroyed the lung tissue, produced pulmonary emphysema, which disturbed the normal functioning of the lungs as an oxygen diffusing organ. It also led him to develop pulmonary hypertension, which disturbed the heart's ability to pump blood through the lungs to get oxygen. And he also developed, even although [sic] it is a mild [sic] point, he developed pulmonary embolism which is related to his underlying chronic lung disease.

Claimant's Exhibit 3 at 16-17.

Although Dr. Goldblatt reiterated his opinion that the miner's died of an acute myocardial infarction, he explained that the miner's underlying lung disease had a "primary and direct link to his myocardial infarction." Claimant's Exhibit 3 at 27.

sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) does not comply with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In light of the above-referenced errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c) and remand the case to the administrative law judge for further consideration.<sup>12</sup>

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<sup>12</sup>Claimant requests that the case be remanded to a different administrative law judge. However, because claimant has not demonstrated any bias or prejudice on the part of the administrative law judge, claimant's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).



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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge