

BRB No. 11-0479 BLA

VINA J. DOTSON)
(Widow of ROBERT B. DOTSON))
)
 Claimant-Respondent)
)
 v.)
)
 McCOY ELKHORN COAL) DATE ISSUED: 03/12/2012
 CORPORATION)
)
 and)
)
 JAMES RIVER COAL COMPANY)
)
 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 on Remand – Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (2007-BLA-5728) of Administrative Law Judge John P. Sellers, III, with respect to a survivor’s claim¹ filed on February 1, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended* by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for a second time. In its previous decision, the Board vacated the Decision and Order awarding benefits of Administrative Law Judge Thomas F. Phalen, Jr., and remanded the case, as he did not resolve the conflicts in the medical opinions of record or adequately explain the basis for his determination that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c).² *Dotson v. McCoy Elkhorn Coal Corp.*, BRB No. 09-0369 BLA (Nov. 9, 2009)(unpub.). The Board also indicated that Judge Phalen did not properly consider the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) but, instead, considered it in connection with his discussion of death causation. *Id.*

Because Judge Phalen had retired, the case was reassigned to Administrative Law Judge John P. Sellers, III (the administrative law judge), on remand. The administrative law judge determined, based on the pathology evidence, that claimant established that the miner had a minimal amount of clinical pneumoconiosis, and that the miner’s emphysema constituted legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Pursuant to 20 C.F.R. §718.205(c), the administrative law judge found that claimant did not establish that the miner’s clinical pneumoconiosis contributed to his death but established that his legal pneumoconiosis did. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that legal pneumoconiosis was established and, therefore, in determining that the miner’s death was due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers’ Compensation Programs, has not filed a response brief in this appeal.

¹ Claimant is the widow of the miner, Robert B. Dotson, who died on January 2, 2006. Director’s Exhibit 49.

² The miner filed a claim for benefits on November 10, 2005, which was subsequently consolidated with the survivor’s claim. Administrative Law Judge Thomas F. Phalen, Jr., addressed the miner’s claim and the survivor’s claim and denied benefits in both claims. Only the denial of benefits in the survivor’s claim was appealed to the Board.

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, in which the rebuttable presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4), is not applicable,⁴ death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or if claimant establishes invocation of the irrebuttable presumption of death due to pneumoconiosis. *See* 20 C.F.R. §§718.205(c)(2), (4), 718.304. Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

I. The Relevant Evidence

Dr. Dennis, whose qualifications are not of record, performed the autopsy and diagnosed, *inter alia*, anthracosilicosis, progressive massive fibrosis and moderate to

³ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

⁴ In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), the survivor of a miner who suffered from a totally disabling respiratory or pulmonary impairment, who worked at least fifteen years in an underground coal mine or in surface mine in conditions substantially similar to those in an underground mine, is entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). The administrative law judge found that it was not necessary to determine whether amended Section 411(c)(4) was applicable in this case, given his finding that claimant established all of the elements of entitlement. *See* Decision and Order on Remand at 10.

severe emphysema. Director's Exhibit 50. Dr. Dennis stated that the miner died "as a result of a pulmonary death with pulmonary congestion and edema, pulmonary emboli, emphysema, and anthracosilicosis, moderate to severe, with progressive massive fibrosis." *Id.*

Dr. Askin, who is Board-certified in anatomic pathology and is a Professor of Pathology and Senior Surgical Pathologist at John Hopkins Medical Institutions, reviewed tissue slides from the miner's autopsy and concluded that "the most striking finding was severe emphysematous change." Director's Exhibit 55. With respect to the cause of the miner's death, Dr. Askin stated, "[i]t is most likely that emphysema and heart failure with intense pulmonary congestion and terminal pneumonia were the significant causes of Mr. Dotson's demise and there is nothing here that would suggest that coal workers' pneumoconiosis played any significant role in the loss of pulmonary function." *Id.*

Dr. Caffrey, who is Board-certified in anatomic and clinical pathology, reviewed the miner's medical records, Dr. Dennis's autopsy report, autopsy slides, and the death certificate. Dr. Caffrey diagnosed simple coal workers' pneumoconiosis and severe centrilobular emphysema. Director's Exhibit 38. In a supplemental report, Dr. Caffrey acknowledged that coal dust inhalation can cause emphysema, but he stated that the amount of coal dust in the miner's lungs was too minimal to have caused his severe emphysema. Employer's Exhibit 1. Dr. Caffrey further indicated that the negative x-ray readings in the records he reviewed corroborated his opinion that there was "a paucity of the lesions of simple coal workers' pneumoconiosis on the autopsy slides." *Id.* Dr. Caffrey also indicated that, because the miner had clinical or pathological pneumoconiosis of a very minimal degree, his coal workers' pneumoconiosis did not cause his moderate to severe emphysema. *Id.* He concluded that the miner "definitely" did not have legal pneumoconiosis and that pneumoconiosis did not cause, or contribute to, the miner's death. *Id.*

Dr. Perper, who is Board-certified in anatomical, surgical and forensic pathology, reviewed the miner's death certificate, Dr. Dennis's autopsy report, autopsy slides, and medical records from Pikeville Methodist Hospital. Claimant's Exhibit 1. Dr. Perper diagnosed coal workers' pneumoconiosis, and "moderate to marked centrilobular emphysema," of which coal dust exposure was a contributing cause. *Id.* Dr. Perper further stated, "[it] is highly questionable that smoking contributed to any degree to his markedly worsening [chronic obstructive pulmonary disease (COPD)]," because the miner had a "mild to moderate smoking history and [had] quit smoking more than five decades prior to his death." *Id.* Dr. Perper concluded, "coal workers' pneumoconiosis was a substantial cause of [the miner's] pulmonary impairment and disability and ultimately contributed to and hastened his death." *Id.*

II. The Administrative Law Judge's Findings

A. Legal Pneumoconiosis

The administrative law judge noted that neither Dr. Dennis nor Dr. Askin commented on the etiology of the emphysema that he diagnosed. Decision and Order on Remand at 12. Therefore, the administrative law judge stated that the evidence concerning legal pneumoconiosis consisted of the conflicting opinions of Drs. Caffrey and Perper. *Id.* The administrative law judge found that Drs. Caffrey and Perper are both Board-certified pathologists and that they essentially reviewed the same medical data. *Id.* at 13. The administrative law judge further determined that the “critical factor” for Dr. Perper was the miner’s cumulative coal dust exposure, while the “critical factor” for Dr. Caffrey was the minimal amount of coal dust in the miner’s lungs. *Id.* at 14. The administrative law judge stated that Dr. Caffrey “appear[ed] to focus on the amount of coal workers’ pneumoconiosis present in the lung tissue as a measure of the amount of dust retained.” *Id.*

The administrative law judge then stated that the Board seems to have adopted “a *per se* rule that prohibits using coal dust retention, or lung burden, as a factor in determining the contribution of coal dust exposure to [COPD] or emphysema.” Decision and Order on Remand at 15, *citing Garrett v. Island Creek Coal Co.*, BRB No. 09-0674 BLA (July 29, 2010)(unpub.); *R.G. [Gilliam] v. Arch Coal Co.*, BRB No. 08-0369 BLA (Feb. 25, 2009)(unpub.). The administrative law judge acknowledged, however, that the Board has also held that a physician can rely upon the amount, or location, of coal dust in the lungs, if his or her assessment of this factor is not dependent upon the presence of evidence of clinical pneumoconiosis. *Id.*, *citing Stewart v. Peabody Coal Co.*, BRB No. 09-0395 BLA (Jan. 28, 2010)(unpub.); *C.L. [Lieber] v. Dunamis Resources, Inc.*, BRB No. 08-0621 BLA (Apr. 20, 2009)(unpub.). The administrative law judge further noted that, under the regulations, clinical pneumoconiosis and emphysema are treated as independent entities and coal dust exposure is recognized as a potential cause of emphysema, even in the absence of clinical pneumoconiosis. *Id.* at 16, *citing Garrett*, BRB No. 09-0674 BLA, slip op. at 5. The administrative law judge accorded diminished weight to Dr. Caffrey’s opinion, as he appeared to rely on the extent to which coal dust exposure caused clinical pneumoconiosis to assess whether coal dust exposure was a contributing cause of the miner’s emphysema. *Id.*

Alternatively, the administrative law judge found that, even if Dr. Caffrey’s opinion was not contrary to the regulations, it was “notably brief,” when compared to Dr. Perper’s opinion. Decision and Order on Remand at 16. The administrative law judge also determined that, unlike Dr. Perper, Dr. Caffrey did not cite any medical authority to support his opinion and did not explain his opinion completely. *Id.* Weighing all of the evidence, the administrative law judge concluded, based on Dr. Perper’s opinion, that

claimant established that the miner's emphysema constituted legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). *Id.* at 16-17.

B. Death Due to Pneumoconiosis

At 20 C.F.R. §718.205(c), the administrative law judge determined that all of the physicians of record agreed that the miner's emphysema was moderate to severe. Decision and Order on Remand at 18. The administrative law judge found that, although he discredited the diagnosis of pulmonary massive fibrosis made by Dr. Dennis, the autopsy prosector, he still gave weight to his opinion that emphysema contributed to the miner's death. *Id.* at 19. The administrative law judge also determined that Dr. Caffrey listed other medical conditions, which he believed caused the miner's death, while Dr. Adkins, the miner's treating physician, listed the cause of death as aspiration pneumonia due to COPD. *Id.* In addition, the administrative law judge stated that Drs. Dennis, Askin, and Perper concluded that the miner's emphysema contributed to his death. *Id.* at 20. The administrative law judge determined that Dr. Caffrey was the only physician who thought that the miner's pneumonia might have been due to his age and dementia. *Id.* The administrative law judge concluded that legal pneumoconiosis, in the form of emphysema, played a significant contributing role in the miner's death. *Id.*

II. Arguments on Appeal

Employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, therefore, also erred in finding that claimant established that legal pneumoconiosis was a contributing cause of the miner's death at 20 C.F.R. §718.205(c). With respect to the administrative law judge's consideration of the medical opinion evidence under 20 C.F.R. §718.202(a)(4), employer argues that the administrative law judge erred in assigning more weight to Dr. Perper's diagnosis of legal pneumoconiosis, as the physician found, contrary to the administrative law judge's determination, that the miner had a significant amount of clinical pneumoconiosis. Further, employer states that the administrative law judge should not have given additional weight to Dr. Perper's opinion simply because he cited to medical literature. Claimant responds, urging affirmance of the award of benefits.

Employer's allegations of error are without merit. With respect to Dr. Caffrey's opinion, the administrative law judge acted within his discretion as fact-finder in determining that it was cursory and lacked the detail present in Dr. Perper's opinion.⁵

⁵ We decline to address employer's argument that the administrative law judge inappropriately relied on Board case law to discount Dr. Caffrey's opinion, as the administrative law judge provided a valid alternative rationale for according less weight

See Jericol Mining, Inc. v. Napier, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Additionally, contrary to employer's contention, the administrative law judge did not assign additional weight to Dr. Perper's opinion merely because he cited to medical literature that supported his opinion. Rather, the administrative law judge rationally found that Dr. Perper's opinion is better supported by the objective test results, more consistent with the regulations, and bolstered by his citations to publications and studies. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order on Remand at 16-17.

In addition, the fact that Dr. Perper diagnosed a more severe degree of clinical pneumoconiosis than that found by the administrative law judge did not require him to reject Dr. Perper's diagnosis of legal pneumoconiosis.⁶ The regulations recognize that clinical pneumoconiosis and a respiratory impairment due to coal dust exposure may occur independently, and the administrative law judge permissibly determined that Dr. Perper rendered a diagnosis of legal pneumoconiosis that was separate from his diagnosis of simple clinical pneumoconiosis.⁷ *See* 20 C.F.R. §718.201(a)(1), (2); *Crockett*

to this opinion. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

⁶ The administrative law judge noted that Dr. Perper characterized the degree of clinical pneumoconiosis as anywhere from "slight to moderate" to "significant" and "substantial," and from "mild to moderately severe." Decision and Order on Remand at 12, *quoting* Claimant's Exhibit 1. The administrative law judge found that "the degree of clinical pneumoconiosis proven by the weight of the evidence is a slight or minimal amount of between 2-5% of the lung tissue." Decision and Order on Remand at 12.

⁷ Under 20 C.F.R. §718.201(a), "clinical pneumoconiosis" is defined as "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Collieries, Inc. v. Barrett, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); Decision and Order on Remand at 13, 16. Consequently, we affirm the administrative law judge’s determination that claimant established that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Regarding the administrative law judge’s finding that claimant proved that the miner’s death was due to legal pneumoconiosis at 20 C.F.R. §718.205(c), employer suggests that the administrative law judge’s conclusion is “in error” because the administrative law judge determined, incorrectly, that the miner had legal pneumoconiosis. Employer’s Brief at 13. Because we have affirmed the administrative law judge’s finding that the miner had legal pneumoconiosis, we also affirm the administrative law judge’s finding that claimant satisfied her burden at 20 C.F.R. §718.205(c). *See Williams*, 338 F.3d at 518, 22 BLR at 2-655; Decision and Order on Remand at 20.

Accordingly, the administrative law judge’s Decision and Order on Remand – Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge