

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0209 BLA

H. DARLENE TAYLOR)
(Widow of KEITH TAYLOR))

Claimant-Respondent)

v.)

KING KNOB COAL COMPANY)

and)

WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 07/17/2019

DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Program Director, Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits (2011-BLA-5998) of Administrative Law Judge Drew A. Swank, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving a survivor's claim filed on September 2, 2010, is before the Board for the third time.¹

In the most recent appeal, the Board reversed in part, and vacated in part, the evidentiary rulings the administrative law judge made concerning the autopsy evidence.² *Taylor v. King Knob Coal Co.*, BRB No. 16-0206 BLA, slip op. at 6-10 (Feb. 16, 2017) (Boggs, J., concurring). The Board also vacated his findings claimant established: 1) clinical pneumoconiosis³ and 2) death due to clinical pneumoconiosis, and remanded the case to him with instructions to initially reconsider these findings, separate from any

¹ Claimant is the widow of the miner, who died on June 23, 2007. Director's Exhibit 14. Section 422(l) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012). Claimant cannot benefit from this provision, as the miner's three claims for benefits were denied. Director's Exhibits 1-3.

² We incorporate the procedural history of this case as set forth in the Board's prior decisions, *Taylor v. King Knob Coal Co.*, BRB No. 14-0305 BLA, slip op. at 4-5 (Mar. 11, 2015) (unpub.) and *Taylor v. King Knob Coal Co.*, BRB No. 16-0206 BLA, slip op. at 1-5 (Feb. 16, 2017) (Boggs, J., concurring) (unpub.).

³ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.*

determinations relevant to legal pneumoconiosis.⁴ *Id.* On remand, the administrative law judge again found claimant established the miner had clinical pneumoconiosis arising out of coal mine employment and the miner's death was due to clinical pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal the administrative law judge erred in failing to follow the Board's remand instructions and in finding the miner's death was due to clinical pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief. Employer filed a reply brief, reiterating its arguments on appeal.⁵

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.⁶ 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).

Benefits are payable on a survivor's claim when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). In cases where the statutory presumptions cannot be invoked, a miner's death will be considered to be due to pneumoconiosis if it was a substantially contributing cause of the miner's death. 20 C.F.R. §718.205(b)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R.

⁴ The Board did not disturb the administrative law judge's finding the miner had less than the requisite fifteen years of qualifying coal mine employment necessary to invoke the rebuttable presumption the miner's death was due to pneumoconiosis under 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. *See* Decision and Order on Remand at 6-7 n.8. The Board also did not disturb his determination claimant failed to invoke the irrebuttable presumption of death due to pneumoconiosis at 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304.

⁵ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 13-14.

⁶ The record indicates the miner's coal mine employment was in West Virginia. Director's Exhibits 7, 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

§718.205(b)(6); see *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80 (4th Cir. 1992).

Pursuant to 20 C.F.R. §718.205(b), the administrative law judge considered the autopsy reports of Drs. Perper and Oesterling, and the medical opinions of Drs. Houser and Castle. Decision and Order on Remand at 14-19; Claimant's Exhibits 2, 3; Employer's Exhibits 1, 5, 7, 10, 13. Drs. Perper and Houser opined that both clinical and legal pneumoconiosis were contributing causes of the miner's death. Claimant's Exhibits 2, 3; Employer's Exhibit 13 at 18-20. In contrast, Drs. Oesterling and Castle opined that the miner's death was due to cardiac disease and chronic lung disease, in the form of chronic obstructive pulmonary disease (COPD)/emphysema, with neither clinical pneumoconiosis nor coal dust exposure playing a role. Employer's Exhibits 1, 5, 10, 11.

The administrative law judge found the opinion of Dr. Perper entitled to substantial weight, and Dr. Houser's opinion entitled to some weight, as it corroborated Dr. Perper's conclusions. Decision and Order on Remand at 17. He determined the opinions of Drs. Oesterling and Castle were entitled to little weight because they incorrectly found the miner died a cardiac death, and did not adequately explain or support their findings. *Id.* at 18. The administrative law judge therefore found claimant established clinical pneumoconiosis was a contributing cause of the miner's death. *Id.* at 19. Based on this finding, he declined to address whether the miner had legal pneumoconiosis and whether it caused or contributed to his death. *Id.* at 4, 19 n.13.

Employer argues that the administrative law judge did not comply with the Board's remand instruction to avoid conflating his analysis of the role clinical pneumoconiosis played in the miner's death, with consideration of the role non-respiratory conditions or legal pneumoconiosis played in the miner's death. Employer's Brief in Support of Petition for Review at 9-15, citing *Taylor*, BRB No. 16-0206 BLA, slip op. at 12. Employer therefore alleges the administrative law judge's credibility determinations on the issue of death causation cannot be affirmed. We agree. The administrative law judge's sole focus on clinical pneumoconiosis led him to commit errors in addressing death causation. Clinical and legal pneumoconiosis are both relevant to the overall inquiry, particularly given the medical opinions regarding the miner's COPD in this case.

The administrative law judge credited Dr. Perper's opinion as "well-documented, well-reasoned, and persuasive" because he "explained why he concluded that the miner's coal workers' pneumoconiosis significantly contributed to the miner's death, and supported his conclusions with specific references to the evidence of record, as well as relevant medical studies." Decision and Order on Remand at 18. Contrary to the administrative law judge's finding, however, Dr. Perper's comments regarding the cause of the miner's death focus on cardiac arrhythmia caused by COPD, rather than clinical

pneumoconiosis. Dr. Perper stated, “[t]here was neither clinical nor pathological evidence of an acute cardiovascular disease (such as a myocardial infarction), but considering the fact that the autopsy revealed severe stenotic coronary artery disease, it is very possible that the severe *COPD* precipitated a fatal cardiac arrhythmia.” Claimant’s Exhibit 2 at 41-42 (emphasis added). Although Dr. Perper further observed, “such indirect impact of coal dust exposure *and coal workers’ pneumoconiosis* has been well[-]reported in the medical literature,” the studies he cited do not discuss clinical pneumoconiosis as a contributing cause of cardiac arrhythmia, as his brief summary of each article indicates that the authors focused on the relationship between COPD and arrhythmia.⁷ *Id.* at 42 (emphasis added).

We therefore vacate the administrative law judge’s determination that Dr. Perper’s opinion is well-documented and well-reasoned, and supportive of a finding of death due to clinical pneumoconiosis. *See Sparks*, 213 F.3d at 190. Because he accorded weight to Dr. Houser’s opinion based primarily on the extent to which it corroborated Dr. Perper’s

⁷ Dr. Perper reported:

As early as 1979, Wolfe noted that arrhythmias often complicate the course of patients with chronic pulmonary disease. (*Arrhythmias in chronic pulmonary disease*: Wolfe, PS, *Angiology* 179 Oct: 30 (10) 676-82). In late 1990, Biggs et al. reported that “patients with chronic obstructive lung disease have a high incidence and variety of cardiac arrhythmia.” (*Disturbance of rhythm in chronic lung disease*; Biggs FD, Lefrak SS, Kleiger RE, Senior Rm, Oliver GC, *Heart Lung* 1997 Mar-April; 6 (2): 256-61)[.] Conte et al. also noted that “patients with chronic obstructive pulmonary disease [(COPD)] especially during acute exacerbations of their disease show a greater incidence of cardiac arrhythmia than health[y] subjects of the same age.” (*Evaluation of hyperkinetic cardiac arrhythmia in chronic obstructive bronchopneumopathy*; Conte, G, Lauro S, Lazzarini M, Rigon N, Perrone A, *Minerva Cardioangiol* 1997, Sept: 45 (9) 429-33.)

A 2002 study by Yildiz P, Tukek T, Akkaya V et al. also confirmed the occurrence of ventricular arrhythmias in patients with COPD and reported that those are associated with increased QT wave dispersion. The authors noted: “Cardiac arrhythmias and increased risk of sudden death are known in patients with [COPD].” (*Ventricular arrhythmias in patient with COPD are associated with QT dispersion*; Yildiz P, Tukek T, Akkaya V et al.; *Chest* 2002; 122:1055-2061.

Claimant’s Exhibit 2 at 42.

opinion, we also vacate his finding Dr. Houser provided a reasoned and documented opinion that clinical pneumoconiosis caused or contributed to the miner's death.⁸ See *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order on Remand at 18. Having vacated the administrative law judge's crediting of the opinions of claimant's experts, we also vacate his finding that claimant established death due to clinical pneumoconiosis at 20 C.F.R. §718.205(b).

We further agree with employer that in discrediting the opinions of Drs. Oesterling and Castle on death causation, the administrative law judge again violated the Board's instruction to refrain from combining analyses of death due to clinical pneumoconiosis and death due to legal pneumoconiosis. Decision and Order on Remand at 14-19; Claimant's Exhibits 2 (at 40), 3 (at 5); Employer's Exhibits 1, 5, 7, 10, 13. Contrary to the administrative law judge's finding, Drs. Oesterling and Castle did not opine that clinical pneumoconiosis played no role in the miner's death because his death was primarily cardiac in nature.⁹ Rather, both physicians noted the miner's chronic lung disease, related

⁸ Like Dr. Perper, Dr. Houser diagnosed COPD/emphysema caused by pipe smoking and coal dust exposure, and identified it as a contributing cause of the miner's death. Claimant's Exhibit 4; Employer's Exhibit 13 at 18-20. The administrative law judge stated: "Although Dr. Houser's opinion does not cite medical literature or studies to support his findings, he did explain why the miner's death was related to his respiratory impairments – which include clinical pneumoconiosis – and not to cardiac issues or chronic heart failure. His opinions support and are consistent with Dr. Perper's conclusions, but because Dr. Houser's findings are not as well-documented or fully explained as Dr. Perper's, his opinion is entitled to less weight." Decision and Order on Remand at 18.

⁹ Dr. Oesterling diagnosed chronic ischemic heart disease resulting in heart failure, pulmonary edema, early pneumonia, mild macular clinical pneumoconiosis and panlobular emphysema related to pipe smoking. Employer's Exhibit 1 at 4. He stated "the limited structural change caused by clinical pneumoconiosis" is "insufficient to have hastened, contributed to or caused [the miner's] demise." *Id.* Dr. Oesterling further concluded the primary cause of death was cardiac disease with pulmonary complications. *Id.* at 3-4. Dr. Castle initially determined that the miner "most likely" did not have clinical pneumoconiosis, but in a supplemental report, he acknowledged "it is possible that [the miner] did have a very mild degree of simple coal workers' pneumoconiosis pathologically." Employer's Exhibit 11. He opined that the miner's clinical pneumoconiosis did not cause a disabling impairment during his life and played no causal role in his death. *Id.* Dr. Castle concluded the miner's death: "[W]as due to pneumonia, occurring in the presence of tobacco smoke-induced pulmonary emphysema with bronchial asthma. This was also very likely contributed to by substantial pulmonary edema and

solely to pipe smoking, contributed to his death but determined the miner's clinical pneumoconiosis was too mild to have hastened, contributed to, or caused death. Employer's Exhibits 1 (at 4), 11. The administrative law judge also found Dr. Oesterling's reference to chronic lung disease undermined his determination that pneumoconiosis was not a factor in the miner's death. Decision and Order on Remand at 17. He did not consider, however, that assessing the causal role played by the miner's COPD/emphysema is not relevant to determining whether the miner's death was due to clinical pneumoconiosis. Rather, this inquiry pertains to whether the miner's chronic lung disease was legal pneumoconiosis and whether it caused, contributed to, or hastened the miner's death, issues the administrative law judge explicitly did not reach. Decision and Order on Remand at 19 n.13.

The administrative law judge also did not explain how Dr. Oesterling's statements the miner's chronic lung disease was a "component" of his death *and* the miner's lung disease was "markedly magnified" by his alleged heart disease, made his opinion internally inconsistent. Employer's Exhibit 10 at 44-45; Decision and Order on Remand at 17. In this regard, the administrative law judge also erroneously determined Dr. Oesterling opined "the degree of passive congestion and interalveolar hemorrhage, paired with the miner's 'normal lungs' was 'sufficient to kill him.'" Decision and Order on Remand at 16, *quoting* Employer's Exhibit 10 at 45. Dr. Oesterling actually stated, "had [the miner] had normal lungs, that degree of passive congestion, interalveolar hemorrhage, the whole bit, *may not have been* sufficient to kill him." Employer's Exhibit 10 at 45 (emphasis added). Because the administrative law judge did not accurately characterize the opinions of Drs. Oesterling and Castle, and did not adequately explain all of his findings as required by the Administrative Procedure Act (APA),¹⁰ we vacate his discrediting of these opinions on the issue of death causation. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

In light of the Board's two previous remands, we further conclude it is appropriate for this case be assigned to a different administrative law judge on remand for a fresh look at the evidence and a proper application of the law. 20 C.F.R. §§802.404(a), 802.405(a); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998);

severe cardiac disease which is unrelated to coal mine dust exposure and coal workers' pneumoconiosis." *Id.*

¹⁰ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented" 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Cochran v. Consolidation Coal Co., 16 BLR 1-101, 1-107 (1992). On remand, the administrative law judge must consider whether claimant has established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). To ensure the appropriate analysis is performed, the administrative law judge must initially determine whether claimant has established the miner had legal pneumoconiosis.¹¹ With respect to clinical pneumoconiosis, the administrative law judge must render a finding as to the degree of the disease the miner had, as this is a relevant factor in assessing the probative value of the medical opinions on the extent to which clinical pneumoconiosis played a role in the miner's death.¹²

The administrative law judge is then required to consider the issue of death causation at 20 C.F.R. §718.205(b). As we previously instructed, the administrative law judge must assess the credibility of the physicians' opinions as to whether the miner's clinical pneumoconiosis contributed to his death, apart from the credibility of their opinions as to whether his death was due to legal pneumoconiosis. Finally, the administrative law judge must set forth his or her findings on remand in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

¹¹ To establish legal pneumoconiosis, claimant must prove the miner had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

¹² In his most recent Decision and Order, the administrative law judge found simple coal workers' pneumoconiosis established. Decision and Order on Remand at 9, 11. He found in his 2016 Decision and Order the evidence established mild simple coal workers' pneumoconiosis. 2016 Decision and Order at 15. Dr. Perper described the miner's clinical pneumoconiosis as both "significant and substantial" and "mild to moderate." Claimant's Exhibit 2 at 40. Dr. Houser did not appear to specify the degree of the miner's clinical pneumoconiosis, while Dr. Oesterling characterized it as mild and Dr. Castle acknowledged the possibility that the miner had a "very mild degree of coal workers' pneumoconiosis." Claimant's Exhibit 4; Employer's Exhibits 1 (at 4), 13.

Accordingly, the Decision and Order on Remand Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for reassignment to a different administrative law judge for consideration in accordance with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge