

BRB No. 05-0809 BLA

FRONA WOJCIK)	
(Widow of HENRY WOJCIK))	
)	
Claimant-Respondent)	
)	
v.)	
)	
FLORENCE MINING COMPANY)	DATE ISSUED: 07/24/2006
)	
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 Remand of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

George H. Thompson (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (02-BLA-0422) of Administrative Law Judge Michael P. Lesniak awarding 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 involves a survivor's claim filed on September 25, 2000¹ and is before the Board for the second time.

¹The miner filed a claim with the Social Security Administration (SSA) on April 27, 1973. Director's Exhibit 1. The SSA denied benefits on December 5, 1975 and March 29, 1979. *Id.* The Department of Labor denied benefits on April 22, 1981. There is no indication that the miner took any further action in regard to his 1973 claim.

In the initial decision, Administrative Law Judge Michael P. Lesniak (the administrative law judge), after crediting the miner with at least twenty-eight years of coal mine employment, found, *inter alia*, that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis arising out of the miner's coal mine employment. Although the administrative law judge found that the miner was not entitled to the presumption set forth at 20 C.F.R. §718.304, the administrative law judge found that the evidence was sufficient 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 awarded benefits.

By Decision and Order dated June 29, 2004, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings of pneumoconiosis arising out of coal mine employment and no complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.304 as unchallenged on appeal. *Wojcik v. Florence Mining Co.*, BRB No. 04-0127 BLA (June 29, 2004) (unpublished). The Board, however, vacated the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the evidence was sufficient 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 awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R.

The miner filed a second claim on June 26, 1984. Director's Exhibit 2. By Notice dated November 9, 1984, the district director denied the miner's 1984 claim by reason of abandonment. *Id.* The miner filed a third claim on January 31, 1990. Director's Exhibit 3. On March 22, 1990, the district director denied the miner's 1990 claim by reason of abandonment. *Id.*

The miner filed a fourth claim on August 29, 1995. Director's Exhibit 4. The district director found that the miner was entitled to benefits. *Id.* At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* However, by letter dated October 7, 1996, employer advised Administrative Law Judge Thomas M. Burke that it wished to withdraw its controversion and concede liability. *Id.* Employer requested that Judge Burke issue an Order remanding the miner's claim to the district director for a final disposition. *Id.* By Order dated October 10, 1996, Judge Burke granted employer's motion and remanded the case to the district director for appropriate action. *Id.* The district director awarded benefits on October 31, 1996. *Id.*

§718.205(c). Neither claimant² nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because the 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).³ 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 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).

Employer argues that the administrative law judge erred in finding the evidence

²Claimant is the surviving spouse of the deceased miner who died on August 25, 2000. Director's Exhibit 12.

³Section 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).

sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In considering the evidence, the administrative law judge noted that Drs. Comas and Fino opined that the miner's death was due to metastatic adenocarcinoma.⁴ Decision and Order on Remand at 2. The administrative law judge, however, found that Dr. Comas's opinion, when considered in conjunction with Dr. Awan's oncology report, was sufficient to establish that the miner's treatment options for his metastatic adenocarcinoma were limited due to his pulmonary impairment due to pneumoconiosis. *Id.* at 3. Because palliative care was the only treatment option available to the miner, the administrative law judge found that Dr. Comas's opinion and Dr. Awan's oncology report were sufficient to establish that the miner's death was hastened by pneumoconiosis. *Id.* The administrative law judge, therefore, found that the evidence was sufficient to establish that the miner's pneumoconiosis was a substantially contributing cause leading to the miner's death pursuant to 20 C.F.R. §718.205(c). *Id.*

Employer argues that the administrative law judge erred in his consideration of Dr. Awan's opinion. In his August 23, 2000 consultation report, Dr. Awan, an oncologist, stated:

This patient is 81 years old in very poor medical condition. He has metastatic disease to the liver, primary unknown, which could be very well GI, such as pancreatic especially in the face of recently diagnosed diabetes versus metastatic disease from the lung. He is not a very good candidate for any aggressive therapy. We will discuss this with the patient's family who has the Power of Attorney.

Our recommendation at this time would be no further workup. Hospice and palliative care as this is an incurable situation. The chance of response to palliative chemotherapy is very poor as the patient has a very poor

⁴Dr. Comas treated the miner from August 17, 2000 until his death on August 25, 2000. Director's Exhibit 30. Dr. Comas completed the miner's death certificate on August 25, 2000. Dr. Comas attributed the miner's death to poorly differentiated adenocarcinoma (metastatic to liver). Director's Exhibit 12. However, Dr. Comas subsequently opined that the miner's treatment was compromised, and his life shortened, by his coal workers' pneumoconiosis. *See* Director's Exhibits 16, 29; Employer's Exhibit 3. Dr. Fino is the only other physician to address the cause of the miner's death. Based upon his review of the medical evidence, Dr. Fino opined that miner's death was due to metastatic cancer. Director's Exhibit 37; *see also* Director's Exhibit 50. Dr. Fino opined that the miner's "coal mine dust inhalation neither caused, contributed to nor hastened his death." *Id.* Dr. Fino opined that there were "no effective treatment options for [the miner's] type of malignancy regardless of the underlying pulmonary condition." Director's Exhibit 50.

performance status and the risk of toxicity is too high. We will discuss this with the patient's family and depending on their wishes further recommendations can be made.

Employer's Exhibit 2.

Because Dr. Awan's oncology report indicates that the miner was not a good candidate for aggressive therapy, the administrative law judge found that it could "be inferred that there were treatment options for the miner's type of cancer if he had been in good physical condition." Decision and Order on Remand at 3. The administrative law judge, therefore, found that Dr. Awan's opinion demonstrated that "the miner's cancer was not treated aggressively due to his poor physical condition." *Id.*

Employer accurately notes that Dr. Awan did not opine that the miner's *pulmonary complications* prevented him from undertaking aggressive therapy. Immediately before making the statement that the miner was not a good candidate for aggressive therapy, Dr. Awan noted that the miner was 81 years old and in poor health, suffering from "metastatic disease to the liver, primary unknown, which could be very well GI, such as pancreatic especially in the face of recently diagnosed diabetes versus metastatic disease from the lung." Employer's Exhibit 2. The administrative law judge failed to consider whether Dr. Awan's opinion that the miner was not a good candidate for aggressive therapy could have been based on the presence of these conditions, rather than on the presence of pneumoconiosis.⁵

Employer also argues that Dr. Comas's opinion is not well documented and reasoned. In his June 15, 2001 report, Dr. Comas stated that the miner suffered from severe coal workers' pneumoconiosis. Director's Exhibit 37. Employer contends, *inter alia*, that Dr. Comas "had no knowledge, based upon any chest x-rays, pulmonary function studies, or blood gas studies, of the severity of the disease." Employer's Brief at 6. Employer's contention has merit. During a deposition on December 10, 2002, Dr. Comas was asked to explain his basis for stating that the miner suffered from "severe" coal workers' pneumoconiosis. Dr. Comas explained that this statement was based upon a discussion that he had with the miner's family and upon a review of the miner's record. Employer's Exhibit 3 at 15-16. Dr. Comas, however, could not identify any notation of severe coal workers' pneumoconiosis in the miner's records that he reviewed.⁶ *Id.* at 16-

⁵Because Dr. Awan completed his report on August 23, 2000, two days before the miner's death, he did not address the cause of the miner's death. *See* Employer's Exhibit 2.

⁶In his Narrative Summary completed after the miner's death, Dr. Comas diagnosed pneumonitis and chronic obstructive pulmonary disease, but did not render a

17. Moreover, Dr. Comas acknowledged that he had not seen the results of any of the miner's pulmonary function or arterial blood gas studies. *Id.* at 18.

The administrative law judge also did not address the basis for Dr. Comas's opinion that the miner's "pulmonary function was greatly compromised" by his coal workers' pneumoconiosis. Although the administrative law judge noted that the record contains evidence that the miner was totally disabled due to pneumoconiosis during his lifetime (notably the medical reports of Drs. Fino, Ignacio, Srivastava, and Strother), there is no indication that Dr. Comas relied upon, or reviewed, this evidence. Moreover, the administrative law judge failed to address why Dr. Comas's opinion, that the miner had a pulmonary impairment due to pneumoconiosis, was sufficient to establish that the miner's death was hastened by his pneumoconiosis. Although the administrative law judge noted that Dr. Comas indicated that the miner's treatment options for his cancer were limited by his pneumoconiosis, the administrative law judge did not address the fact that Dr. Comas did not identify the specific treatment options that were foreclosed by the miner's pneumoconiosis. When asked whether there was anything that could have been administered to the miner that would have saved his life as far as cancer treatment, Dr. Comas indicated that he could not answer that question because he is not an oncologist.⁷ Employer's Exhibit 3 at 15.

diagnosis of pneumoconiosis. *See* Director's Exhibit 30. In completing the miner's death certificate, Dr. Comas attributed the miner's death to poorly differentiated adenocarcinoma (metastatic to liver). Director's Exhibit 12. Dr. Comas did not list pneumoconiosis as an "[o]ther significant condition contributing to death." *Id.*

⁷Dr. Fino opined that there were "no effective treatment options for [the miner's] type of malignancy regardless of the underlying pulmonary condition." Director's Exhibit 50. The administrative law judge discounted Dr. Fino's opinion that there were no effective treatment options for the miner's type of malignancy. Decision and Order on Remand at 3. The administrative law judge found that Dr. Fino's assessment was inconsistent with Dr. Awan's opinion that treatment options would have been available if the miner had been in good physical condition. *Id.* The administrative law judge found that Dr. Awan's opinion was entitled to greater weight than Dr. Fino's opinion based upon his status as a Board-certified oncologist. *Id.* However, Drs. Awan and Comas, like Dr. Fino, opined that the miner's condition was "incurable." Employer's Exhibits 2, 3. Dr. Awan's assessment was limited to whether or not it was possible for the miner to undergo any type of palliative *therapy*. Because of the miner's poor medical condition, Dr. Awan concluded that such therapy was not possible. On remand, the administrative law judge should reconsider whether Dr. Awan's opinion supports a finding that there were *treatment* options available for the miner's cancer.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and remand the case to the administrative law judge for further consideration.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully disagree with the majority's decision to vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer's statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the medical opinion evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Although employer generally asserts that Dr. Comas's opinion is not well documented and reasoned, employer's statements constitute a request to reweigh the evidence. *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).

Moreover, I would affirm the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) on the merits. The administrative law judge found that pneumoconiosis hastened the miner's death because the presence of the disease limited the options which the physicians could utilize to treat the miner's cancer. Dr. Comas, who attended to the miner during the last week of his life, testified that the miner "was

not in [physical] condition to entertain any aggressive treatments which could cause decreased physiology of his function.” Employer’s Exhibit 3 at 29. Dr. Awan, a Board-certified oncologist, whose expertise on the subject of cancer the administrative law judge referenced, agreed that the miner’s “chance of response to palliative chemotherapy [was] very poor as the [miner had] a very poor performance status and the risk of toxicity [was] too high.” Employer’s Exhibit 2. Dr. Awan specifically noted that the miner was “in very poor medical condition” and, therefore, opined that the miner was “not a good candidate for any aggressive therapy.” *Id.* One of the medical conditions diagnosed by Dr. Awan was coal workers’ pneumoconiosis. *Id.* The administrative law judge reasonably found that Dr. Comas’s opinion that pneumoconiosis hastened the miner’s death, when considered in conjunction with Dr. Awan’s opinion, was sufficient to establish that pneumoconiosis hastened the miner’s death. The administrative law judge reasonably rejected Dr. Fino’s opinion that there were no effective treatment options for the miner’s type of cancer because it conflicted with the opinion of Dr. Awan, a Board-certified oncologist. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because it is supported by substantial evidence, I would affirm the administrative law judge’s finding that the evidence is sufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, I would affirm the administrative law judge’s award of benefits.

BETTY JEAN HALL
Administrative Appeals Judge