

BRB No. 00-0764 BLA

GERALDINE R. WENTZ)
(Widow of HERBERT WENTZ))
)
Claimant-Respondent)
)
v.)
)
ISLAND CREEK COAL COMPANY) DATE ISSUED:
)
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-0081) of

Administrative Law Judge Michael P. Lesniak 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 This case is on appeal to the Board for the fourth time.² In the last appeal, the Board vacated the administrative law judge's award of survivor's benefits, and remanded this case for the administrative law judge to reevaluate the medical opinions of Drs. Comas, Kleinerman and Naeye, and to render a specific credibility finding with respect to the opinion of Dr. Fino, in determining whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to the standard enunciated in *Lukosevich v. Director*, OWCP, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989), by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises. *Wentz v. Island Creek Coal Co.*, BRB No. 99-0184 BLA (Nov. 26, 1999)(unpub.). On remand, the administrative law judge found the evidence of record sufficient to establish that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(2) (2000). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's findings pursuant to Section 718.205(c)(2) (2000), and requests that this case be reassigned to a different administrative law judge. Claimant, the miner's widow, responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²The full procedural history of this case is set forth in *Wentz v. Island Creek Coal Co.*, BRB No. 99-0184 BLA (Nov. 26, 1999)(unpub.). In his original Decision and Order issued on September 11, 1995, the administrative law judge accepted the stipulation of the parties that the miner had occupational pneumoconiosis.

Programs (the Director), has declined to submit a brief on the merits of this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 18, 2001, to which claimant, employer and the Director have responded.³ Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 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 finding that the weight of the medical opinions of record established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2) (2000). Specifically, employer maintains that the administrative law judge improperly relied on the January 14, 1993 report of Dr. Comas to support a finding of death due to pneumoconiosis, as employer asserts that this report does not constitute a reasoned opinion that pneumoconiosis was a contributing cause of death, and the death certificate, signed by Dr. Comas, did not mention pneumoconiosis as a factor in the miner's death. Employer further argues that the administrative law judge failed to provide a rationale for crediting the opinions of Drs. Comas, Perper and Benschhoff

³Claimant and the Director assert that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer generally asserts that the regulations at issue in the lawsuit could affect the outcome of this case, but has not specifically indicated how the application of the amended regulations to the facts of the case herein could affect the outcome of the instant appeal.

over the contrary opinions of Drs. Kleinerman, Naeye and Fino. Employer's arguments have merit.

In the last appeal, the Board held that the administrative law judge was not required to credit the death certificate, signed by Dr. Comas, as the physician's conclusive opinion that pneumoconiosis played no role in the miner's death. The Board, however, remanded this case to the administrative law judge with instructions to identify the basis for his determination that Dr. Comas, in his January 14, 1993 report, "provided an adequate explanation for his conclusion that pneumoconiosis contributed to the miner's death," inasmuch as it was not apparent from the face of the report that Dr. Comas provided any such explanation. On remand, the administrative law judge acknowledged that a rationale for Dr. Comas's conclusions was not apparent on the face of the report, but the administrative law judge found the report to be well reasoned on the grounds that: (1) Dr. Comas treated the miner during his terminal admission and consequently was aware first-hand of the miner's condition leading up to his death; and (2) Dr. Comas noted that an autopsy was performed and that early to moderate pneumoconiosis was a contributing factor, thus "[i]t is logical to assume that he relied on the autopsy report in rendering his diagnoses." Decision and Order on Remand at 3.

A review of the report, however, does not reveal any indication that the physician personally concluded that pneumoconiosis was a contributing cause of the miner's death; rather, Dr. Comas merely documented the miner's admission and discharge diagnoses and the course of his terminal hospitalization, stated that the miner was pronounced dead from cardiopulmonary arrest secondary to acute myocardial infarction, and listed the preliminary autopsy findings of the prosector, Dr. Benshoff.⁴ Director's Exhibit 50. Inasmuch as Dr.

⁴Dr. Comas's sole reference to the contributory causes of the miner's death is located at the end of his report, as follows:

Autopsy was performed with cause of death found to be acute coronary thrombosis with left ventricular myocardial infarction. Contributory factors: Early to moderate pneumoconiosis and bilateral hydrothorax. Incidental findings: Moderate myocardial hypertrophy. Severe coronary atherosclerosis with calcification. Anthracosis of hilar lymph nodes. Umbilical hernia. Large scar of anterior surface of left leg.

Director's Exhibit 50. Included within the same exhibit is the preliminary necropsy report issued by the prosector, Dr. Benshoff, on December 12, 1992, which provides as follows:

CAUSE OF DEATH: ACUTE CORONARY THROMBOSIS WITH LEFT VENTRICULAR MYOCARDIAL INFARCTION

Comas's report does not constitute an independent, reasoned opinion that pneumoconiosis hastened the miner's death, *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997), and the administrative law judge did not provide a rationale for crediting the opinions of Drs. Benshoff and Perper over the contrary opinions of Drs. Naeye, Kleinerman and Fino,⁵ we vacate the administrative law judge's findings pursuant to Section 718.205(c)(2) (2000), and remand this case for a reevaluation of the medical opinions and an analysis which comports with the requirements of 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), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Lastly, we reject employer's argument that this case has resulted in administrative gridlock, necessitating reassignment to a different administrative law judge. The administrative law judge has consistently followed the Board's instructions on remand, and employer has demonstrated no evidence of bias or intransigence on the part of the administrative law judge. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

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

CONTRIBUTORY FACTORS: EARLY TO MODERATE
PNEUMOCONIOSIS (PROBABLE ANTHRACOSILICOSIS)
BILATERAL HYDROTHORAX (ACUTE HEART FAILURE)

INCIDENTAL FINDINGS: MODERATE MYOCARDIAL HYPERTROPHY
SEVERE CORONARY ATHEROSCLEROSIS WITH CALCIFICATION
ANTHRACOSIS OF HILAR LYMPH NODES
UMBILICAL HERNIA
LARGE SCAR OF ANTERIOR SURFACE OF THE LEFT LEG

Director's Exhibit 50.

⁵The administrative law judge explicitly found that the opinion of Dr. Perper and the original autopsy report of Dr. Benshoff were well reasoned, but the administrative law judge did not indicate that the contrary opinions of Drs. Naeye, Kleinerman and Fino were not well reasoned. Rather, the administrative law judge stated that he could not discredit Dr. Fino's opinion specifically, and that Drs. Naeye and Kleinerman performed an "equivalent" review of all of the relevant medical records to that of Dr. Perper in rendering their opinions. Decision and Order on Remand at 2-3.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge