

BRB No. 94-0872 BLA

EVA WHITT (Widow of KENNETH)
WINFRED WHITT))
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED:
 NO COAL COMPANY, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-In-Interest) DECISION and ORDER

Appeal of the Decision and Order After Remand of George A. Fath, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Cooper, L.C.), Pineville, West Virginia, for claimant.

Jennifer U. Toth (Thomas S. Williamson, Jr., 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, the United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order After Remand (91-BLA-1460) of Administrative Law Judge George A. Fath 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 is before the Board for the second time. In *Whitt v. No Coal Co., Inc.*, BRB

No. 92-2258 BLA (November 1, 1993)(unpub.), the Board vacated the administrative law judge's finding that the autopsy evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and remanded the case for reconsideration of the autopsy evidence under the regulatory definition of pneumoconiosis in 20 C.F.R. §718.201. The Board also directed the administrative law judge to consider the evidence relating to the existence of pneumoconiosis from the miner's three prior claims, evidence that the administrative law judge had erroneously found to be irrelevant to the survivor's claim. The Board further instructed that, if on remand the administrative law judge found that the evidence established the existence of pneumoconiosis, he was to assess whether the disease substantially contributed to the miner's death under the "hastening" standard of *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

On remand, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that, even assuming that the miner had pneumoconiosis, the miner's death was not due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were again denied. Claimant appeals, asserting that the administrative law judge again misinterpreted the autopsy report of Dr. Yoneyama. Claimant also argues that the administrative law judge erred in according greater weight to the autopsy review report of Dr. Naeye, and in failing to find that the evidence establishes that pneumoconiosis contributed to the miner's death. The Director, Office of Workers' Compensation Programs (the Director), responds, urging reversal of the administrative law judge's finding regarding Dr. Yoneyama's autopsy report. The Director further argues that the administrative law judge applied the wrong legal standard in finding that pneumoconiosis was not a substantially contributing cause of the miner's death, and urges a remand for a determination of whether pneumoconiosis hastened the miner's death.¹

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

¹ Pursuant to the Board's instructions, the administrative law judge considered the evidence from the three prior living miner claims and found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge's finding that the evidence from the prior claims is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) is affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

In finding that the autopsy evidence was insufficient to establish the existence of pneumoconiosis, the administrative law judge found that the autopsy prosector did not diagnose pneumoconiosis despite his autopsy report findings of anthracosis and anthrosilicosis. The administrative law judge found that Dr. Yoneyama was actually describing anthracotic pigmentation because he used the phrase "carbon pigmentation" in his microscopic examination and because he never mentioned the word "pneumoconiosis" in his report. Decision and Order After Remand at 5. We disagree. Anthracosis and anthrosilicosis are two diseases expressly encompassed by the definition of pneumoconiosis at 20 C.F.R. §718.201. Thus, as a matter of law, Dr. Yoneyama diagnosed pneumoconiosis, and the administrative law judge was not free to substitute his own opinion. See *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Therefore, we reverse the administrative law judge's finding that Dr. Yoneyama did not diagnose pneumoconiosis in the autopsy report and remand for reconsideration of the autopsy evidence respecting the existence of pneumoconiosis.

After concluding that Dr. Yoneyama did not diagnose pneumoconiosis, the administrative law judge went on to credit Dr. Naeye's autopsy review report as a better reasoned and explained medical opinion than that of Dr. Yoneyama. Decision and Order After Remand at 5, 7. The administrative law judge also gave additional weight to Dr. Naeye's opinion because of "his nationally recognized competence in the field of pathology as doctor, teacher, and writer."² Decision and Order After Remand at 7. Claimant contends that the administrative law judge erred by crediting the report of Dr. Naeye over that of Dr. Yoneyama. As the record contains no evidence of Dr. Naeye's credentials, the administrative law judge's assigning greater weight to Dr. Naeye's opinion based on superior credentials is unsupported by the record and cannot be affirmed. See *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Moreover, in according less weight to the report of Dr. Yoneyama, the administrative law judge also found that it was not a reasoned opinion as the opinion was brief and unsupported by the physician's clinical findings. Decision and Order After Remand at 5. The administrative law judge's finding on this issue is without merit, however, as the conclusions of Dr. Yoneyama are supported by the underlying

² There is no evidence of Dr. Naeye's credentials or nationally recognized competence in the record other than the letterhead on which his report appears, listing him as Chairman of the Pathology Department of the Penn State University College of Medicine and a Professor of Pathology. Director's Exhibit at 9. Dr. Yoneyama's credentials are not in the record.

documentation in his six-page autopsy report. See Director's Exhibit 8; *Marcum, supra*; *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). Thus, as the administrative law judge's decision to credit the report of Dr. Naeye over that of Dr. Yoneyama is unsupported by the record, it is vacated and the case is remanded for further consideration of this evidence.³ See *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Turning to Section 718.205(c), the administrative law judge found that, even assuming that the miner had pneumoconiosis, "there is no credible evidence that it caused or contributed (hastened) his death." Decision and Order After Remand at 8. The administrative law judge noted that while Dr. Yoneyama cited "adenocarcinoma," "anthrasilicosis (sic) of moderate degree," and "diffuse pulmonary emphysema" as "factors...contributing to [the miner's] demise," he failed to explain how these factors contributed individually or collectively to the timing of

³ The administrative law judge permissibly discredited the autopsy review report of Dr. Ranavaya, who concluded that the miner had pneumoconiosis which was a contributing factor in the miner's death. Decision and Order After Remand at 6, Claimant's Exhibit 1. The administrative law judge discredited this report because Dr. Ranavaya did not review the tissue slides, failed to disclose either the source of his information on the miner's antemortem disability or the epidemiological studies upon which he relied, and overlooked the miner's smoking history as a possible cause of the miner's emphysema. Decision and Order After Remand at 7. Although claimant alleges that the administrative law judge erroneously concluded that Dr. Ranavaya's report was biased, the administrative law judge permissibly discredited Dr. Ranavaya's opinion for the foregoing reasons. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

the miner's death from respiratory failure. Decision and Order After Remand at 8; Director's Exhibit 8. Pursuant to the standard set forth by the United States Court of Appeals for the Fourth Circuit in *Shuff, supra*, the evidence need only establish that pneumoconiosis hastened the death of the miner in order to establish entitlement to benefits under Section 718.205. In the instant case, as the administrative law judge misinterpreted the *Shuff* standard to require a stringent causal explanation of how the pneumoconiosis hastened death, we vacate the administrative law judge's finding on this issue and remand for reconsideration of the evidence under the *Shuff* standard, if necessary. See *Shuff*, 967 F.2d at 979-80, 16 BLR 2-90; see also *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order After Remand denying benefits is affirmed in part, reversed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.⁴

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

_____NANCY S.
DOLDER
Administrative Appeals Judge

⁴ The Director argues that remand is required because the administrative law judge erred in finding that the sole cause of death was lung cancer. Remand for consideration of whether pneumoconiosis hastened death removes the need to address this argument.