

BRB No. 11-0379 BLA

MARTHA WEST (A/K/A MARTHA CHILDRESS))	
Widow of JAMES G. WEST)	
Claimant-Respondent)	
v.)	
N.O.W. COAL COMPANY)	DATE ISSUED: 02/15/2012
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 on Second Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, 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:

Employer appeals the Decision and Order on Second Remand (2007-BLA-05136) of Administrative Law Judge Daniel F. Solomon awarding benefits on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at

30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ This case is before the Board for a third time.² Initially, in *M.M.W. [West] v. N.O.W. Coal Co.*, BRB No. 07-0943 BLA (Aug. 22, 2008) (unpub.), the Board held, pursuant to employer's appeal, that the administrative law judge erred, in various respects, in finding that pneumoconiosis and death due to pneumoconiosis were established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.205(c). The Board, therefore, vacated the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.205(c), and his consequent finding that claimant established a basis for modification under 20 C.F.R. §725.310. The Board remanded the case to the administrative law judge for reconsideration and instructed him to determine whether granting modification would render justice under the Act, if he found that pneumoconiosis was a contributing cause of the miner's death.

On remand, the administrative law judge found legal pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4), and determined that the miner's pneumoconiosis significantly contributed to his amyotrophic lateral sclerosis disease (ALS) and hastened his death pursuant to Section 718.205(c). Further, the administrative law judge determined that granting claimant's request for modification would render justice under the Act and, accordingly, awarded benefits.

Employer appealed, citing numerous errors in the administrative law judge's analysis of the medical evidence. In *Childress v. N.O.W. Coal Co.*, BRB No. 09-0450 BLA (Apr. 14, 2010)(unpub.), the Board held that the administrative law judge failed to adequately explain how Dr. Perper's opinion supported a finding of legal pneumoconiosis.³ *Id.*, slip op. at 6. In so doing, the Board held the administrative law

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as it was filed prior to January 1, 2005.

² Claimant is the surviving spouse of the miner, James West, who died on December 14, 2003. Director's Exhibit 7. Claimant, who filed her survivor's claim on February 5, 2004, subsequently remarried and her last name is now Childress. *Id.* at 2; 2007 Decision and Order at 2-3. The district director issued a Proposed Decision and Order denying benefits on September 14, 2004. Director's Exhibit 28. On August 31, 2005, claimant requested modification of the district director's denial and submitted additional medical evidence in support of her request. Director's Exhibit 32. On July 19, 2006, the district director issued a Proposed Decision and Order granting claimant's request for modification and awarding benefits. Following employer's request for a formal hearing, the parties agreed to a decision on the record. *Id.* at 47, 48.

³ Legal pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited

judge erred in summarily crediting Dr. Perper's opinion that the miner's centrilobular emphysema was significantly aggravated by coal dust exposure and in summarily crediting the doctor's finding that the miner's death was, therefore, hastened by pneumoconiosis. The Board also held that the administrative law judge failed to adequately consider the contrary medical evidence. The Board, therefore, vacated the administrative law judge's finding of legal pneumoconiosis pursuant to Section 718.202(a)(4), and death due to pneumoconiosis pursuant to Section 718.205(c). Consequently, the Board remanded the case, instructing the administrative law judge to reevaluate the conflicting medical opinions, and to sufficiently explain his findings of fact and conclusions of law in accordance with the requirements of 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).

On second remand, the administrative law judge explained how Dr. Perper's opinion, that coal dust exposure significantly aggravated the miner's emphysema, was the best reasoned opinion of record and, therefore, established legal pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge also credited Dr. Perper's opinion, explaining how the miner's pneumoconiosis significantly contributed to his ALS and, therefore, hastened his death pursuant to Section 718.205(c). In addition, the administrative law judge discussed why the contrary opinions of record were not well-reasoned on the issues of pneumoconiosis and death causation. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge failed to comply with the Board's remand instructions and the requirements of the APA. Specifically, employer argues that the administrative law judge erred in finding legal pneumoconiosis established pursuant to Section 718.202(a)(4), and death due to pneumoconiosis established pursuant to Section 718.205(c). Employer argues that the administrative law judge erred in finding that Dr. Perper's medical opinion was sufficiently documented and reasoned, that the administrative law judge erred in evaluating the relative medical qualifications of the physicians, and that the administrative law judge erred in rejecting the opinions of Drs. Fino and Crouch. Claimant responds, arguing that the administrative law judge's award of benefits should be affirmed. In reply, employer reiterates its arguments. The Director, Office of Worker's Compensation Programs, has not filed a substantive response to the appeal.

to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2), (b).

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.⁴ 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied.*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge's Decision and Order on Second Remand, the evidence of record, and the issues presented on appeal, we affirm the administrative law judge's award of benefits as it is rational, supported by substantial evidence, and rendered in accordance with applicable law. For the reasons that follow, we reject employer's assertions of error.

20 C.F.R. §718.202(a)(4)
Legal Pneumoconiosis

Contrary to employer's argument, the administrative law judge properly credited Dr. Perper's opinion, that the miner's coal dust exposure significantly aggravated his emphysema and, thereby, established legal pneumoconiosis as defined by the Act, because Dr. Perper explained his opinion better than the physicians who found the contrary. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

(*en banc*). Further, contrary to employer's argument, the administrative law judge, in evaluating the medical opinions of record, along with the Department of Labor's (DOL) discussion of the medical science cited in the preamble to the amended regulations, did not improperly treat the preamble as evidence, or as a presumption that all obstructive lung disease is pneumoconiosis. See *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 117, 125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990); Employer's Brief at 13-14. Rather, the administrative law judge permissibly found that medical opinions that fail to adequately explain why coal dust exposure was not an aggravating factor in a miner's respiratory impairment, may be assigned less weight. *Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. 979,943 (Dec. 20, 2000). Accordingly, the administrative law judge acted within his discretion in according greater weight to the opinion of Dr. Perper, who explained how the miner's emphysema was significantly aggravated by his coal dust exposure. See *Obush*, 24 BLR 1-125-26.

In contrast, the administrative law judge permissibly accorded less weight to the opinion of Dr. Crouch, because he did not address the issue of legal pneumoconiosis. See 20 C.F.R. §718.201; *Obush*, 24 BLR 1-125-26; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge also permissibly accorded less weight to the opinion of Dr. Fino, because he did not diagnose emphysema or any respiratory impairment apart from ALS. See *Obush*, 24 BLR at 1-125-26. See generally *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000)(A medical opinion that is found to be based on a premise contrary to the administrative law judge's findings may be accorded less weight.). Therefore, as the administrative law judge found that the record established that the miner had emphysema, he also rationally discounted Dr. Fino's medical opinion ruling out emphysema, as "flawed" and not well-reasoned on the issue of legal pneumoconiosis, because it was contrary to the probative evidence in the record documenting the miner's emphysema. Decision and Order at 4-6, 7-8; see *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Moreover, the administrative law judge permissibly exercised his discretion in assigning greater weight to the medical opinion of Dr. Perper because he is Board-certified in anatomical, surgical, and forensic pathology, while Dr. Fino is not a pathologist, and Dr. Crouch is Board-certified in only anatomical pathology.⁵ See *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Decision and Order at 4.

⁵ Dr. Segan, the autopsy prosector, diagnosed moderate coal workers' pneumoconiosis, noting the presence of macules surrounded by focal emphysema. Director's Exhibit 7 at 8. Dr. Perper, based his review of the pathology and other evidence, diagnosed coal workers' pneumoconiosis along with centrilobular emphysema. Director's Exhibit 35. Dr. Crouch diagnosed the presence of mild coal workers'

An administrative law judge need not accept any particular medical theory or the opinion of any particular medical expert, but must weigh all the evidence and draw his own conclusions. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Anderson*, 12 BLR at 1-111. Here, the administrative law judge properly evaluated Dr. Perper's rationale and relied on permissible criteria for crediting his opinion, that the miner's respiratory impairment was significantly aggravated by his coal dust exposure, over the contrary opinions of record. 20 C.F.R. §718.202(a)(4); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). Consequently we conclude that the administrative law judge's analysis and weighing of the medical opinions of record is adequately explained and supported by substantial evidence, and we affirm his finding of legal pneumoconiosis pursuant to Section 718.202(a)(4). *Compton*, 211 F.3d at 207-08, 22 BLR at 2-168; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326.

20 C.F.R. §718.205(c)
Death Due to Pneumoconiosis

Turning to the issue of death due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law judge properly assigned less weight to the opinions of Drs. Fino and Crouch, because they “[did] not diagnose legal pneumoconiosis.” *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-709 (4th Cir. 1995); Decision and Order at 8. The administrative law judge also properly accorded less weight to the opinion of Dr. Crouch, because the doctor failed to consider whether coal dust exposure substantially *aggravated* the miner's ALS and hastened his death. 20 C.F.R. §718.205(c)(5); *Sparks*, 213 F.3d at 190, 22 BLR at 2-259; Decision and Order at 4, 8. Likewise, the administrative law judge properly accorded less weight to Dr. Fino's opinion because he failed to consider all the record evidence regarding the issue of legal pneumoconiosis. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-606. *Id.* at 4, 8.

In contrast, the administrative law judge properly credited the opinion of Dr. Perper as better reasoned, because the doctor's opinion was more thorough and he explained how pneumoconiosis hastened the miner's death. Specifically, the administrative law judge noted that Dr. Perper concluded that the miner's

pneumoconiosis and emphysema. Employer's Exhibit 5. Dr. Fino diagnosed coal workers' pneumoconiosis and a mild respiratory impairment due to ALS. Employer's Exhibit 6.

pneumoconiosis aggravated his ALS, and through each of the listed medical complications,⁶ contributed substantially to, and hastened, his death. *Id.* The administrative law judge, therefore, properly credited Dr. Perper's opinion on death causation, because Dr. Perper sufficiently established the causal connection between the miner's pneumoconiosis and his death from ALS, and adequately identified the bases for his opinion that the miner's death was hastened by his pneumoconiosis. *See Sparks*, 213 F.3d at 186, 22 BLR at 2-251; *Clark*, 12 BLR at 1-155.

In conclusion, the administrative law judge evaluated the medical opinions of record, rendered credibility determinations, and permissibly resolved evidentiary conflicts in view of the persuasiveness of the medical opinions. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); *Lane*, 105 F.3d at 166, 21 BLR at 2-34; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Credibility determinations may not be disturbed if, as in this case, they are rational and supported by substantial evidence. *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge's decision comports with the requirements of the APA, and substantial evidence supports his determination that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c); *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93; *Dillon*, 11 BLR at 1-114; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). It is therefore affirmed.

⁶ Dr. Perper found that the miner's health history of respiratory symptoms was consistent with pneumoconiosis, including exertional shortness of breath, and orthopnea in the absence of cardiac symptoms and/or congestive heart failure, and that there was "a combination of factors involved in the miner's demise, including 'complications separately and in aggregate,' " including:

- a. Replacement of normally breathing lung tissue by fibro-anthracotic dysfunctional tissue interfering with diffusion of respiratory gases;
- b. Chronic obstructive pulmonary disease (COPD) on the background of centrilobular emphysema; and,
- c. Terminal bronchopneumonia (alongside his ALS disease).

Decision and Order at 8; Director's Exhibit 35 at 11-12.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge