

BRB No. 09-0430 BLA

MARGARET DOTSON )  
(Widow of GEORGE DOTSON, JR.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
DOTCO ENERGY COMPANY, ) DATE ISSUED: 01/26/2010  
INCORPORATED, C/O UNDERWRITERS )  
SAFETY & CLAIMS )  
 )  
and )  
 )  
A.T. MASSEY )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
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 - Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan, P.S.C.), South Williamson, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly, PLLC), Charleston, West Virginia, 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 on Remand – Denial of Benefits (05-BLA-5676) rendered by Administrative Law Judge Larry S. Merck (the administrative law judge) on a survivor’s 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 is the second time this case is on appeal to the Board. In his prior decision, awarding benefits, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718 and credited the miner with 27.94 years of coal mine employment. The administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (4), that claimant was entitled to the rebuttable presumption that the miner’s pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Pursuant to an appeal by employer, the Board affirmed in part,<sup>2</sup> and vacated in part,<sup>3</sup> the

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<sup>1</sup> The miner died on November 5, 2003. Claimant, the miner’s widow, filed this application for survivor’s benefits on February 4, 2004.

<sup>2</sup> The Board affirmed the administrative law judge’s findings on the length of coal mine employment and that the miner’s pneumoconiosis, if established, arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> In relevant part, the Board held that pursuant to *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*), employer was entitled to submit an additional report in rebuttal to claimant’s affirmative-case autopsy report under 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). The Board also held that the administrative law judge failed to adequately consider the report of the autopsy prosector, Dr. Dennis, on the issue of whether the miner’s death was hastened by pneumoconiosis pursuant to Section 718.205(c). Further, the Board held that the administrative law judge improperly excluded Dr. Caffrey’s entire autopsy rebuttal report, rather than determining whether those portions that exceeded the scope of Dr. Dennis’s autopsy report could be redacted, in accordance with *Keener*, 23 BLR at 1-240. Accordingly, the Board specifically vacated the administrative law judge’s evidentiary findings under 20 C.F.R. §725.414 and, therefore, his findings of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (4), and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Board directed the administrative law judge to allow employer to redesignate its affirmative-case autopsy evidence, rebuttal autopsy evidence and medical opinion evidence pursuant to Section 725.414, on remand. The administrative law judge was also instructed to reconsider the weight to accord the autopsy reports and medical opinions of Drs. Roggli, Repsher, Dennis, and Dr. Abad, the miner’s treating physician, on the issue of death causation pursuant to Section 718.205(c). Finally, the administrative law judge was instructed to provide the basis for his credibility findings, and to reevaluate the medical

administrative law judge's decision awarding benefits and remanded the case to the administrative law judge for further consideration. *M.D. [Dotson] v. Dotco Energy Co., Inc.*, BRB No. 07-0202 BLA (Nov. 30, 2007)(unpub.). Specifically, the Board held that the administrative law judge should provide employer the opportunity to redesignate its affirmative and rebuttal evidence pursuant to 20 C.F.R. §725.414 in keeping with *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*). The Board held that the administrative law judge should then reevaluate the medical evidence on the issue of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (4) and reevaluate the medical opinion evidence on the issue of death causation pursuant to 20 C.F.R. §718.205(c). The Board further held that if claimant is again found entitled to benefits, the administrative law judge should determine the commencement date of those benefits pursuant to 20 C.F.R. §725.503(c). On remand, the administrative law judge again found that the evidence established the existence of clinical pneumoconiosis under Section 718.202(a)(2) and (4).<sup>4</sup> The administrative law judge, however, according the greatest weight to the medical opinions of Drs. Ghio and Repsher and less weight to the opinion of Dr. Abad, found that the miner's death was not due to pneumoconiosis pursuant to Section 718.205(c) (death causation). Benefits were, accordingly, denied.

On appeal, claimant contends that the administrative law judge erred in finding that the opinion of Dr. Abad, the miner's treating physician, was "more equivocal and speculative" on the issue of death causation than the opinions of Drs. Ghio and Repsher.<sup>5</sup>

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evidence to determine whether it was sufficient to establish the existence of pneumoconiosis and that the miner's death was hastened by pneumoconiosis. Following remand of the case to the administrative law judge, employer redesignated its evidence, submitting medical reports from Drs. Ghio and Repsher and Dr. Caffrey's medical report as affirmative autopsy evidence under Section 725.414(a)(3)(i). Employer also submitted the medical report of Dr. Roggli, as rebuttal autopsy evidence under Section 725.414(a)(3)(ii), as well as the deposition testimony of Dr. Caffrey. Decision and Order on Remand at 2.

<sup>4</sup> The administrative law judge also found that clinical pneumoconiosis was not established by the x-ray evidence at 20 C.F.R. §718.202(a)(1) and that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(3), as none of the presumptions contained therein was applicable. Additionally, the administrative law judge found that legal pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4), as none of the physicians diagnosed legal pneumoconiosis. Decision and Order on Remand at 6, 15. These findings are affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

<sup>5</sup> Claimant does not challenge the administrative law judge's accordance of little weight to the autopsy reports of Drs. Dennis, Caffrey and Roggli on the issue of death

Specifically, claimant contends that the administrative law judge erred in making that finding because he found that Dr. Abad's opinion on the issue of death causation was well-reasoned and well-documented in his prior decision. Claimant also contends that the administrative law judge failed to give the opinion and testimony of Dr. Abad appropriate weight, as Dr. Abad was the miner's treating physician. Claimant's Brief at 5-6; *see* Decision and Order on Remand at 19. In response, employer contends that the administrative law judge properly weighed the medical opinion evidence, and that the administrative law judge's decision on remand denying benefits should be affirmed.<sup>6</sup> The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to Section 718.205(c), 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; 718.203; 718.205. Failure to establish any one of these elements precludes entitlement. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivor's claims filed on or after January 1, 1982, the cause of death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, pursuant to Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the

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causation at Section 718.205(c). These findings are, accordingly, affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

<sup>6</sup> Neither party challenges the administrative law judge's disposition of the procedural issues regarding the evidentiary limitations pursuant to Section 725.414. These findings are therefore affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

miner's death.<sup>7</sup> 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

On remand, the administrative law judge found that the medical reports of Drs. Abad, Ghio and Repsher were all well-reasoned and well-documented and were, therefore, entitled to probative weight.<sup>8</sup> Decision and Order on Remand at 15. Ultimately, however, the administrative law judge assigned greater weight to the opinions of Drs. Ghio and Repsher than to the opinion of Dr. Abad on the issue of death causation, to find that the miner's death was not due to pneumoconiosis at Section 718.205(c). Addressing the opinion of Dr. Abad, the miner's treating physician, the administrative law judge noted that he reviewed the questionnaire filled out by Dr. Abad, Dr. Abad's deposition, and Dr. Abad's treatment records. Referencing his summary of these documents from his previous decision, the administrative law judge noted that Dr. Abad never diagnosed pneumoconiosis or treated the miner for pneumoconiosis during the miner's lifetime. Decision and Order on Remand at 10-11. Additionally, the administrative law judge found that Dr. Abad, who is not a pulmonologist, "primarily" treated the miner for non-pulmonary issues, and "typically refers patients to a pulmonologist for a diagnosis regarding pneumoconiosis." Decision and Order on Remand at 15.

Turning to the opinions of Drs. Ghio and Repsher, who both found that pneumoconiosis played no role in the miner's death, the administrative law judge accorded their opinions greater weight because, unlike Dr. Abad, both physicians were Board-certified internists and pulmonologists. Decision and Order on Remand at 20. Additionally, the administrative law judge accorded their opinions greater weight because they were based on more extensive medical evidence, including the three autopsy reports of record. Decision and Order on Remand at 21. Consequently, based on the nature of Dr. Abad's treatment of the miner, and his inferior credentials, the administrative law

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<sup>7</sup> 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. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1 at 261.

<sup>8</sup> The administrative law judge found that the death certificate, signed by Dr. Abad, listed hepatorenal failure as the immediate cause of the miner's death. Other significant conditions listed that lead to the immediate cause of death included hypovolemia and hypoalbuminemia/anemia. The underlying cause that initiated events resulting in death was listed as hepatic cirrhosis. Decision and Order on Remand at 14. Director's Exhibit 9. The administrative law judge, however, gave no weight to the miner's death certificate and treatment records, as they did not contain a reasoned diagnosis of pneumoconiosis. This finding is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

judge determined that Dr. Abad's status as the miner's treating physician did not, in this case, merit deference. The administrative law judge, therefore, gave less weight to the opinion of Dr. Abad on the issue of death causation at Section 718.205(c) than to the opinions of Drs. Ghio and Repsher. Further, the administrative law judge found that, although Dr. Abad stated that the miner's pulmonary edema and bronchopneumonia "could be hastened" by pneumoconiosis, and opined that pneumoconiosis could cause hypoxemia, he did not identify hypoxemia as a cause of death. Decision and Order on Remand at 21. The administrative law judge, therefore, concluded that Dr. Abad's opinion on the issue of death causation, was "more speculative and equivocal" than the opinions of Dr. Repsher and Ghio, who both found that pneumoconiosis played no role in the miner's death. Decision and Order on Remand at 20-21.

Based on our review of the administrative law judge's re-evaluation of the relevant evidence, as instructed on remand, we conclude that he rationally explained his credibility determinations and rendered valid findings and conclusions. Initially, we reject claimant's argument that the administrative law judge erred in assigning less weight to the opinion of Dr. Abad on the ground that it was "speculative and equivocal," after he had found it well-reasoned and well-documented in his earlier decision. When the Board vacated the administrative law judge's findings under Section 718.205(c) and remanded the case for, *inter alia*, a complete analysis and adequate discussion of all the relevant medical evidence, including the weight to be accorded the opinion of Dr. Abad, "the effect of the Board's action was to return the parties to the *status quo ante* the administrative law judge's decision on these issues." *Williams v. Peabody Coal Co.*, BRB No. 00-0236 BLA (May 17, 2001)(unpub.); *see Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). Moreover, contrary to claimant's argument, the administrative law judge did not find that the opinion of Dr. Abad was not well-reasoned on remand, contrary to the finding of his earlier decision that it was well-reasoned and well-documented, Decision and Order on Remand at 20. Rather, he found it "more equivocal and speculative" on the issue of death causation than the opinions of Drs. Ghio and Repsher. Decision and Order on Remand at 21. Specifically, the administrative law judge's identification of evidentiary deficiencies, such as Dr. Abad's inferior medical credentials, that his treatment of the miner was confined to non-pulmonary health conditions, that he never diagnosed or treated the miner for pneumoconiosis, that he reviewed less medical evidence than the other physicians, and, finally, that his opinion was equivocal on the role pneumoconiosis played in the miner's death, were permissible factors the administrative law judge could consider in determining that Dr. Abad's opinion was "more speculative and equivocal" than the opinions of Drs. Ghio and Repsher on the issue of death causation. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320(6th Cir 2002); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see generally Jericol Mining Inc., v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR

2-495 (6th Cir. 2002). Because it is within the administrative law judge's discretion, as trier-of-fact, to assess the relevant evidence of record and draw conclusions and inferences therefrom, we conclude that the administrative law judge fully complied with the Board's instructions to re-examine the respective qualifications of the physicians of record and the reliability of their opinions, in rendering his credibility determinations. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Justice*, 11 BLR at 1-94; *see also Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-130 (6th Cir. 1989). The administrative law judge's assessment of Dr. Abad's medical report is, therefore, affirmed as rational and in accordance with law.

Next, comparing the probative value of the conflicting medical opinions of record, the administrative law judge permissibly characterized and credited Drs. Ghio and Repsher as the better qualified medical experts of record. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Mabe v. Bishop Coal Co.*, 9 BLR 1067 (1986); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-298 (6th Cir. 1994). Additionally, he found that they rendered more fully documented opinions on the issue of death causation pursuant to Section 718.205(c). *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Claimant's arguments to the contrary largely comprise disagreement with the administrative law judge's findings and recitation of sections of evidence in claimant's favor from his previous decision. As such, claimant's assertions fail to raise an argument for review, *see Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992), and essentially constitute a request to reweigh the evidence and overturn the administrative law judge's credibility determinations, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because the administrative law judge's credibility determinations were rational and within his discretion, we, therefore, affirm his determination to accord greater weight to the medical opinions of Drs. Ghio and Repsher, that pneumoconiosis played no role in the miner's death. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because the administrative law judge validly discounted the only evidence supportive of claimant's burden at Section 718.205(c), and assigned determinative weight to the contrary medical opinion evidence, we affirm his determination that claimant has failed to establish death causation at Section 718.205(c), an essential element of entitlement in a survivor's claim. *See Trumbo*, 17 BLR at 1-87. Consequently, we affirm the administrative law judge's denial of survivor's benefits in this case.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

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