BRB No. 98-1344 BLA

WILMA LEE (Widow of ALVA LEE) Claimant-Respondent v. OLD BEN COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Jack VanStone (VanStone and Associates), Evansville, Indiana, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-1344) of Administrative Law Judge Donald W. Mosser denying benefits on a miner's claim and awarding benefits 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).[1] The administrative law judge found that the evidence of record

[1]Claimant, Wilma Lee, is the widow of the miner, Alva Lee, who died on August 1, 1989. The "Record of Death" lists the causes of death as pneumonia, "CHF", "Recurrent MI", emphysema and pneumoconiosis. Director's Exhibit 3. Claimant is not challenging the denial of benefits on the miner's claim and thus the denial is affirmed. *See Skrack v. Island*

established the miner's coal mine employment history of thirty-five years. Decision and Order at 4. The administrative law judge further found the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2), Decision and Order at 14-17, 21, that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), that the evidence established the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), but that the evidence failed to establish that such total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), Decision and Order at 21-23. Finally, the administrative law judge concluded that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 23-25. Accordingly, benefits were denied on the miner's claim and awarded on the survivor's claim. On appeal, employer contends that the administrative law judge erred in determining that the miner's death was due to pneumoconiosis. Claimant, in response, urges affirmance of the award of benefits on the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has declined to file a brief in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed 33 U.S.C. §921(b)(3), as incorporated into the

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Creek Coal Co., 6 BLR 1-710 (1983).

[2]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, as well as the findings that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1), (2), that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), that claimant was totally disabled pursuant to Section 718.204(c), and that the evidence failed to establish that total disability was due to pneumoconiosis pursuant to Section 718.204(b). *See Skrack, supra*.

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

Employer contends that the administrative law judge erred in concluding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Specifically, employer contends that the administrative law judge erred in relying on the opinion of Dr. Gehlhausen, that the miner's death was due to pneumoconiosis, Director's Exhibit 2, merely because of the physician's status as the miner's treating physician. Employer further contends that the administrative law judge erred in crediting the opinion of Dr. Long, who found that the compromise of the miner's respiratory reserve due to coal workers' pneumoconiosis was a substantial contributing factor in the miner's death, Director's Exhibit 4, inasmuch as the physician provided no support for her conclusions. Similarly, employer contends that the administrative law judge erred in crediting the opinion of Dr. Houser, who indicated his agreement with the other physicians who concluded that coal workers' pneumoconiosis was a contributing factor in the miner's death, Claimant's Exhibit 13, because there was no supporting evidence provided for the physician's conclusions.

Employer further asserts that the administrative law judge improperly discredited the opinions of Drs. Tuteur, Renn and Caffrey, all of whom concluded that pneumoconiosis played no role in the miner's death, Employer's Exhibits 1, 3, 7, 8, as these physicians all based their conclusions on a thorough review of the evidence and not merely "antiquated" evidence, Decision and Order at 24, as determined by the administrative law judge. Employer also asserts that the administrative law judge improperly discredited the opinion of Dr. Castle, who concluded that the miner's death was not due to pneumoconiosis, Employer's Exhibit 7, as the physician's failure to review the autopsy slides did not provide a proper basis for discrediting the opinion. Employer further contends that the administrative law judge improperly discredited the opinions of Drs. Naeye, Caffrey and Crouch, all of whom concluded that pneumoconiosis played no role in the death of the miner, Employer's Exhibits 1, 8, 95, in favor of the opinion of the autopsy prosector, Dr. Jacobi, Director's Exhibit 3. Employer also contends that the administrative law judge erred in failing to address the relative qualifications of all the physicians of record. Finally, employer asserts that the administrative law judge erred in discrediting the report of Dr. Kleinerman, who opined that coal workers' pneumoconiosis played no role in the miner's death, Employer's Exhibit 12, inasmuch as the physician clearly stated that coal dust exposure played no role in the miner's death.

In order to establish entitlement to benefits on a survivor's claim pursuant to

Section 718.205, a claimant must establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2). *See Neeley v. Director, OWCP,* 11 BLR 1-85 (1988); *Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this claim arises, has held that a substantially contributing factor is any condition which hastens the miner's death. *Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *see Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In finding that claimant established entitlement to survivor's benefits, the administrative law judge found that the weight of the evidence established that pneumoconiosis hastened the miner's death. The administrative law judge accorded greatest weight to the opinion of Dr. Gehlhausen as he was the miner's treating physician and "very familiar" with his condition. Decision and Order at 24. The administrative law judge further accorded greater weight to the opinions of Drs. Long and Houser as they corroborated the conclusions of Dr. Gehlhausen. Decision and Order at 24. The administrative law judge accorded less weight to the opinions of record which concluded that the miner's death was not due to pneumoconiosis, however. The administrative law judge accorded less weight to the opinions of Drs. Tuteur and Renn based on these physicians' reliance on less recent evidence. Decision and Order at 24. Further, the administrative law judge accorded less weight to the opinion of Dr. Castle as he failed to examine the autopsy slides, the autopsy report or the "Record of Death." Decision and Order at 24. The administrative law judge found the opinion of Dr. Kleinerman not relevant as to the cause of the miner's death inasmuch as the physician "clearly distinguished between pneumoconiosis and silicosis in his report," and ruled out pneumoconiosis as a contributor to the miner's death, but made no findings regarding the role of silicosis in the death of the miner. Decision and Order at 24. Finally, the administrative law judge accorded less weight to the opinions of Drs. Naeye, Crouch and Caffrey, inasmuch as the credibility of these physicians' conclusions, that the miner's pneumoconiosis was not of sufficient severity to hasten death, were contradicted by the autopsy report of the prosector, Dr. Jacobi, who "had the advantage of seeing the entire autopsy." Decision and Order at 24-25. Accordingly, the administrative law judge concluded that the weight of the medical evidence was sufficient to support a finding of death due to pneumoconiosis pursuant to Section 718.205(c). *See Railey*, *supra*.

Initially, we reject employer's assertion that the administrative law judge improperly relied on the opinion of Dr. Jacobi in determining that the miner's death was due to pneumoconiosis. A review of Dr. Jacobi's opinion demonstrates that the physician attributed the miner's death to acute respiratory failure secondary to broncho pneumonia and chronic congestive heart failure. The physician also noted the presumptive presence of nodular silicosis. Under the standard enunciated by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this claim arises, in *Railey, supra*, the opinion of Dr. Jacobi would not be sufficient as a matter of a law for finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), inasmuch as the physician did not link the miner's death due to silicosis or make any commentary on the role of the silicosis in the miner's death. Nevertheless, a review of the administrative law judge's Decision and Order demonstrates convincingly that, instead of using the opinion of Dr. Jacobi as support for a finding of death due to pneumoconiosis, the administrative law judge found that, based on Dr. Jacobi's status as autopsy prosector and thus because of his greater familiarity with the miner's condition at the time of death, the opinion called into question the validity of the conclusions reached by Drs. Caffrey, Naeye and Crouch, that the miner's pneumoconiosis was not severe enough to contribute to the death of the miner. Decision and Order at 24-25. While an administrative law judge may not mechanically award greater weight to the opinion of a physician merely based on that physician's status as an autopsy prosector, *see Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992), the administrative law judge may accord greatest weight to medical evidence he determines to be the most thoroughly reasoned and detailed, *see Gruller v. Bethenergy Mines Inc.*, 16 BLR 1-3 (1991); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Accordingly, we hold that the administrative law judge rationally relied upon the opinion of Dr. Jacobi as a basis for discrediting the opinions of Drs. Naeye, Caffrey and Crouch. We further reject employer's contentions regarding the opinions of Drs. Gehlhausen, Long and Houser and hold that employer's assertions in this regard are tantamount to a request to reweigh the evidence, a role outside the scope of the Board's authority. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Specifically, we reject employer's assertion that the administrative law judge improperly relied upon the opinions of Dr. Gehlhausen as support for the conclusion that the miner's death was due to pneumoconiosis. A review of the "Record of Death" demonstrates that Dr. Gehlhausen was present at the time of the miner's death and diagnosed pneumoconiosis as being one of the causes of death. Director's Exhibit 3. Moreover, a review of the record demonstrates that Dr. Gehlhausen was the miner's treating physician and the administrative law judge permissibly accorded greatest weight to his opinion based, not only on his status as

a treating physician, but because of his great familiarity with the miner's condition and his long treatment history of the miner. *See Amax Coal Company v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *see also Amax Coal Company v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992). We further hold that the administrative law judge's decision to credit the opinions of Drs. Long and Houser as corroborative of the opinion of Dr. Gehlhausen does not constitute reversible error. Dr. Long reviewed the relevant evidence of record and diagnosed the presence of coal workers' pneumoconiosis and indicated that the compromise of the miner's respiratory reserve due to coal workers' pneumoconiosis was a substantially contributing factor in the miner's death. The administrative law judge, in a permissible exercise of his discretion as trier-of-fact, *see Kuchwara v. Director, OWCP,* 7 BLR 1-167 (1984), concluded that the opinion was supportive of a finding of death due to pneumoconiosis. *See Railey, supra*; *Clark, supra*; *Peskie; supra*; *Lucostic, supra*. Similarly, Dr. Houser reviewed the relevant medical evidence of record and concluded that coal workers' pneumoconiosis was a significant contributor to the miner's death. The administrative law judge thus properly concluded that the opinion supported a finding of death due to pneumoconiosis. *See Railey, supra*; *Clark, supra; Peskie, supra*; *Lucostic, supra*. Further still, we reject employer's assertion that the administrative law judge erred in failing to take into account the physicians' relative qualifications. Contrary to employer's assertion, the decision to credit a physician is a decision clearly within the administrative law judge's discretion, *see Clark, supra*; *DeFore v. Alabama By-Products Corp*., 12 BLR 1-27 (1988); *Worley v. Blue Diamond Coal Co*, 12 BLR 1-20 (1988), and absent a showing of abuse of that discretion, we will not disturb the administrative law judge's findings.

Nevertheless, we are compelled to vacate the award of a survivor's benefits in the instant case. As employer contends, the administrative law judge impermissibly discredited the opinions of Drs. Tuteur and Renn as relying on antiquated evidence in reaching the conclusion that the miner's death was not due to pneumoconiosis. A review of these physicians' opinions demonstrates that their conclusions were based upon a comprehensive review of the relevant evidence of record. *See* Employer's Exhibits 3, 7. Inasmuch as the administrative law judge has mischaracterized these opinions, we vacate his conclusions with regard to them and remand the claim for further consideration. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Further, contrary to the administrative law judge's determination, Dr. Castle's opinion, that coal workers' pneumoconiosis did not cause the miner's death, was based upon a review of pathology reports rendered by Drs. Houser and Naeye. Employer's Exhibit 4. Thus, the administrative law judge also mischaracterized the opinion of Dr. Castle and the opinion must also be

reconsidered on remand. *See Tackett, supra; Arnold, supra*; *Branham*, *supra*.

We further hold that, on remand, the administrative law judge must reconsider the opinion of Dr. Kleinerman. Dr. Kleinerman indicated that the miner suffered from simple nodular silicosis, but that there was no evidence of simple or complicated pneumoconiosis. Employer's Exhibit 12. The physician further concluded that the miner's "respiratory impairment did not arise in any part as a result of his coal mine work." *Id.* Dr. Kleinerman then opined that:

> ...I find no competent medical evidence to establish that Mr. Lee's death was due to occupational pneumoconiosis. Pneumoconiosis due to coal mine dust was not a substantial contributing cause or factor leading to Mr. Lee's death. Mr. Lee's death was not caused by complications of pneumoconiosis and occupational pneumoconiosis did not hasten his death.

Employer's Exhibit 12. While the administrative law judge correctly notes that Dr. Kleinerman made no commentary as to the role, if any, of silicosis (rather than pneumoconiosis) , in the miner's death, our review of Dr. Kleinerman's opinion leads us to the conclusion that the physician ruled out any occupationally caused impairment as a cause of the miner's death as the physician specifically indicated the absence of any coal mine employment related impairment. *See Railey*, *supra*. Thus, the administrative law judge must reweigh the opinion of Dr. Kleinerman on remand.

Accordingly, the administrative law judge's Decision and Order denying benefits on a miner's claim and awarding benefits on a survivor's claim is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge