BRB No. 00-0967 BLA

GERALDINE THACKER (Widow of ZACK THACKER)	)	
Claimant-Respondent	)	
v.	)	
SCOTTS BRANCH COAL COMPANY	)	DATE ISSUED:
and	)	
MAPCO, 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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Thomas G. Polites (Wilson, Sowards, Polites & McQueen), Lexington, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-1036) of Administrative Law Judge Thomas F. Phalen, Jr. awarding benefits on a 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 instant case involves a survivor's claim filed on June 8, 1998.[2] After crediting the miner with eleven years of coal mine employment, the administrative law judge found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). The administrative law judge further found that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. 718.203(b) (2000). The administrative law judge also found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2) (2000) and 718.205(c) (2000). Claimant[3] responds in

[1]The 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.

[2]The miner filed a claim for benefits on July 6, 1989. Director's Exhibit 27. In a Decision and Order dated October 2, 1992, Administrative Law Judge Lee J. Romero, Jr. denied benefits. *Id.* There is no indication that the miner took any further action in regard to his 1989 claim.

[3]Claimant is the surviving spouse of the deceased miner who died on April 6, 1998. Director's Exhibit 9.

support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.[4]

[4]Inasmuch as no party challenges the administrative law judge's finding of eleven years of coal mine employment, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 Ass'n 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 employer and the Director have responded.[5] Employer contends that the revised regulation set out at 20 C.F.R. §718.205(c) could affect the outcome of the instant case. The Director asserts that application of the revised regulations at issue in the lawsuit does not affect the outcome of this case.

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. Employer contends that the hastening standard set out at 20 C.F.R. §718.205(c)(5) could affect the disposition of the instant case. The revised regulation at Section 718.205(c)(5), however, merely codifies the standard previously set out by the United States Court of Appeals for the Sixth Circuit in *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[6] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director,*

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[5]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 16, 2001, is construed as a position that the challenged regulations will not affect the outcome of this case.

[6]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by

OWCP, 11 BLR 1-85 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown, supra*.

Employer initially contends that the administrative law judge erred in finding the autopsy evidence sufficient to establish the existence of pneumoconiosis. In the instant case, the administrative law judge credited the opinions of Drs. Dennis, Naeye and Perper that the miner suffered from pneumoconiosis over the contrary opinions of Drs. Caffrey, Hutchins and Kleinerman. Decision and Order at 9-10; Director's Exhibits 10, 11, 15, 21; Employer's Exhibits 1-3, 5, 6.

Employer argues that Dr. Naeye's opinion cannot support a finding of pneumoconiosis as a matter of law. Employer contends that because Dr. Naeye, in diagnosing pneumoconiosis, provided the miner with the "benefit of the doubt," his opinion is equivocal and, thus, fails to meet claimant's burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. We disagree. In reports dated August 8, 1998 and September 27, 1999, Dr. Naeye explicitly diagnosed coal workers' pneumoconiosis. Director's Exhibit 10; Employer's Exhibit 3. Although Dr. Naeye, during an October 12, 1999 deposition, explained that he tends to give the "benefit of the doubt" to the miner and diagnose pneumoconiosis if there are lesions (even one or two) that could be classified as pneumoconiosis, *see* Employer's Exhibit 5 at 18, Dr. Naeye reiterated that he diagnosed pneumoconiosis in the instant case because the miner's autopsy slides revealed "several small lesions" that satisfied the minimal criteria for the disease. *Id.* at 18-19. Under such circumstances, the administrative law judge reasonably found Dr. Naeye's opinion supportive of a finding of pneumoconiosis.

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complications of pneumoconiosis, or

(3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

We agree, however, with employer that the administrative law judge erred in not providing a basis for crediting the opinions of Drs. Dennis, Naeye and Perper that the miner suffered from pneumoconiosis over the contrary opinions of Drs. Caffrey, Hutchins and Kleinerman. Although the administrative law judge credited the opinions of Drs. Dennis, Naeye and Perper over those of Drs. Caffrey, Hutchins and Kleinerman regarding whether the autopsy evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge failed to provide a basis for doing so.[7] Consequently, the administrative law judge's analysis does not comport with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 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) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding that the autopsy evidence is sufficient to establish the existence of pneumoconiosis and remand the case to the administrative law judge for further consideration.[8] *See* 20 C.F.R. §718.202(a)(2).

Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis. The administrative law judge found that the opinions of Drs. Dennis and Perper were sufficient to establish that pneumoconiosis was a "substantial cause" of the miner's death. Decision and Order at 10-11. The administrative law judge further found that the opinions of Drs. Dennis and Perper were entitled to greater weight than the contrary opinions of Drs Naeye, Caffrey, Hutchins and Kleinerman.[9] *Id.* The administrative law judge noted that Dr. Dennis's opinion was

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[7]We note that the administrative law judge found that Dr. Dennis "reached a diagnosis of coal workers' pneumoconiosis." Decision and Order at 10. The administrative law judge subsequently noted that Dr. Dennis found "extensive anthracosilicosis." *Id.* at 10. Because Dr. Dennis never used the terms "coal workers' pneumoconiosis" or diagnosed "anthracosilicosis" in his autopsy report, *see* Director's Exhibit 21, the administrative law judge is instructed to explain his basis for finding Dr. Dennis's opinion supportive of a finding of pneumoconiosis.

[8]On remand, should the administrative law judge find the autopsy evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge must consider whether the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge properly found that claimant was not entitled to any of the presumptions set out at 20 C.F.R. §718.202(a)(3). *See* Decision and Order at 9.

[9]Drs. Naeye, Caffrey, Hutchins and Kleinerman opined that pneumoconiosis did

entitled to greater weight based upon his status as the autopsy prosector. *Id.* at 10. The administrative law judge further found that Dr. Perper's opinion was "entitled to the greatest weight" because his opinion was the only one that correlated with Dr. Dennis's "extensive anthracosilicosis findings." *Id.*

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not contribute to the miner's death. Director's Exhibits 10, 15; Employer's Exhibits 1-3, 5-6.

Dr. Nichols completed the miner's death certificate. Dr. Nichols attributed the miner's death to respiratory failure due to pulmonary fibrosis. Director's Exhibit 9.

Employer argues that the administrative law judge erred in crediting Dr. Dennis's opinion based upon his status as the autopsy prosector. We agree. When evaluating the pathology-related evidence relevant to the cause of the miner's death, an administrative law judge must first determine the credibility and weight of the reviewing pathologists' contrary opinions before giving complete deference to a physician's opinion based upon his status as the autopsy prosector. *See generally Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). In the instant case, the administrative law judge credited Dennis's opinion based upon his status as the autopsy prosector despite his recognition that "all of the reviewing pathologists performed a comprehensive review of the [m]iner's medical records and thoroughly addressed the evidence." Decision and Order at 10. The administrative law judge erred in crediting Dr. Dennis's opinion based upon his status as the autopsy prosector without explaining how this status provided him with an advantage over the reviewing physicians.[10]

We also agree with employer that the administrative law judge failed to adequately scrutinize Dr. Perper's opinion.[11] The administrative law judge failed to adequately address the opinions of physicians who questioned Dr. Perper's conclusions. After noting the different conclusions reached by Drs. Perper and Kleinerman, the administrative law judge merely concluded that "it is clear that a physician can come to a conclusion either way as to what the studies establish." Decision and Order at 11. The administrative law judge, however, failed to address Dr. Naeye's criticisms of Dr. Perper's conclusions. *See* Employer's Exhibits 3, 5. The administrative law judge also failed to adequately explain his basis for finding that Dr. Perper's explanations were "persuasive, documented, and well-reasoned." Decision and Order at 11. On remand, the administrative law judge is instructed to reconsider whether Dr. Perper's opinion is sufficiently reasoned. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Finally, we note that the administrative law judge, in his summary of the medical evidence, took issue with Dr. Naeye's conclusion that the miner "would have died on the same day and in the same way if he had never mined coal or had any other known occupational exposure." *See* Director's Exhibit 10. The administrative law judge found that

[10]Drs. Naeye, Caffrey and Kleinerman are Board-certified in Anatomic and Clinical Pathology. Employer's Exhibit 4. Dr. Hutchins is Board-certified in Anatomic Pathology. *Id.* The record does not reveal that Drs. Dennis and Perper are Board-certified in any specialty.

[11]In his November 23, 1998 report, Dr. Perper opined that "coal workers' pneumoconiosis and exposure to coal dust and silica was a substantial cause of [the miner's] death." Director's Exhibit 11.

Dr. Naeye's statement was a "rhetorical attempt to drive home his point," was "unwarranted," and was not based on the evidence. Decision and Order at 5 n.4. Because the administrative law judge found that Dr. Naeye's statement was "biased," he discredited Dr. Naeye's entire opinion. *Id.* Contrary to the administrative law judge's characterization, Dr. Naeye's statement is not biased, but rather represents his opinion regarding the contribution of the miner's coal dust exposure to his death. Dr. Naeye merely expressed his opinion that the miner's death was not hastened by his exposure to coal mine dust. We, therefore, hold that the administrative law judge erred in discrediting Dr. Naeye's opinion on this basis.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis and remand the case to the administrative law judge for further consideration. *See* 20 C.F.R. §718.205(c).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge