

BRB No. 07-0622 BLA

W.B.)	
(Widow of J.B.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CLINCHFIELD COAL COMPANY)	DATE ISSUED: 05/21/2008
)	
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 on Remand – Award of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (2003-BLA-6262) of Administrative Law Judge Thomas M. Burke rendered 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). This is the second

time this case has been before the Board. In the last appeal, the Board affirmed the administrative law judge's finding that claimant¹ established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Finding that the administrative law judge had failed to provide adequate reasons for crediting the opinion of Dr. Perper over the contrary opinions of Drs. Naeye, Caffrey and Castle, however, the Board vacated the administrative law judge's finding that the weight of the evidence established that pneumoconiosis was a substantially contributing cause of the miner's death from complications of lung cancer pursuant to 20 C.F.R. §718.205(c). The Board remanded the case to the administrative law judge with instructions to render findings of fact as to the etiology of the miner's emphysema and lung cancer in order to properly assess whether each medical opinion was well reasoned, and to reevaluate the conflicting medical opinion evidence relevant to the cause of the miner's death at 20 C.F.R. §718.205(c). *See [W.B.] v. Clinchfield Coal Co.*, BRB No. 05-0219 BLA (Nov. 3, 2005) (unpub.). On remand, the administrative law judge again found that claimant established that pneumoconiosis was a substantially contributing cause of death and hastened the miner's death at Section 718.205(c). Accordingly, survivor's benefits were awarded.

On appeal, employer contends that substantial evidence does not support the administrative law judge's findings of fact and credibility determinations at Section 718.205(c), and maintains that the administrative law judge failed to comply with the Board's instructions on remand. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has issued a limited response, arguing that employer has misstated key facts regarding its description of the medical opinions of Drs. Naeye and Caffrey. The Director further asserts that, if the Board determines that another remand of this case is appropriate, the administrative law judge must be instructed to reassess the medical opinion evidence of record in light of the regulatory limitations at 20 C.F.R. §725.414, consistent with *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*). Employer has filed a reply brief in support of its position.

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,

¹ Contrary to the administrative law judge's characterization in the caption of this case, claimant is the eligible surviving divorced spouse of the miner. The miner died on November 21, 2000, Director's Exhibit 13, and claimant filed her claim for survivor's benefits on September 10, 2001. Director's Exhibit 3.

and in accordance with applicable law.² 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).

After consideration of the administrative law judge’s Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In evaluating the credibility of Dr. Perper’s opinion, that “[c]oal workers’ pneumoconiosis was a substantial contributory cause of [the miner’s] death both directly and indirectly through the associated centrilobular emphysema, that caused hypoxemia that either triggered or aggravated a fatal cardiac arrhythmia, and the complicating bronchopneumonia and pulmonary cancer,” Director’s Exhibit 43, against the contrary opinions of Drs. Naeye, Caffrey and Castle, that the miner’s death was caused by complications of lung cancer related to smoking and not pneumoconiosis, the administrative law judge followed the Board’s remand instructions to determine the etiology of the miner’s lung cancer and emphysema. The administrative law judge rationally determined that the weight of the evidence did not support a finding that the miner’s lung cancer was related to coal dust exposure, Decision and Order on Remand at 7, and that the major dispute between the expert physicians was whether the miner’s pneumoconiosis was sufficiently severe to hasten death. Decision and Order on Remand at 3. Further, the administrative law judge acted within his discretion in accepting Dr. Perper’s opinion, that the miner’s moderate to severe centrilobular emphysema was caused by both coal dust exposure and smoking. Decision and Order on Remand at 5; *see generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Contrary to employer’s contentions, the administrative law judge accurately determined that Dr. Perper’s opinion as to the severity of the centrilobular emphysema was consistent with Dr. Naeye’s initial report,³ the opinions of Drs. Caffrey and Castle, and the findings of Dr. Joyce, the

² The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mine industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibits 8-9.

³ The administrative law judge acted within his discretion in according little weight to Dr. Naeye’s December 26, 2002 opinion that “there is no clinical evidence that this man had clinically significant centrilobular emphysema,” Director’s Exhibit 48, as he found it to be inconsistent with the physician’s earlier report dated May 15, 2002. Decision and Order on Remand at 5; *see generally Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984). In the earlier report, Dr. Naeye diagnosed moderately severe centrilobular emphysema that was one of the “two clinically important chronic disorders in [the miner’s] lungs,” and stated that “in

autopsy prosector. Decision and Order on Remand at 5-6. While Dr. Naeye referenced two studies, purportedly showing that coal dust has no effect on life expectancy when smoking is taken into consideration, in support of his opinion that coal dust rarely has a significant role in the genesis of centrilobular emphysema, the administrative law judge permissibly gave little weight to Dr. Naeye's opinion, as he found it to be inconsistent with studies showing that centrilobular emphysema was causally related to coal dust exposure, that were reviewed and cited with approval by the Department of Labor in amending its regulations. Decision and Order on Remand at 6; *see* 65 Fed. Reg. 79,941 (Dec. 20, 2000); *see generally Consolidation Coal Co. v. Director, OWCP [Beeler]*, ___ F.3d ___, 2008 WL 879858 (7th Cir. Apr. 3, 2008). Further, as Dr. Caffrey provided no reason for disagreeing with Dr. Perper's conclusion that coal dust exposure was a contributing cause of the miner's centrilobular emphysema, other than stating that smoking is "the number one cause of centrilobular emphysema," Employer's Exhibit 9, and Dr. Castle's opinion focused on the etiology of the miner's cancer but was devoid of any analysis regarding the etiology of the centrilobular emphysema, Employer's Exhibit 10, the administrative law judge permissibly accorded less weight to these opinions. Decision and Order on Remand at 6; *see Clark v. Karst-Robbins Coal Corp.*, 12 BLR 1-149 (1989)(*en banc*).

The administrative law judge also acted within his discretion in crediting Dr. Perper's opinion, that the miner's pneumoconiosis was moderate to severe, over the contrary opinions of Drs. Naeye, Caffrey and Castle, that the pneumoconiosis was too mild to have caused, contributed to, or hastened the miner's death, as he found that Dr. Perper's opinion was most consistent with the findings of the autopsy prosector, Dr. Joyce, who observed severe and diffuse pneumoconiosis with coal macules in all lobes.⁴ Decision and Order on Remand at 3-4; *see generally Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). The administrative law judge permissibly accorded less weight to the opinion of Dr. Naeye, who also found that the autopsy slides showed moderate to severe pneumoconiosis but opined that the tissue samples available for review were not representative of the lungs as a whole. The

the few lung areas where cancer and its consequences were mild, centrilobular emphysema and chronic bronchitis were the only disorders that could have measurably affected lung function." Director's Exhibit 35.

⁴ Dr. Joyce conducted an autopsy of the miner's lungs, and prepared 41 autopsy slides. He found that the miner had "coal workers' pneumoconiosis, diffuse, severe - coal macules all lobes and silicotic nodules within left upper lobe, subcarinal and right hilar and peribronchial lymph nodes," as well as squamous cell carcinoma, moderate to severe pulmonary emphysema with areas of interstitial fibrosis and atelectasis, acute bronchopneumonia, pulmonary edema and congestion, and pleural effusion. Director's Exhibit 14.

administrative law judge rationally concluded that Dr. Joyce, the pathologist responsible for preparing the slides, was in the best position to determine whether the slides were representative of the extent of the pneumoconiosis he observed. Decision and Order on Remand at 4; *Fetterman*, 7 BLR 1-688. Moreover, the administrative law judge permissibly accorded little weight to the opinions of Drs. Naeye and Castle, that the miner's pneumoconiosis was too mild to cause radiographic abnormalities. The administrative law judge concluded that it was "not surprising" that x-rays taken during the miner's treatment for terminal lung cancer in 2000 were not read for pneumoconiotic abnormalities, and the remaining x-rays of record were taken more than eight years prior to the miner's death, thus the autopsy evidence was more probative. Decision and Order on Remand at 3-5; see generally *Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991); *Fetterman*, 7 BLR 1-688. Because Dr. Caffrey did not explain why he ruled out pneumoconiosis as a contributing cause of the miner's death, but merely opined that "death occurred in an individual who was a heavy smoker and who suffered from emphysema, chronic bronchitis, coronary artery disease and carcinoma of the lung [which] in my opinion were a result of years of cigarette smoking," Employer's Exhibit 9, the administrative law judge also permissibly discounted his opinion. Decision and Order on Remand at 4; see generally *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark*, 12 BLR 1-149.

Accordingly, we affirm the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis at Section 718.205(c), as supported by substantial evidence, and we further affirm his award of survivor's benefits. See generally *Piney Mountain Coal Co. v. Mays*, 176 F. 3d 753, 755, 21 BLR 2-587, 2-592 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979, 16 BLR 2-90, 2-92 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge