

BRB No. 09-0751 BLA

ANNA BELLE GOBLE)
(Widow of DAVID GOBLE))
)
Claimant-Petitioner)
)
v.)
)
AZTEC MINING COMPANY,)
INCORPORATED)
)
and)
) DATE ISSUED: 07/30/2010
AMERICAN BUSINESS & MERCANTILE)
INSURANCE MUTUAL, INCORPORATED)
)
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 Denial of Survivor's Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant¹ appeals the Decision and Order Denial of Survivor's Benefits (2004-BLA-06576) of Administrative Law Judge Joseph E. Kane, with respect to a claim filed on September 6, 2002, 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).² After crediting claimant with twenty years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that, although claimant established that the miner had clinical pneumoconiosis arising from coal mine employment at 20 C.F.R. §§718.202(a)(2), 718.203, she did not establish that the clinical pneumoconiosis was a substantially contributing cause of the miner's death at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in granting employer's request for a protective order prohibiting discovery of information related to the fees paid, and the referrals made, to employer's experts. In addition, claimant asserts that the administrative law judge erred in finding that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) or that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's issuance of the protective order and the

¹ Claimant is the widow of the miner, David Goble, who died on April 7, 2002. Director's Exhibit 16.

² On May 4, 2010, the Board issued an order granting the parties the opportunity to submit briefs regarding the potential effects of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010. *Goble v. Aztec Mining Co.*, BRB No. 09-0751 BLA (May 4, 2010) (unpub. Order). The Director, Office of Workers' Compensation Programs (the Director), filed a supplemental brief in which he asserted that, based on the filing date of this claim, the amendments do not apply. Employer also filed a supplemental brief, arguing that the claim is not affected by the amendments. Upon consideration of this issue, we agree with the Director and employer that the recent amendments do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 4.

denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief in this appeal.³

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 in this claim, 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 (1993). For a survivor's claim filed on September 6, 2002, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

I. Employer's Request for a Protective Order

A. Procedural History

On September 1, 2006, claimant filed a Motion to Compel Discovery regarding employer's failure to properly respond to interrogatories concerning employer's evidence and information about the fees paid, and referrals made, to employer's experts. Claimant

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established that the miner had clinical pneumoconiosis arising from his coal mine employment at 20 C.F.R. §§718.202(a)(2), 718.203, but not at 20 C.F.R. §718.202(a)(1), (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 5, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

renewed the motion in a letter to the administrative law judge dated June 6, 2008. On July 14, 2008, employer responded and asserted that the administrative law judge should deny the additional requested discovery because it was for the purpose of harassment, was not relevant, and its production would be unduly burdensome.

On September 5, 2008, the administrative law judge, pursuant to 29 C.F.R. §18.15, issued an Order Granting Protective Order.⁵ The administrative law judge noted that claimant sought “information that may show bias of a medical witness who is offering evidence in this proceeding, especially if such doctors regularly submit evidence on behalf of [e]mployer in other cases.” Order Granting Protective Order at 3. Citing 29 C.F.R. §18.14(a), the administrative law judge determined that permitting discovery of the requested evidence would not “lead to the discovery of relevant information,” as bias cannot be established merely by showing “a particular number of referrals or a dollar figure of income earned from acting as an expert witness for a particular employer[.]”⁶ *Id.* at 4. The administrative law judge also indicated, “[e]mployer has made a good case that the information sought would be difficult to obtain, as well as burdensome.” *Id.* Accordingly, the administrative law judge granted employer’s request for a protective order.

⁵ Under 29 C.F.R. §18.15:

(a) Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) The discovery not be had

29 C.F.R. §18.15.

⁶ In relevant part, 29 C.F.R. §18.14(a) provides:

(a) Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. . . .

29 C.F.R. §18.14(a).

B. Arguments on Appeal

Claimant alleges that because the credibility of a witness is always an issue, and the existence of bias cannot be determined without evidence as to the nature of the relationship between the witness and employer, claimant's discovery request pertained to relevant evidence. In addition, claimant states that the evidence obtained from the discovery requests may have persuaded the administrative law judge that Dr. Oesterling's opinion was less credible and, therefore, entitled to less weight than Dr. Kahn's opinion, which could have resulted in an award of benefits. Further, claimant argues that the administrative law judge did not adequately explain the basis for the issuance of the protective order.

We reject claimant's contentions. An administrative law judge is granted broad discretion in resolving procedural and evidentiary issues. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). In accordance with this principle, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his discretion. We hold that, in the present case, claimant has not met this burden. The administrative law judge rationally applied 29 C.F.R. §18.14(a) to find that the information regarding the fees paid by employer to its experts, and the frequency of employer's use of its experts, was not relevant because it would not establish that employer's experts are biased. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985).

Regarding the dissent's view, that the case law and regulations establish that the administrative law judge erred in granting employer's request for a protective order, we note that the administrative law judge acknowledged the holdings of the United States Courts of Appeals for the Fourth and Sixth Circuits cited by our dissenting colleague. Order Granting Protective Order at 3-4, citing *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Furthermore, our dissenting colleague's citation of the Fourth Circuit's decision in *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), is inapposite, as the court's holding pertained to discovery of communications regarding the extent to which counsel actually authored medical opinions offered into evidence, rather than information regarding fees and referrals. Significantly, despite the court's comment in *Underwood*, that an administrative law judge should consider whether an opinion was the product of bias in favor of the party retaining the expert, the Fourth Circuit affirmed, as a proper exercise of his discretion, the administrative law judge's evidentiary ruling admitting evidence submitted by the employer that the claimant sought to exclude. *Underwood*, 105 F.3d at 951, 21 BLR at 2-32-33.

In addition, the Sixth Circuit's reference in *Woodward* to the party affiliation of the physicians performing x-ray readings was dicta. *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. In *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 637 n.6, 24 BLR 2-199, 2-214 n. 6 (6th Cir. 2009), the Sixth Circuit rejected the claimant's allegation that the employer's experts were biased, citing *Richardson v. Perales*, 402 U.S. 389 (1971), in support of the proposition that bias cannot be presumed merely because an expert is compensated for his opinion. Lastly, although the dissent is correct in noting that claimant did not have the right to subpoena employer's experts in this case at no cost to herself, she did have the opportunity to cross-examine Dr. Oesterling when he was deposed by employer, but chose not to appear at the deposition. See Employer's Exhibit 4. We remain convinced, therefore, that in issuing the protective order requested by employer on the ground that the information sought by claimant is not relevant, the administrative law judge acted within the broad discretion granted to him in resolving evidentiary issues.⁷ *Clark*, 12 BLR at 1-153; *Morgan*, 8 BLR at 1-493.

II. The Merits of the Survivor's Claim

A. The Existence of Legal Pneumoconiosis

1. The Administrative Law Judge's Findings

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge initially cited *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*), in support of the proposition that "it is often necessary to make separate findings concerning the existence of clinical and legal pneumoconiosis."⁸ Decision and Order at 17. The administrative law judge determined

⁷ We decline to address whether the administrative law judge acted within his discretion in determining that employer established, pursuant to 29 C.F.R. §18.15(a), that answering the interrogatories at issue would be unduly burdensome. Because the administrative law judge provided a valid, alternative rationale for granting employer's request for a protective order, error, if any, in his finding is harmless. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378, 1-384 n.4 (1983).

⁸ "Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "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(b). In contrast, under 20 C.F.R. §718.201(a)(1), "clinical pneumoconiosis" is defined as "those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions

that Dr. Sundaram's opinion, that the miner had coal workers' pneumoconiosis, was insufficient to establish the existence of clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), despite his status as the miner's treating physician. *Id.* The administrative law judge noted that Dr. Sundaram relied on an unspecified x-ray and did not review the autopsy evidence, or consider the miner's smoking history. *Id.* Further, the administrative law judge stated that Dr. Sundaram failed to provide a rationale for his conclusions, other than the unspecified x-ray, the miner's coal dust exposure history, and a reference to his treatment of the miner. *Id.* In addition, the administrative law judge determined that, although the pathology reports were sufficient to establish the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(2), they did not establish the presence of legal pneumoconiosis, because neither Dr. Dennis nor Dr. Kahn indicated that the other respiratory diseases that they diagnosed were due to coal dust exposure. *Id.* at 17-18. Therefore, the administrative law judge concluded that claimant did not establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id.* at 18.

2. Arguments on Appeal

On appeal, claimant argues that the administrative law judge erred in finding that the miner did not have legal pneumoconiosis. Claimant asserts that the administrative law judge erred in relying upon *Webber* to separately consider whether claimant established the existence of legal pneumoconiosis, as "an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis as well." Claimant's Brief at 14, citing *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). Employer responds, urging affirmance of the administrative law judge's findings at 20 C.F.R. §718.202(a)(4). Employer argues that claimant's reliance on *Martin* is misplaced because it was based on a definition of pneumoconiosis that predated the current regulations, which employer notes, clarify that legal pneumoconiosis is a different disease process. In addition, employer asserts that none of the opinions claimant relies on to support her claim establishes the requisite causal link between the miner's respiratory impairment and his coal dust exposure.

Contrary to claimant's assertions, the Sixth Circuit's recognition that "an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis as well," does not support the proposition that, because autopsy evidence establishes the existence of clinical pneumoconiosis, the miner's other respiratory diseases are

characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

attributable to coal dust exposure, and, therefore, constitute legal pneumoconiosis. *Martin*, 400 F.3d at 306, 23 BLR at 2-285. Rather, as the administrative law judge properly noted, to establish that other conditions, such as emphysema or bronchitis, constitute legal pneumoconiosis, claimant must affirmatively establish, through medical evidence, that those diseases arose out of coal mine employment. Decision and Order at 17-18; see 20 C.F.R. §718.201(a)(2); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006). In the present case, claimant has not challenged the administrative law judge's findings that Dr. Sundaram's opinion was insufficient to establish the existence of either clinical or legal pneumoconiosis or that the opinions of Drs. Dennis and Kahn were insufficient to establish the existence of legal pneumoconiosis. Decision and Order at 17-18. Therefore, we affirm these findings as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We affirm, therefore, the administrative law judge's determination that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order at 18; see *Webber*, 23 BLR at 1-139.

B. Death Due to Pneumoconiosis

1. The Administrative Law Judge's Findings

The administrative law judge initially determined that Dr. Sundaram's statement, that pneumoconiosis contributed to, or hastened, the miner's death, was entitled to no probative weight. Decision and Order at 18. The administrative law judge noted that Dr. Sundaram's opinion was insufficiently reasoned, particularly since there was no evidence that he treated the miner in the weeks leading up to his death. *Id.*; Director's Exhibit 19. In addition, the administrative law judge indicated that Dr. Sundaram did not consider any autopsy evidence or "appear to have any basis to assess the extent of the miner's pneumoconiosis." Decision and Order at 18.

The administrative law judge gave less weight to Dr. Dennis's opinion, that the miner died a pulmonary death with significant anthracosilicosis, fibrosis, and anthracosilicotic expressions of macule formation, because his assessment of the severity of the miner's pneumoconiosis was based on his finding of macules greater than two centimeters in size, which the administrative law judge indicated was contrary to the findings made by the other pathologists of record. Decision and Order at 18-19; Director's Exhibit 17. The administrative law judge also found that Dr. Dennis's opinion was conclusory, and the least thorough of the pathology reports, as he did not describe the process by which the miner died. Decision and Order at 19. The administrative law judge found that Dr. Caffrey's opinion, that the miner "most likely" died a cardiac death, was not persuasive because he did not provide a reasoned discussion of the process by

which the miner died, but rather focused primarily on the perceived flaws in Dr. Dennis's opinion. Decision and Order at 11; Employer's Exhibit 7.

Regarding Dr. Rosenberg's opinion, that the miner's death was not related to coal workers' pneumoconiosis, the administrative law judge stated that he did "not find [Dr. Rosenberg's] reliance on [Dr. Oesterling's] autopsy reports and [four] year-old medical evidence to be a rational basis for determining the extent of pneumoconiosis present at the time of the miner's death" or whether pneumoconiosis caused, contributed to, or hastened the miner's death.⁹ Decision and Order at 19; Employer's Exhibits 3, 4 at 13, 8. Additionally, the administrative law judge indicated that Dr. Rosenberg did not personally review the autopsy slides but, instead, accepted Dr. Oesterling's findings. Decision and Order at 19. Therefore, the administrative law judge concluded that, instead of relying on Dr. Rosenberg's opinion, he would rely on the opinions of the pathologists who actually observed the autopsy slides. *Id.*

Accordingly, the administrative law judge credited Dr. Oesterling's opinion, that the miner's death was unrelated to coal dust exposure, because it was more detailed than the other pathology reports. Decision and Order at 20; Employer's Exhibits 5, 6 at 21. The administrative law judge also noted that Dr. Oesterling explained his findings and the basis for his disagreement with Dr. Kahn, who opined that coal workers' pneumoconiosis contributed to the miner's death. Decision and Order at 20; Claimant's Exhibit 1; Employer's Exhibits 5, 6 at 21.

Similarly, the administrative law judge gave Dr. Kahn's opinion great weight because he determined it was well-reasoned and well-documented, as Dr. Kahn specifically explained his findings regarding the cause of the miner's death, and the mechanism by which pneumoconiosis contributed to the miner's death. Decision and Order at 18. Further, the administrative law judge noted that Dr. Kahn reviewed both the autopsy information and additional medical evidence. *Id.* However, the administrative law judge found that there was no basis for giving greater weight to Dr. Kahn's opinion, or even the combined opinions of Drs. Dennis and Kahn, over Dr. Oesterling's opinion since Dr. Oesterling's opinion was equally, or more, persuasive. *Id.* at 20. Consequently, the administrative law judge concluded that claimant did not meet her burden of

⁹ The administrative law judge found that Dr. Rosenberg based his opinion regarding the degree of the miner's pneumoconiosis on the x-ray and pulmonary function test evidence. Decision and Order at 19. However, the administrative law judge stated that one of the x-rays Dr. Rosenberg relied on was deemed unreadable and the other was from June 1998. *Id.* In addition, the administrative law judge noted that the pulmonary function test on which Dr. Rosenberg relied was also from June 1998, almost four years prior to the date of the miner's death in April 2002. *Id.*

establishing, by a preponderance of the evidence, that the miner's death was caused, contributed to, or hastened by coal workers' pneumoconiosis. *Id.*

2. Arguments on Appeal

Claimant contends that it was error for the administrative law judge to require claimant to prove that the miner's death was actually caused by clinical pneumoconiosis, as claimant is only required to prove that pneumoconiosis hastened the miner's death in some way. Claimant also argues that the administrative law judge erred in crediting Dr. Oesterling's opinion regarding the cause of the miner's death. Employer responds and states that claimant's arguments regarding death causation are insufficient to disturb the administrative law judge's findings.

We reject claimant's assertion that the administrative law judge erred in requiring her to establish that the miner's clinical pneumoconiosis caused or hastened the miner's death at 20 C.F.R. §718.205(c). The administrative law judge acted within his discretion in giving less weight to Dr. Dennis's opinion, that the miner's death was due to coal workers' pneumoconiosis, because he found it was based, in part, on his finding of macules greater than two centimeters, which the administrative law judge rationally concluded was contrary to the weight of the evidence. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Director's Exhibit 17. In addition, the administrative law judge acted within his discretion in determining that Dr. Dennis's opinion was conclusory and that his report was the least thorough of the pathology reports. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. The administrative law judge also rationally found that Dr. Oesterling submitted the most detailed pathology report and that his opinion was equally, or more, persuasive than the opinions of Drs. Kahn and Dennis.¹⁰ *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325.

In addition, we find no merit in claimant's assertion that, based on the Sixth Circuit's holding in *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007), Dr. Oesterling's opinion should be rejected because he failed to explain why coal dust exposure did not aggravate the miner's lung condition. Dr. Oesterling did, in fact, explain that he ruled out coal dust exposure as a cause of the miner's death because the largest macules he observed on the autopsy slides did not show scarring and, without

¹⁰ Claimant does not challenge the administrative law judge's discrediting of Dr. Sundaram's opinion regarding the cause of the miner's death. Accordingly, we affirm the administrative law judge's finding that Dr. Sundaram's opinion is insufficient to satisfy claimant's burden of proof at 20 C.F.R. §718.205(c). *See Skrack*, 6 BLR at 1-711.

scarring, there was no structural or functional change. Employer's Exhibit 6 at 14-15, 20-21. Further, unlike in *Barrett*, the administrative law judge in the present case acted within his discretion in determining that Dr. Oesterling's opinion was the most detailed pathology report because "[h]e explained all of his findings and the basis for his disagreement with Dr. Kahn." Decision and Order at 20; *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325.

Thus, we affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Since we have affirmed the administrative law judge's finding that claimant did not establish death due to pneumoconiosis, an essential element of entitlement, we must affirm the denial of benefits.¹¹ *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, J., dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's Order Granting Protective Order regarding claimant's request for discovery

¹¹ Because we have affirmed the denial of benefits, we need not address employer's allegations of error regarding the administrative law judge's discrediting of Dr. Rosenberg's opinion at 20 C.F.R. §718.205(c).

of the fees paid, and referrals made, to employer's experts. A careful reading of the Order reveals that the majority has mistakenly concluded that the administrative law judge properly exercised the discretion given him under 29 C.F.R. §18.15.

As the majority concluded, an administrative law judge is granted broad discretion in resolving procedural and evidentiary issues. However, in this case, the administrative law judge applied an incorrect standard to preclude claimant from seeking relevant discovery. The administrative law judge identified the United States Supreme Court case of *Richardson v. Perales*, 402 U.S. 389 (1971), as the "seminal case" controlling whether a party is entitled to discovery regarding an expert witness's relationship to the party who has retained his or her services. Order Granting Protective Order at 3. The administrative law judge indicated that *Perales* stood for the proposition that bias cannot be imputed to an expert merely because he or she received a fee for providing his or her opinion. *Id.* The administrative law judge also stated, "the Supreme Court held the fact that certain physicians' reports, including consulting physicians['] opinions, 'were adverse to [the claimant] is not in itself bias or an indication of non-probative character.'" *Id.*, quoting *Perales*, 402 U.S. at 404.

Perales involved a claim for Social Security disability benefits, in which the agency referred the claimant to particular physicians and paid the physicians regardless of whether their medical assessments supported or contradicted a finding of disability. *Perales*, 402 U.S. at 402-403. The Court stated:

The identity of the five reporting physicians is significant. Each report presented here was prepared by a practicing physician who had examined the claimant. A majority . . . were called into the case by the state agency. Although each received a fee, that fee is recompense for his time and talent otherwise devoted to private practice or other professional assignment. We cannot, and do not, ascribe bias to the work of these independent physicians, or any interest on their part in the outcome of the administrative proceeding beyond the professional curiosity a dedicated medical man possesses.

Id. The Court further emphasized, "the agency operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary." *Id.* at 403. The Court also found significant the fact that, under the Social Security system, the claimant had the right to have any doctor subpoenaed, at no expense, so that he could cross-examine them. *Id.*

In relying upon *Perales*, the administrative law judge did not recognize that it is distinguishable from this case. The physicians with respect to whom claimant sought discovery were not retained by the Department of Labor, but by employer, who is

claimant's adversary. The presumption of independence that the Court extended to agency physicians does not exist, therefore, with respect to the physicians hired by employer. In addition, the Act does not give claimant the right to subpoena the physicians hired by employer. Rather, she is required to marshal her own resources and doggedly ascertain information that might enable her to impeach the potential bias of the opposing doctor. Thus, *Perales* is not persuasive authority, let alone "seminal," to deny claimant's discovery in this case.

With respect to authority from the United States Courts of Appeals, as the administrative law judge noted in his order, both the Fourth and Sixth Circuits have held that party affiliation can be relevant in assessing the opinions of experts. In *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), the Fourth Circuit held the following regarding establishing bias via the party affiliation of experts:

To the extent that [administrative law judges] determine that a particular expert's opinion is not, in fact, independently based on the facts of a particular claim, but is instead influenced more by the identity of his or her employer, [administrative law judges] have clear discretion to disregard such as expert's opinion as being of exceedingly low probative value.

Underwood, 105 F.3d at 951, 21 BLR at 2-32. The Sixth Circuit observed in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), that experts hired exclusively by either party may tend to obfuscate, rather than promote, a true evaluation of the miner's condition.

More recently, in *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), the Fourth Circuit stated:

And, as several courts have observed, it is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him.

Blake, 480 F.3d at 301, 23 BLR at 2-467. The court also quoted a passage from a decision in which a district court indicated: "[T]he impact of expert witnesses on modern-day litigation cannot be overstated; yet, to some, they are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune desired Thus, full, effective cross examination is critical to the integrity of the truth-finding process." *Blake*, 480 F.3d at 301, 23 BLR at 2-468, quoting *Karn v. Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996). I would submit that, contrary to the majority's position, *Blake* is not inapposite in that the court specifically noted, "[r]ather than seeking

to benefit from its opposing counsel's work product, [the employer] was seeking those materials for *an entirely legitimate purpose – to fully explore the trustworthiness and reliability of [employer's experts].*" *Blake*, 480 F.3d at 302-03, 23 BLR at 2-468 (emphasis added).

Regarding the regulations applicable to the scope of discovery in claims under the Act, as noted by the administrative law judge in his Order, the general regulations governing the procedures to be followed before the Office of Administrative Law Judges are set forth at 29 C.F.R. Part 18. Further, the Federal Rules of Civil Procedure are applicable to procedural issues not specifically addressed by 29 C.F.R. Part 18. 29 C.F.R. §18.1(a). The regulation at 29 C.F.R. §18.14, which tracks the federal rules, governs the scope of discoverable information and provides: "Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding *any matter, not privileged, which is relevant to the subject matter involved in the proceeding*" 29 C.F.R. §18.14(a) (emphasis added). In addition, Rule 26(b) of the Federal Rules of Civil Procedure states:

(b) Discovery, Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties *may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action* The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence

Fed. R. Civ. P. 26(b) (emphasis added).

In terms of whether the information sought by claimant in this case meets the standard of relevancy set forth in 29 C.F.R. §18.14(a) and Rule 26 of the Federal Rules of Civil Procedure, the credibility of a witness is always at issue. Whether a witness is biased in favor of a party due to a longstanding and profitable relationship is, therefore, discoverable. Whether the evidence sought would in fact prove bias cannot be predicted without actually determining what the relationship is. As the court stated in *Behler v. Hanlon*, 199 F.R.D. 553 (D. Md. 2001):

[T]he fact that an expert witness may have a 20 year history of earning significant income testifying primarily as a witness for defendants, and an ongoing economic relationship with certain insurance companies, certainly fits within recognized examples of bias/prejudice impeachment, making such facts relevant both to the subject matter of the litigation, and the

claims and defenses raised, and placing it squarely within the scope of discovery authorized by Rule 26(b)(1)

199 F.R.D. at 556-557

Therefore, the case law and the applicable regulations support a holding that, in this case, claimant's interrogatories regarding the fees paid to employer's physicians and the frequency of employer's use of these physicians and referrals constituted proper discovery. The information sought by claimant could have been used to attack the credibility of Dr. Oesterling, employer's expert, by establishing bias, based on the longstanding relationship with, and possible financial reliance on, employer. Thus, the majority erred in affirming the administrative law judge's Order Granting Protective Order.

With respect to the administrative law judge's disposition of the merits of the claim, the majority has also erred in affirming the administrative law judge's weighing of the medical opinion evidence at 20 C.F.R. §§718.202(a)(4) and 718.205(c). Specifically, regarding the issue of death due to pneumoconiosis, the administrative law judge found that Dr. Oesterling's opinion was equally or more persuasive than Dr. Kahn's opinion or the combined opinions of Drs. Kahn and Dennis. Decision and Order at 20. Therefore, any evidence of bias on Dr. Oesterling's part is extremely relevant in this case, as it could have "tipped the scales" regarding credibility and may have persuaded the administrative law judge that Dr. Oesterling's opinion was based, in part, on his relationship with employer. Contrary to the majority's holding, claimant does not allege that Dr. Oesterling is biased based on how much employer paid him over the past five years or based on the number of referrals employer made to him. Rather, claimant is arguing that she was entitled to an opportunity to examine these facts in order to determine if this information, in conjunction with other facts, might have "tipped the scales" in favor of the credibility of claimant's experts.

Further, in finding claimant's request "too burdensome," the administrative law judge simply pens one sentence: "Additionally, [e]mployer has made a good case that the information sought would be difficult to obtain, as well as burdensome." *See* Order Granting Protective Order at 4. This is not sufficient to satisfy the administrative law judge's burden under 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), 30 U.S.C. §932(a), of adequately setting forth the rationale underlying his findings. *See Wojtowiczv. Duquesne Light Co.*, 12 BLR 1-1621 (1988). The only evidence in the record that the request would be burdensome, or difficult to obtain, consists of the "declaration" of a manager, Betsey Sellers, which was attached to Employer's Opposition to Claimant's Motion for Protective Order. However, the administrative law judge did not explain how this statement proves that providing the requested information for a five-

year period would be unduly burdensome to employer, especially given its potential relevance in this case.

Accordingly, I would vacate the Order Granting Protective Order, the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.205(c) and the denial of the claim for survivor's benefits, and remand the case to the administrative law judge for further consideration.

BETTY JEAN HALL
Administrative Appeals Judge