

BRB No. 00-0957 BLA

ERMA JEAN THOMAS)	
(Widow of ANDREW THOMAS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	DATE ISSUED:
CORPORATION)	
)	
Employer-Respondent)	
)	
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 - Denying Benefits and the Decision on Motion for Reconsideration of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Laura Metcoff Klaus and Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (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 and McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant, the miner's widow, appeals the Decision and Order on Remand - Denying

Benefits and the Decision on Motion for Reconsideration (97-BLA-0776) of Administrative Law Judge Michael P. Lesniak issued 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 a second time. In his initial Decision and Order issued on March 18, 1998, the administrative law judge credited the miner with more than forty years of qualifying coal mine employment as stipulated by the parties, and adjudicated this survivor's claim, filed on May 6, 1996, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(2), 718.203(b) (2000), but insufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000) or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1)-(3) (2000). Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(2), 718.203(b), 718.304 and 718.205(c)(1), (3) (2000), and affirmed his discounting of Dr. Tsai's opinion as equivocal, but vacated his remaining findings pursuant to Section 718.205(c)(2) (2000). The Board remanded this case to the administrative law judge to reconsider the record evidence to determine whether, regardless of the immediate or primary cause of death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, pursuant to the standard enunciated in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied sub nom. Cedar Coal Co. v. Shuff*, 506 U.S. 1050 (1993), by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. The Board further instructed the administrative law judge to make specific findings with respect to the credibility of Dr. Goldblatt's opinion; to provide an explanation of his credibility determination with respect to Dr. Weiss's opinion; and to determine the probative value of the opinions of Drs. Kleinerman and Naeye in light of *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *as modified by Hobbs v. Clinchfield Coal Co.*, 45 F.3d 790, 19 BLR 2-86 (4th Cir. 1995) and *Dehue Coal Co. v.*

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.

Ballard, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), as their conclusion that the miner did not have pneumoconiosis was contrary to the administrative law judge's finding that pneumoconiosis was established by autopsy evidence. *Thomas v. Eastern Associated Coal Corp.*, BRB No. 98-0961 BLA (Oct. 28, 1999)(unpub.)(McGranery, J., concurring and dissenting). On remand, the administrative law judge found the evidence of record insufficient to establish that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(2) (2000). Accordingly, benefits were denied.

In the present appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.205(c)(2) (2000). Employer responds, urging affirmance. The Director, Office of Workers' Compensation 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 March 16, 2001, to which claimant, employer and the Director have responded.² 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.

²Employer and the Director assert that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant argues that the regulations at issue in the lawsuit "could have some effect on the outcome of this case," because the definition of pneumoconiosis now explicitly encompasses "legal" and "clinical" pneumoconiosis, and the revised regulations recognize the latent and progressive nature of the disease. The administrative law judge previously found the existence of simple pneumoconiosis established, however, and claimant concedes that the revisions at 20 C.F.R. §718.205(c) merely codify existing Circuit Court precedent.

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).

Claimant contends that the administrative law judge erred in finding the weight of the medical opinions of record insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2) (2000). Specifically, claimant maintains that the administrative law judge did not discuss all relevant evidence and only addressed the role that "clinical" pneumoconiosis played in the miner's death without considering the effects of "legal" pneumoconiosis, thereby providing invalid reasons for according less weight to the opinion of Dr. Goldblatt that pneumoconiosis hastened the miner's death. Claimant's arguments have merit.

In his Decision on Motion for Reconsideration, the administrative law judge provided two reasons for finding Dr. Goldblatt's opinion to be less persuasive than Dr. Weiss's contrary opinion, that the miner's death was due entirely to cancer: (1) Dr. Goldblatt's opinion was premised on the physician's belief of the presence of a greater degree of coal workers' pneumoconiosis than was supported by the evidence, the preponderance of which indicated that the miner had minimal coal workers' pneumoconiosis; and (2) Dr. Goldblatt's credentials and experience in the field of pathology and coal dust-related diseases were not as extensive as those of Drs. Kleinerman and Naeye who, for example, participated on the committee that developed the standards for diagnosing coal workers' pneumoconiosis. Decision on Motion for Reconsideration at 2. The administrative law judge, however, did not fully address Dr. Goldblatt's qualifications³ and compare them to those of the autopsy prosecutors and Dr. Weiss, or explain why the experience of Drs. Kleinerman and Naeye in developing the standards for diagnosing pneumoconiosis placed them in a better position to determine the extent of the miner's pneumoconiosis and its contribution to death when they, contrary to the administrative law judge's finding, did not diagnose pneumoconiosis. *See generally Toler v. Eastern Associated Coal Corp.* 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995);

³Contrary to claimant's arguments, any findings in unrelated cases that Dr. Goldblatt possesses superior qualifications are not relevant to the administrative law judge's weighing of the respective qualifications of physicians in the instant case. We also reject claimant's argument that the administrative law judge was required to acknowledge that pneumoconiosis was diagnosed prior to the development of the miner's cancer and that pneumoconiosis is a progressive disease, as the relevant inquiry is the miner's condition at the time of death.

Bill Branch Coal Corp. v. Sparks, 213 F.3d 186 (4th Cir. 2000); *BethEnergy Mines, Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996)(Hall, J., dissenting). The administrative law judge also did not explain how Dr. Goldblatt's diagnosis of simple pneumoconiosis was inconsistent with the record evidence or why any conflicting evidence was entitled to greater weight. Further, the administrative law judge did not take into account Dr. Goldblatt's opinion that the miner's focal dust and centrilobular emphysema arising out of dust exposure in coal mine employment hastened the miner's death, which diagnosis falls within the regulatory definition of pneumoconiosis at 20 C.F.R. §718.201, 65 Fed. Reg. 80,048 (2000); *see also* 65 Fed. Reg. 79,937-79,945 (2000); *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). Inasmuch as the autopsy prosectors, Drs. Patel and Rizkalla, found the presence of focal emphysema, Director's Exhibit 15, while Drs. Kleinerman and Naeye found only centrilobular emphysema which they attributed solely to smoking, Employer's Exhibits 1, 2, 4, we vacate the administrative law judge's findings pursuant to Section 718.205(c)(2) (2000), and remand this case for the administrative law judge to reevaluate the relevant evidence in accordance with the principles enunciated by the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), resolve the conflicts, and provide 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 Collins v. J & L Steel*, 21 BLR 1-181 (1999).

Accordingly, the Decision and Order on Remand - Denying Benefits and the Decision on Motion for Reconsideration of the administrative law judge are vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

I concur in the result only:

REGINA C. McGRANERY
Administrative Appeals Judge