

BRB No. 07-0765 BLA

L. M.	)	
(Widow of R.M.)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEN COAL CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	DATE ISSUED: 06/20/2008
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-BLA-5137) of Administrative Law Judge Ralph A. Romano 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).<sup>1</sup> The administrative law judge found that the parties stipulated that the miner had six years of coal mine employment and that employer did not contest that the miner had pneumoconiosis. Decision and Order at 3. The administrative law judge stated that employer contested only whether the miner's death was due to pneumoconiosis. The administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and accordingly awarded benefits.

Employer appeals, contending that the administrative law judge did not properly weigh the medical evidence relevant to Section 718.205(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c), 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4<sup>th</sup> Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).<sup>2</sup>

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<sup>1</sup> Claimant is the widow of a miner who died on March 5, 2002. Claimant filed a survivor's claim for herself and her two minor children on May 20, 2002. Director's Exhibit 2.

<sup>2</sup> The miner was employed as a coal miner in West Virginia. Therefore, the law of the United States Court of Appeals for the Fourth Circuit is applicable in this case. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Employer contends that the administrative law judge erred in weighing the medical opinions of record, as he did not provide an adequate explanation for his rejection of the opinions of Drs. Bush, Crouch, and Rosenberg. Employer also contends that the administrative law judge erred in finding the opinions of Drs. Perper and Mahmoud to be well-reasoned and documented and therefore supportive of a finding that the miner's death was due to pneumoconiosis.

In his decision, the administrative law judge summarized the conclusions of Drs. Bush, Crouch, and Rosenberg that the miner's simple pneumoconiosis did not cause, contribute to, or hasten his death. The administrative law judge found that Drs. Bush and Rosenberg attributed the death solely to coronary artery disease caused by cigarette smoking and hypertension, and that all three doctors also denied any relationship between the miner's emphysema and his coal mine employment. The administrative law judge discussed why instead, he credited the opinions of Drs. Perper and Mahmoud, and he stated summarily that the opinions of Drs. Bush, Crouch and Rosenberg "are outweighed by the opinions of Drs. Perper and Mahmoud, which are better reasoned, documented, and supported by the evidence of record." Decision and Order at 6-7.

Dr. Mahmoud completed the death certificate and performed an autopsy. The death certificate lists atherosclerotic cardiovascular disease as the cause of death, and lists pneumoconiosis under the heading, "[O]ther significant conditions contributing to death but not resulting in the underlying cause." Director's Exhibit 10. Dr. Mahmoud's "Pathologic Diagnoses" in the autopsy report include pneumoconiosis, which he described as: pneumoconiosis secondary to mining, anthracotic lymphadenopathy, and emphysema. Director's Exhibit 11. Dr. Mahmoud opined that the miner's death was due to atherosclerotic cardiovascular disease which was complicated by a heart attack, and that pneumoconiosis was a contributing cause of death. *Id.*

Dr. Perper, a forensic pathologist, reviewed the miner's medical records, the death certificate, the autopsy report and slides, and the report of Dr. Crouch. He opined that the miner had simple pneumoconiosis and centrilobular emphysema and cor pulmonale attributable to coal mine employment. Claimant's Exhibit 1. He further opined that these pulmonary conditions hastened the miner's death and caused hypoxemia that precipitated the miner's fatal cardiac arrhythmia. *Id.*

Dr. Bush, a pathologist, opined that the miner's lung tissue showed a mild degree of simple pneumoconiosis and mild to moderate centrilobular emphysema, "which does appear" related to coal dust exposure. Employer's Exhibit 9. Dr. Bush stated that the miner's pneumoconiosis was too limited to have any effect on his pulmonary function or to have contributed to his death. Dr. Bush also opined that the miner's heart attack would have resulted in the miner's death "irrespective of lung function." *Id.* Moreover, Dr. Bush disagreed with Dr. Perper's diagnosis that the miner had cor pulmonale. *Id.*

Dr. Crouch, a pathologist, also diagnosed simple pneumoconiosis and emphysema which she stated “can most reasonably” be attributed to cigarette smoking. Employer’s Exhibit 1. She opined that the miner’s coal dust exposure did not cause a significant degree of impairment and, therefore, did not contribute to his death. *Id.* In her supplemental report, she stated that “the histological findings do not suggest a significant contributing role of coal dust [to the miner’s emphysema].” Employer’s Exhibit 5.

Dr. Rosenberg, a pulmonologist, also diagnosed simple pneumoconiosis but without any associated pulmonary impairment. Dr. Rosenberg opined that: “[A]ny focal emphysema he had related to past coal mine dust exposure was not the major component of the emphysema he had.” Employer’s Exhibit 4. Dr. Rosenberg disagreed with Dr. Perper’s opinion that the hypoxemia the miner had in October 1999 was clinical evidence of a chronic respiratory condition and with his diagnosis of cor pulmonale. Employer’s Exhibits 4, 7 at 17-19. Dr. Rosenberg stated that the miner’s death was due to coronary artery disease, which was not caused, hastened, or aggravated by coal dust exposure or simple pneumoconiosis.

The administrative law judge explained why he found the opinions of Drs. Perper and Mahmoud to be well-reasoned and well-documented, and therefore sufficient to establish that the miner’s death was due to pneumoconiosis. Decision and Order at 6-7. We cannot affirm this conclusion, however, because the administrative law judge did not provide a rationale for finding these opinions deserving of greater weight than those of Drs. Bush, Rosenberg, and Crouch, nor did he resolve conflicts among the opinions of Dr. Perper and employer’s experts. Therefore, we must vacate his decision to accord greatest weight to the opinions of Drs. Mahmoud and Perper and his finding that claimant established that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). *See generally Sparks*, 213 F.3d 186, 22 BLR 2-251; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

On remand, the administrative law judge must address the specific conflicts in the evidence. Dr. Perper’s opinion that the miner’s pneumoconiosis caused a significant pulmonary impairment resulting in hypoxemia, which, in turn, contributed to his death, and that the miner had cor pulmonale, is contradicted by Dr. Rosenberg’s opinion. Dr. Rosenberg opined that the miner’s hypoxemia in 1999, three years before his death, was an acute condition related to an ankle fracture that occurred four weeks prior to the miner’s hospitalization. Dr. Rosenberg stated that, in 1999, the miner had a pulmonary embolism and potential pneumonia. Employer’s Exhibits 4; 7 at 14-15.<sup>3</sup> Moreover, the

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<sup>3</sup> Employer asserts that Dr. Rosenberg’s opinion is supported by the absence of evidence that the miner had chronic respiratory problems after October 1999 and claimant’s testimony that the miner did not have any breathing problems. Tr. at 23.

administrative law judge must address the opinions of Drs. Rosenberg, Bush and Crouch that the miner did not have any impaired lung function, in contrast to Dr. Perper's opinion that the miner experienced pulmonary insufficiency, and Dr. Bush's opinion that the miner would have died due to coronary artery disease irrespective of his lung function. Furthermore, in assigning weight to the physicians' opinions, the administrative law judge should explicitly address the physicians' credentials. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4<sup>th</sup> Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4<sup>th</sup> Cir. 1997); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

Employer also correctly contends that the administrative law judge erred in finding Dr. Mahmoud's opinion, that pneumoconiosis contributed to the miner's death, to be "well-reasoned," as neither the death certificate nor the autopsy report includes any rationale for his conclusion. *Sparks*, 213 F.3d 186, 22 BLR 2-251; *United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4<sup>th</sup> Cir. 1999). Accordingly, Dr. Mahmoud's statement that pneumoconiosis contributed to the miner's death cannot, by itself, satisfy claimant's burden of establishing that the miner's death was due to pneumoconiosis. *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). The administrative law judge may, however, find it supportive of any fully reasoned and documented opinion.

Employer challenges the administrative law judge's reliance on Dr. Perper's opinion because he stated that the miner had twenty-one years of coal mine employment, whereas the administrative law judge relied on a six-year history of such employment. In his decision, the administrative law judge inaccurately stated that the parties stipulated to six years of coal mine employment. Decision and Order at 3. At the hearing, employer stated that, while the record may demonstrate more years of coal mine employment, it could stipulate only to the six years it employed the miner. Claimant asserted that the miner had twenty-one years of coal mine employment. Tr. at 17, 22.<sup>4</sup> Therefore, as the parties did not stipulate to the length of the miner's coal mine employment, the administrative law judge must make a finding of fact in this regard so that he can determine the accuracy of all the medical opinions of record in light of his finding. See *Robel v. Director, OWCP*, 7 BLR 1-775 (1985).

Finally, employer asserts that Dr. Perper relied on general medical studies to support his opinion as to the cause of the miner's death, rather than on the particular circumstances of the miner's physical condition. Dr. Perper's February 26, 2006, report

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<sup>4</sup> On the form referring the claim for a formal hearing, it was noted that the Director was contesting that the miner worked "at least 18 years in or around one or more coal mines." Employer did not contest this issue. Director's Exhibit 28.

states that he reviewed the medical evidence of record, including his own microscopic examination of nineteen autopsy slides. Claimant's Exhibit 1. Dr. Perper rendered microscopic diagnoses, which included: slight to moderate pneumoconiosis with macules, micronodules and focal interstitial fibro-anthraxis; slight to moderate centrilobular emphysema; and sclerosis of intrapulmonary blood vessels consistent with pulmonary hypertension and cor pulmonale. *Id.* He opined that the miner had pneumoconiosis based on his twenty-one years of coal mine employment, the records from the miner's hospitalization in 1999, and the autopsy evidence, which confirmed the diagnosis of pneumoconiosis and associated centrilobular emphysema.

Dr. Perper found significant the presence of silicotic nodules in the pulmonary lymph nodes as evidence of exposure to mixed coal dust rich in silica. Dr. Perper acknowledged that centrilobular emphysema is a known complication of smoking and that the miner had a "chronic smoking history." *Id.* He stated that scientific literature has substantiated that chronic obstructive pulmonary disease and underlying centrilobular emphysema is the direct result of exposure to mixed coal dust containing silica. Dr. Perper extensively summarized this scientific literature in his report and Appendix 1.<sup>5</sup> Dr. Perper opined, "[B]ased on the clinical, radiological, and laboratory findings," that pneumoconiosis was a substantial contributing cause of the miner's death. *Id.* Dr. Perper explained that pneumoconiotic lesions, centrilobular emphysema, and cor pulmonale created a pulmonary insufficiency and resulting hypoxemia, and concluded that the hypoxemia precipitated or aggravated a fatal cardiac arrhythmia.

Contrary to employer's contention that Dr. Perper's opinion is based solely on general medical studies, his opinion that the miner's centrilobular emphysema is related to his coal mine employment is based on Dr. Perper's microscopic finding of silicotic nodules in the pulmonary lymph nodes and supported by medical literature relating centrilobular emphysema to exposure to mixed coal dust containing silica. Moreover, the record reflects that Dr. Perper's hypoxemia and cor pulmonale diagnoses also are based on the miner's specific medical records. Thus, we reject employer's assertion that Dr. Perper relied only on general medical studies as the basis for his opinion regarding the cause of the miner's death. *See generally Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723 (7<sup>th</sup> Cir. 2008).

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<sup>5</sup> Appendix 1 in Dr. Perper's report is a seven-page discussion and synopsis of medical literature addressing the relationship between coal dust exposure and the development of centrilobular emphysema. *See* Claimant's Exhibit 1.

In sum, we vacate the administrative law judge's finding that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and we remand the case for further findings. On remand, the administrative law judge must fully discuss the medical evidence, resolve conflicts contained therein, and provide a full rationale for his assignment of weight to particular opinions. *Hicks*, 138 F.3d 524, 21 BLR 2-323.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge