

BRB No. 07-0371 BLA

L.C.)	
(Widow of D.C.))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 03/28/2008
)	
VIRGINIA POCAHONTAS COMPANY)	
)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe, Williams and Rutherford), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (06-BLA-5015) of Administrative Law Judge Daniel F. Solomon 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 In his Decision and Order, the

¹ Claimant is the widow of the deceased miner. The miner filed three claims for benefits and a petition for modification. When he died, on September 6, 2004, his request for modification had been transferred to the Office of Administrative Law Judges

administrative law judge credited the miner with 15.87 years of coal mine employment and determined that the autopsy, pathology and medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4).² The administrative law judge further found that claimant established that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

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

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 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); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (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

for hearing. The present case involves only the survivor's claim, filed by L.C., on September 27, 2004. Decision and Order at 2; Director's Exhibit 2; Hearing Transcript at 4, 8-9.

² Employer concedes that the "autopsy evidence establishes the existence of coal workers' pneumoconiosis." Employer's Brief at 22. The administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2) is, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-719 (1983).

³ The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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 hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.205(c), the administrative law judge considered the death certificate and the reports of several physicians. Dr. Nwauafe prepared the death certificate, listing cardiopulmonary arrest as the immediate cause of death and chronic obstructive airway disease, black lung disease, and coronary artery disease as significant conditions contributing to death. Director's Exhibit 7. Dr. Bluemink, who is Board-certified in Anatomical and Clinical Pathology, conducted an autopsy limited to the chest. Dr. Bluemink diagnosed coal workers' pneumoconiosis complicated by progressive massive fibrosis and cor pulmonale and opined, "the cause of death and all the anatomic findings are due to occupational exposure to massive amounts of coal dust over a long period of time sustained in [the miner's] work environment." Director's Exhibit 8. Dr. Bluemink reiterated his findings and conclusions at his deposition. Director's Exhibit 11. Dr. Perper, who is Board-certified in Anatomical, Surgical, and Forensic Pathology, reviewed the autopsy report, lung tissue slides, and the miner's medical records. Dr. Perper diagnosed coal workers' pneumoconiosis and centrilobular emphysema. Claimant's Exhibit 2 at 27. Dr. Perper opined that the miner's pneumoconiosis was severe and contributed to the miner's death. Claimant's Exhibit 2 at 35.

Dr. Oesterling, who is Board-certified in Anatomic and Clinical Pathology and Nuclear Medicine, reviewed the autopsy report, lung tissue slides, and the miner's medical records. Dr. Oesterling diagnosed "mild macular coal workers' pneumoconiosis" that was insufficient to affect the miner's pulmonary function or play a role in the miner's death due to panlobular emphysema. Director's Exhibit 10 at 6; Employer's Exhibit 8. At his deposition, Dr. Oesterling disputed the findings of Drs. Bluemink and Perper, opining that the miner's death was due to a combination of heart disease, pneumonia and emphysema, all of which were unrelated to coal mine employment. Employer's Exhibit 12 at 20-27. Dr. Tomashefski, who is Board-certified in Anatomic and Clinical Pathology, reviewed the autopsy report, lung tissue slides, and the miner's medical records and concluded that the miner had "minimal" coal workers' pneumoconiosis that was "too mild a degree to have caused him any respiratory symptoms or to have been a cause or a contributory factor in his death." Employer's Exhibit 1. During his deposition, Dr. Tomashefski disputed the findings of Drs. Bluemink and Perper and opined that the miner's death was due to a severe bronchopneumonia and emphysema due solely to smoking. Employer's Exhibit 10. Dr. Rosenberg, who is Board-certified in Internal Medicine, reviewed the autopsy report and

the miner's medical records and diagnosed coal workers' pneumoconiosis that was too mild to have hastened the miner's death. Employer's Exhibit 10 at 10-18.

In considering this evidence, the administrative law judge gave little weight to the death certificate, as Dr. Nwanuae did not indicate that he had any personal knowledge of the miner's condition or the circumstances of his death nor did he explain the conclusions set forth on the death certificate. Decision and Order at 17. With respect to Dr. Bluemink's autopsy report, the administrative law judge accorded great weight to the physician's determination that dust exposure in coal mine employment was the cause of the miner's death based upon Dr. Bluemink's status as the autopsy prosector. *Id.* at 18. The administrative law judge gave "some weight" to the reports of Drs. Rasmussen and Perper, as they both identified coal mine dust as a contributing cause of the miner's disabling respiratory condition, thereby supporting the conclusion that pneumoconiosis was a contributing cause of the miner's death.⁴ *Id.* at 19.

The administrative law judge found that Dr. Tomaszewski's opinion was not entitled to "much weight," as Dr. Tomaszewski "impermissibly relied on medical records and reports which exceeded the limitations on evidence." Decision and Order at 19. The administrative law judge also discredited Dr. Tomaszewski's finding, that the miner's lungs showed minimal coal dust deposition and that the microscopic examination performed by Dr. Bluemink was conducted improperly, based upon Dr. Bluemink's statement that a diagnosis of coal workers' pneumoconiosis can be made based solely upon a visual examination of the miner's lungs. The administrative law judge further indicated that Dr. Tomaszewski's failure to account for the presence of silica in the miner's lungs detracted from the credibility of his opinion. *Id.* Regarding Dr. Oesterling's opinion, that coal dust exposure played no role in the miner's death, the administrative law judge found that it was entitled to less weight because the doctor did not diagnose coal workers' pneumoconiosis, in contrast to the administrative law judge's findings at Section 718.202(a)(2) and (a)(4), and did not actually participate in the autopsy. Decision and Order at 19. Similarly, the administrative law judge determined that Dr. Rosenberg's conclusions regarding the cause of the miner's death were "of little probative value," because Dr. Rosenberg "did not look at the autopsy slides nor did he look at any of the original x-rays." *Id.* at 18-19. The administrative law judge also noted that Dr. Rosenberg's conclusions were entitled to diminished weight because he is not a pathologist. *Id.* at 19. The administrative law judge concluded that Dr. Bluemink's opinion was sufficient to establish that the miner's death was due to pneumoconiosis

⁴ Dr. Rasmussen examined the miner on January 3, 2001 and prepared a written report in which he diagnosed pneumoconiosis and a totally disabling respiratory impairment caused by smoking and coal dust exposure. Claimant's Exhibit 1. This is the only report from Dr. Rasmussen in the record.

pursuant to Section 718.205(c), “in part because he was the prosector, but also because he provides a salient explanation for the miner’s demise.” *Id.*

Employer contends that the administrative law judge did not provide adequate rationales for according greatest weight to Dr. Bluemink’s opinion or for discrediting the opinions of Drs. Tomashefski, Oesterling, and Rosenberg. Employer also alleges that the administrative law judge did not properly weigh Dr. Perper’s opinion. These contentions have merit, in part. In according greatest weight to Dr. Bluemink’s determination that the miner’s death was caused by pneumoconiosis, the administrative law judge relied, in large part, upon the fact that Dr. Bluemink was the autopsy prosector. In so finding, the administrative law judge did not explain why Dr. Bluemink’s ability to perform the autopsy gave him an advantage over the other pathologists of record in addressing the issue of whether pneumoconiosis caused or hastened the miner’s death. *Sparks*, 213 F.3d at 191-92, 22 BLR at 262; *BethEnergy Mines, Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996); *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992). In addition, as employer maintains, the administrative law judge did not explain why he credited Dr. Bluemink’s conclusion, that the black pigment observed on gross examination of the miner’s lungs constituted evidence of complicated pneumoconiosis with progressive massive fibrosis, over the contrary opinions of Drs. Oesterling, Perper, Tomashefski, and Rosenberg.

Similarly, the administrative law judge did not resolve the conflict between his finding that Dr. Bluemink’s diagnosis of complicated pneumoconiosis was not supported by the record and his decision to accept the doctor’s explanation regarding the cause of death, even though it was based on the discredited diagnosis of complicated pneumoconiosis. Because the administrative law judge did not set forth the rationale underlying his findings with respect to Dr. Bluemink’s opinion and did not resolve all of the conflicts in the evidence, his Decision and Order does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Accordingly, we must vacate his decision to accord greatest weight to Dr. Bluemink’s opinion and his finding that Dr. Bluemink’s opinion was sufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c).⁵ *Sparks*, 213 F.3d at 190, 22 BLR at

⁵ We reject, however, employer’s argument that because Dr. Bluemink referred to statements made by the miner’s family in his report, employer had a right to rebut these statements. Employer waived this argument by failing to raise it earlier in the proceedings. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16, (4th Cir. 1993); *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986); see *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984). Moreover, employer has not specifically identified how Dr. Bluemink’s opinion was tainted by the lay testimony.

2-259; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Employer is also correct in asserting that the administrative law judge did not properly weigh the opinions of Drs. Tomashefski and Oesterling. With respect to Dr. Tomashefski's opinion, that pneumoconiosis played no role in the miner's death, the administrative law judge determined that Dr. Tomashefski's opinion was not entitled to "much weight," because the physician relied upon inadmissible evidence in the form of medical reports from the miner's claims for benefits during his lifetime. Decision and Order at 18. Although it is permissible for an administrative law judge to accord diminished weight to a medical opinion for that reason, *see Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 23 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), it is not clear that Dr. Tomashefski relied upon inadmissible evidence. Indeed, the administrative law judge noted that Dr. Tomashefski referred to the autopsy slides and autopsy report in disputing Dr. Bluemink's diagnosis of massive amounts of coal dust. Decision and Order at 13-14, 18. The administrative law judge's finding does not contain, therefore, an adequate explanation of how Dr. Tomashefski's review of the inadmissible evidence tainted his opinions regarding the severity of the miner's pneumoconiosis and the cause of his death.⁶ In addition, the administrative law judge did not set forth the rationale underlying his decision to reject Dr. Tomashefski's review of Dr. Bluemink's microscopic examination of the miner's lung tissue. The administrative law judge also did not explain why Dr. Tomashefski's failure to identify the presence of silica made his opinion regarding the cause of death less persuasive than Dr. Bluemink's, when Dr. Bluemink did not identify the deposition of silica as a factor in the miner's demise. We vacate, therefore, the administrative law judge's findings with respect to Dr. Tomashefski's opinion under Section 718.205(c). *Sparks*, 213 F.3d at 190, 22 BLR at 2-259; *Wojtowicz*, 12 BLR at 1-165.

With respect to Dr. Oesterling's opinion, employer indicates correctly that the administrative law judge erred in finding that Dr. Oesterling's conclusion, that the miner's death was not due to pneumoconiosis, was entitled to less weight because Dr. Oesterling's opinion regarding the cause of the miner's death is "based on a premise contrary to my findings." Decision and Order at 18. In his opinion, Dr. Oesterling

⁶ We decline to address employer's argument that Dr. Tomashefski's opinion was admissible as both an autopsy report and a medical report, as the administrative law judge did not exclude Dr. Tomashefski's opinion because it exceeded the evidentiary limitations. Rather, the administrative law judge found that Dr. Tomashefski based his opinion on inadmissible evidence in violation of 20 C.F.R. §725.414(a)(3)(i). Decision and Order at 14, 18.

acknowledged that the miner had “limited macular” coal workers’ pneumoconiosis and explained why he disagreed with Dr. Bluemink’s finding that the miner’s lungs contained massive amounts of coal dust. Employer’s Exhibit 8. In addition, the administrative law judge did not explain why Dr. Oesterling’s failure to discuss the significance of the presence of silica made his opinion regarding the cause of death less persuasive than Dr. Bluemink’s, when Dr. Bluemink did not identify the deposition of silica as a factor in the miner’s demise. Accordingly, the administrative law judge’s decision to discredit Dr. Oesterling’s opinion is vacated. *Sparks*, 213 F.3d at 190, 22 BLR at 2-259; *Wojtowicz*, 12 BLR at 1-16.

Regarding the administrative law judge’s consideration of Dr. Rosenberg’s opinion, that pneumoconiosis did not play any role in the miner’s death, employer argues that the administrative law judge erred in finding it of little probative value because Dr. Rosenberg based his conclusion upon on a review of the medical reports, rather than his own interpretation of the x-rays and autopsy slides. We agree. Contrary to the administrative law judge’s finding, Dr. Rosenberg did not merely reiterate the “conclusions and findings of others.” Decision and Order at 19. He expressed his own opinion regarding the cause of the miner’s death, based upon the information contained in the evidence that he reviewed, and explained how he arrived at his opinion. Employer’s Exhibit 11 at 9-17. Moreover, it is improper for an administrative law judge to reject a report solely because it was prepared by a non-examining physician. *See Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). We vacate, therefore, the administrative law judge’s credibility findings regarding the medical report of Dr. Rosenberg.

With respect to the administrative law judge’s treatment of Dr. Perper’s opinion at Section 718.202(a)(4), however, even assuming that there is merit in employer’s argument that the administrative law judge did not adequately explain his findings with respect to Dr. Perper’s opinion regarding the extent of the miner’s pneumoconiosis, the administrative law judge did not commit error requiring remand. Because the administrative law judge discredited Dr. Bluemink’s diagnoses of complicated pneumoconiosis and progressive massive fibrosis, the administrative law judge’s omission of Dr. Perper’s contrary findings is harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

On remand, the administrative law judge must reconsider the medical opinions of Drs. Bluemink, Tomashefski, Oesterling, and Rosenberg at Section 718.205(c). In addition, because the administrative law judge did not address Dr. Perper’s opinion, that pneumoconiosis caused the miner’s death, he must do so on remand. In determining the respective weight to which each of these opinions is entitled, the administrative law judge should consider “the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the

sophistication and bases of their diagnoses.” *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (6th Cir. 1998). The administrative law judge is also required by the APA to set forth the rationale underlying his findings. In addition, the administrative law judge must resolve the conflict in the medical opinion evidence regarding the extent to which smoking contributed to the miner’s respiratory condition and death. In this regard, the administrative law judge should consider whether each physician had an accurate understanding of the miner’s smoking history. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge is also required to apply the evidentiary limitations set forth in 20 C.F.R. §725.414 to each of the medical opinions of record and determine whether any physician relied upon inadmissible evidence.⁷ 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). If the administrative law judge finds that a physician’s opinion regarding the cause of the miner’s death is inextricably linked to the inadmissible evidence, he may, within his discretion, exclude the opinion. *Harris*, 23 BLR at 1-108; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004)(*en banc*). In the alternative, the administrative law judge may redact the objectionable content, ask the physicians to submit new reports, or factor in the physicians’ reliance upon the inadmissible evidence when deciding the weight to which their opinions are entitled. Exclusion is not a favored option, as it could result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Harris*, 23 BLR at 1-108.

⁷ Employer has asserted that Dr. Perper, like Dr. Tomashefski, reviewed evidence submitted with the miner’s claim that was not admitted into the record.

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed in part and vacated in part, and this 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