BRB No. 02-0664 BLA

GERALDINE THACKER (Widow of ZACK THACKER) Claimant-Petitioner v. SCOTTS BRANCH COAL COMPANY and MAPCO, INCORPORATED Employer/Carrier Respondents 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 on Remand of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (99-BLA-1036) of

Administrative Law Judge Thomas F. Phalen, Jr. denying 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).[2] This case involves a survivor's claim filed on June 8, 1998.[3] In the initial Decision and Order, the administrative law judge credited the miner with eleven years of coal mine employment and found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). He 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. By Decision and Order dated June 29, 2001, the Board affirmed the administrative law judge's finding of eleven years of coal mine employment as unchallenged on appeal. *Thacker v. Scotts Branch Coal Co.*, BRB No. 00-0967 BLA (June 29, 2001) (unpublished). The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2) (2000) and 718.205(c) (2000) and remanded the case for further consideration. *Id.*

On remand, 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). However, the administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant further contends that that Board erred in not affirming the administrative law judge's initial Decision and Order awarding benefits. Employer responds in support of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). However, employer contends that the administrative law judge erred in finding the autopsy evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

We initially address employer's contention, set out in its response brief, that the administrative law judge erred in finding the autopsy evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Drs. Dennis,[4] Naeye[5] and Perper[6] opined that the miner suffered from pneumoconiosis, Director's Exhibits 10, 11, 21; Employer's Exhibits 3, 5, while Drs. Caffrey,[7] Hutchins[8] and Kleinerman[9] opined that the miner did not suffer from the disease. Director's Exhibit 15; Employer's Exhibits 1, 2, 6.

In his Decision and Order on Remand, the administrative law judge placed "great weight" on Dr. Naeye's opinion because of his Board-certification in Anatomic and Clinical Pathology. Decision and Order on Remand at 3. The administrative law judge also noted that Dr. Naeye had the opportunity to review not only the autopsy slides, but also the death certificate and the other medical evidence of record, "thereby providing him with a broad base of information on which to base his decision." *Id.* The administrative law judge also placed "great weight" on Dr. Perper's opinion because of the body of evidence he considered before rendering his opinion. *Id.* The administrative law judge further noted that Dr. Perper was Board-certified in Anatomic and Forensic Pathology, entitling his opinion to greater weight because of his superior expertise. *Id.* The administrative law judge also found that Dr. Dennis' opinion was supportive of a finding of pneumoconiosis. *Id.* The administrative law judge noted that Dr. Dennis is Board-certified in Anatomic and Clinical pathology, and deferred to his "excellent credentials." *Id.* The administrative law judge finally found that the opinions of Drs. Naeye, Perper, and Dennis were "bolstered by the x-ray evidence of record, which, although not as probative as autopsy evidence, is another basis for making a finding of pneumoconiosis." *Id.*

In his consideration of the other relevant autopsy evidence, the administrative law judge stated that:

> Although Drs. Caffrey, Hutchins, and Kleinerman are board certified pathologists, I find that their opinions – that pneumoconiosis was not present on autopsy – is not as credible as the contrary opinions of Drs. Naeye, Dennis, and Perper. Dr. Caffrey did not find any macules or nodules consistent with pneumoconiosis on his microscopic examination. Dr. Kleinerman did not make a finding of pneumoconiosis. Dr. Hutchins, who saw the same birefringent silicate-type particles that Dr. Naeye found, (and based thereon diagnosed coal workers' pneumoconiosis), likewise did not diagnose pneumoconiosis. All three physicians viewed the autopsy slides and reviewed some medical evidence in reaching their conclusions. It is difficult to

> discount their opinions. I find pivotal the fact that Dr. Naeye's initial opinion was sought by the Director, thereby removing any trace of bias from his report. Although he visualized the same process that Drs. Caffrey, Hutchins, and Kleinerman did, it is his practice to give the benefit of the doubt to the claimant. I am persuaded by Dr. Naeye's candid statement and find it in accordance with the spirit of the Act. Consequently, I conclude that the claimant has established by a preponderance of the evidence, the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

Decision and Order on Remand at 3-4.

Employer argues that the administrative law judge erred in crediting Dr. Naeye's opinion because "Dr. Naeye's initial opinion was sought by the Director, thereby removing any trace of bias from his report." We agree. Unless the physicians retained by the parties are properly held to be biased, based on the evidence in the record, the administrative law judge may not accord greater weight to the opinions of Department of Labor physicians. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Furthermore, absent a foundation in the record for a finding that the Department of Labor's experts are independent, the administrative law judge shall not accord those opinions greater weight on that basis.[10] *Id.*; *Cochran v. Consolidated Coal Co.*, 16 BLR 1-101 (1992); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). Because the administrative law judge did not identify any evidence of bias in the record, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(2) and remand the case for further consideration.[11]

The administrative law judge further erred in finding that the opinions of Drs. Naeye, Perper and Dennis are "bolstered by the x-ray evidence of record." Decision and Order on Remand at 3. The administrative law judge did not render a finding as to whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Moreover, because Section 718.202(a) provides four alternative methods by which a claimant may establish the existence of pneumoconiosis, *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), the administrative law judge erred in weighing the x-ray and autopsy evidence together. *But see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

We now turn our attention to claimant's contention that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because the 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).[12] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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 v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In his Decision and Order on Remand, the administrative law judge credited the opinions of Drs. Drs. Naeye, Kleinerman, Caffrey and Hutchins that the miner's death was not due to pneumoconiosis over the contrary opinions of Drs. Dennis and Perper.

[13] Decision and Order on Remand at 4-5.

Claimant initially contends that the administrative law judge's denial of benefits is "irrational, arbitrary and erroneous" given the fact that the administrative law judge credited opinions on remand that he discredited in his initial decision. We disagree. Because the Board held that the administrative law judge's initial decision contained errors, the Board vacated the administrative law judge's findings and instructed the administrative law judge to reconsider the relevant evidence, with no instructions or assurances that the administrative law judge was to reach the same result. When the Board enters such a remand order, the administrative law judge may fully consider whether claimant satisfied his or her burden of proving the relevant elements of entitlement. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Claimant next contends that the administrative law judge should have accorded less weight to the opinions of Drs. Kleinerman, Caffrey and Hutchins regarding the cause of the miner's death because these physicians did not find that the miner suffered from pneumoconiosis. In support of her contention, claimant cites *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). In *Trujillo*, the administrative law judge credited the autopsy prosector's diagnosis of pneumoconiosis, a finding affirmed by the Board. The Board held that the administrative law judge permissibly determined that a physician's opinion on causation was entitled to no weight because its underlying premise, that the miner did not have pneumoconiosis, was inaccurate. Although the Board has held that an administrative law judge may discredit a physician's opinion on causation where he finds that its underlying premise, that the miner did not have pneumoconiosis, is inaccurate, an administrative law judge is not obligated to do so. *Trujillo*, *supra*. Nevertheless, it is clear that the administrative law judge's finding of pneumoconiosis could affect his

weighing of the evidence pursuant to 20 C.F.R. §718.205(c). In light of our decision to vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), we also vacate the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

In the interest of judicial economy, we will also address whether the administrative law judge committed any errors in his Section 718.205(c) analysis. In his consideration of whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge discredited the opinions of Drs. Dennis and Perper.
[14] The administrative law judge discredited Dr. Dennis' opinion because there was "no indication that he reviewed additional evidence which may have assisted, by providing him with a history of presenting symptoms and physical findings during his life or just prior to death, in forming his opinion." Decision and Order on Remand at 4. The administrative law judge, however, erred in failing to explain why Dr. Dennis' review of "additional evidence" would have assisted him in forming his opinion. 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).

The administrative law judge discredited Dr. Perper's opinion "because of the cogent criticisms made thereof by Dr. Kleinerman and especially Dr. Naeye." Decision and Order on Remand at 4. Because the administrative law judge found that "Drs. Naeye and Kleinerman adeptly uprooted the basis for Dr. Perper's opinion," the administrative law judge accorded Dr. Perper's opinion less weight. *Id.* Drs. Naeye and Kleinerman did, in fact, provide detailed criticism of Dr. Perper's findings. The administrative law judge, however, did not explain why he found the criticisms put forth by Drs. Naeye and Kleinerman to be "cogent" or why he found them sufficient to "uproot" the basis for Dr. Perper's opinion. *See Wojtowicz*, *supra*. The administrative law judge also failed to address Dr. Perper's criticisms of Dr. Naeye's opinions.
[15]

The administrative law judge also found that the opinions and Drs. Naeye, Kleinerman, Caffrey, and Hutchins were "more persuasive on the issue of the cause of death." Decision and Order on Remand at 4. The administrative law judge found, *inter alia*, that all four of these physicians "were certain that pneumoconiosis played no role in the [miner's] death." *Id.* at 5. The administrative law judge found that "their opinions are supported by a review of the autopsy slides as well as extensive medical evidence during the miner's life and just prior to his death." *Id.* The

administrative law judge further found that their "opinions are better supported by the objective medical data of record." *Id.* The administrative law judge, however, failed to explain the basis for these findings. *See Wojtowicz*, *supra*.

Consequently, should the administrative law judge, on remand, find the evidence sufficient to establish the existence of pneumoconiosis, he must reconsider whether the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge