

BRB No. 08-0593 BLA

V.M.)	
(Widow of W.M.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
OLIVER COAL COMPANY)	DATE ISSUED: 05/21/2009
)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-6297) of Administrative Law Judge Daniel F. Solomon awarding benefits 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 its prior Decision and Order, the Board vacated the award of benefits on the survivor's claim and remanded the case to the administrative law judge to reconsider the medical opinion evidence and to fully explain his reasoning as to whether the medical opinion evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). On remand, the administrative law judge again found that the evidence established that the miner's death was due to

pneumoconiosis at Section 718.205(c). Accordingly, the administrative law judge awarded benefits on the survivor's claim.¹

On appeal, employer argues that the administrative law judge failed to follow the Board's remand instructions, made the same errors in evaluating the evidence as he did in his first decision, and impermissibly evaluated the evidence. Employer also requests that the case be remanded to a different administrative law judge because of the administrative law judge's lack of impartiality. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a substantive response 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.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).

To establish entitlement to survivor's benefits pursuant to Section 718.205(c), 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; 718.203; 718.205. Failure to establish any

¹ The miner filed a claim on August 10, 2001, which was pending on June 2, 2004, the date of his death. Claimant filed a survivor's claim on June 8, 2004. A hearing was held on March 14, 2006, before Administrative Law Judge Daniel F. Solomon on the miner's and the survivor's claims. The administrative law judge found that thirty-three years of coal mine employment were established. The administrative law judge denied benefits on the miner's claim because, while employer conceded that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and claimant established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), claimant failed to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, however, awarded benefits on the survivor's claim. The Board affirmed the denial of benefits on the miner's claim, but vacated the award of benefits on the survivor's claim and remanded the case for reconsideration of the evidence on the issue of death causation at 20 C.F.R. §718.205(c). The denial of benefits on the miner's claim has not been appealed. *V.M. v. Oliver Coal Co.*, BRB No. 06-0965 BLA (Sept. 24, 2007)(unpub.).

² We will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in coal mining in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

one of these elements precludes entitlement. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivor's claims filed on or after January 1, 1982, the cause of death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if the presumption, relating to complicated pneumoconiosis, pursuant to Section 718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-980, 16 BLR 2-90, 2-93 (4th Cir. 1992).

Employer contends that the administrative law judge has simply reinstated his previous findings, based on the same discredited reasoning, without addressing the evidence pursuant to the Board's remand instructions. Employer further contends that the administrative law judge has erred in his weighing of the evidence. Specifically, employer contends that the administrative law judge erred in crediting Dr. Perper's opinion, attributing the miner's death to pneumoconiosis, because Dr. Perper failed to explain how pneumoconiosis hastened death in the miner's *particular* case, as opposed to opining that pneumoconiosis can, in general, hasten death.

In its prior Decision and Order, the Board held that the administrative law judge failed to adequately explain why he found Dr. Perper's opinion as to the cause of the miner's death, more rational than the opinions of Drs. Crouch and Tomashefski. The Board also held that the administrative law judge should consider the opinions of these pathologists in light of their pulmonary credentials. Additionally, the Board held that the administrative law judge erred in discounting the opinions of Drs. Castle and Dahhan, pulmonary experts, as to the cause of death, on the ground that they were not pathologists and had not reviewed the miner's autopsy slides. Further, the Board held that the administrative law judge erred in finding that the opinions of Drs. Ranavaya, Rasmussen and Nida supported Dr. Perper's opinion on the issue of death causation, because Drs. Ranavaya and Rasmussen did not address the issue, and because the administrative law judge did not consider the reasoning and documentation underlying Dr. Nida's opinion. Accordingly, the Board vacated the administrative law judge's decision awarding benefits on the survivor's claim and remanded the case for the administrative law judge to reconsider the evidence on the issue of death causation at Section 718.205(c).

In weighing the evidence on remand, the administrative law judge again credited Dr. Perper's opinion that the miner's coal workers' pneumoconiosis and associated chronic obstructive pulmonary disease (copd) contributed to and hastened his death. The administrative law judge credited Dr. Perper's opinion that pneumoconiosis and copd hastened the miner's death both directly, by causing the miner's pulmonary insufficiency;

and indirectly, by increasing his risk of fatal cardiac arrhythmia.³ Decision and Order on Remand at 2; Claimant's Exhibit 1. The administrative law judge noted that Dr. Perper's opinion was substantiated by the opinions of Drs. Ranavaya and Rasmussen, who had examined the miner, and found that pneumoconiosis contributed to his disability.⁴ The administrative law judge also found that Dr. Perper's opinion was supported by the opinion of Dr. Nida, the miner's treating physician, who found that the miner had end-stage copd at the time of his death and who listed "black lung" as a cause of death on the death certificate.⁵ The administrative law judge accorded little weight to the opinions of

³ Dr. Perper noted, on his review of the miner's medical records, that the miner had significant coal worker's pneumoconiosis based on the fact that 1) the miner worked more than thirty-five years in underground coal mining; 2) he had worsening obstructive lung disease and mild restrictive lung disease; 3) there was progressive respiratory deterioration that eventually led to the need for bronchodilators; and 4) the autopsy substantiated the presence of simple coal workers' pneumoconiosis and associated moderately severe centrilobular emphysema. Dr. Perper further noted that, despite the fact that the miner was a former substantial smoker, his chronic obstructive pulmonary disease (copd) and underlying emphysema were also a direct result of his exposure to coal dust and coal workers' pneumoconiosis, beyond any effect of smoking.

Dr. Perper concluded by explaining that pneumoconiosis played a direct cause in the miner's death because the miner died due to the pulmonary insufficiency caused by the extensive replacement of normal lung tissue by non-breathing pneumoconiotic lesions and associated centrilobular chronic emphysema, cor pulmonale and resulting hypoxemia. He explained that pneumoconiosis indirectly caused death through hypoxemia precipitating and aggravating the miner's cardiac arrhythmia, noting that scientific literature substantiated that patients with copd showed greater incidence of cardiac arrhythmia than healthy subjects of the same age. Claimant's Exhibit 1.

⁴ Dr. Ranavaya found, on examination, that the miner had pneumoconiosis, based on his thirty-three years of coal mine employment, as well as hypertension, and coronary artery disease. Dr. Ranavaya opined that these diagnosed conditions contributed to the miner's disability to a major extent. Director's Exhibit 13.

Dr. Rasmussen found, on examination, that the miner had x-ray changes consistent with pneumoconiosis, and that the causes of his lung function loss were his cigarette smoking and coal mine dust exposure. Director's Exhibit 14.

⁵ The miner's death certificate, completed by his treating physician, Dr. Nida, listed, as the immediate cause of death, respiratory failure due to black lung and lung mass. Director's Exhibit 12.

Drs. Tomashefski⁶ and Crouch,⁷ who found that pneumoconiosis did not contribute to or hasten the miner's death. The administrative law judge found that their opinions were faulty because: They did not consider whether the miner's death was due to multiple factors and; they relied on the fact that the amount of coal workers' pneumoconiosis seen on autopsy was too minimal to cause death, even though there is no standard for determining how much pneumoconiosis can cause death. The administrative law judge also accorded little weight to the opinions of Drs. Dahhan and Castle,⁸ who are Board-

⁶ Dr. Tomashefski, on review of the miner's medical records, opined that because the autopsy was limited to the miner's thoracic organs, he was unable to determine with certainty the anatomical cause of death. He noted that there was no evidence of either primary or metastatic carcinoma in the miner's lungs and that the presence of cardiomegaly and pulmonary edema suggested that left ventricular cardiac failure was the immediate or a major contributory cause of death. Employer's Exhibit 9.

Dr. Tomashefski further concluded that the miner had very mild simple coal workers' pneumoconiosis and centrilobular emphysema, along with pulmonary congestion and edema. However, Dr. Tomashefski opined that the miner's emphysema was due to smoking, rather than coal workers' pneumoconiosis or coal dust exposure.

⁷ Dr. Crouch found, on review of the miner's autopsy report and slides, that there was evidence of mild simple coal workers' pneumoconiosis, but that, in her opinion, occupational coal dust exposure could not have caused any clinically significant degree of respiratory impairment or disability and could not have caused, contributed to, or otherwise hastened the miner's death. She also opined that while emphysema was present, she saw no concordance between the extent and distribution of coal dust deposition in the lungs and the distribution or severity of the observed emphysema. In her opinion, the major cause of the miner's emphysema was cigarette smoking, rather than occupational dust exposure. Employer's Exhibit 7.

⁸ On examining the miner, Dr. Dahhan opined that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis, but found that the miner had a mild obstructive respiratory impairment that did not arise out of coal mine employment. Subsequent to the miner's death, Dr. Dahhan, on reviewing additional medical records, including the autopsy reports of Drs. Crouch and Tomashefski, found that the miner had mild simple coal workers' pneumoconiosis, centrilobular emphysema due to a lengthy smoking habit, and a mass due to metastatic renal cell carcinoma. Dr. Dahhan opined that the miner's multiple medical problems were diseases of the general public at large and were unrelated to his coal mine employment. Employer's Exhibit 1; Director's Exhibit 26; Employer's Exhibit 2.

certified pulmonologists, because 1) they did not provide independent opinions, but relied on the findings of Drs. Tomaszewski and Couch; 2) they relied on the fact that the pneumoconiosis seen on autopsy was too little to hasten death, when there is no standard for determining how much pneumoconiosis is sufficient to cause death; 3) they failed to consider whether the miner's emphysema could have been aggravated by coal mine employment; 4) their opinions were equivocal, as they did not actually diagnose the cause of death; and 5) Dr. Dahhan did not recognize that Dr. Castle had determined that the miner had a totally disabling respiratory impairment, thereby diminishing Dr. Dahhan's opinion as to the extent of the miner's impairment.

At the outset, we note that the administrative law judge erred in relying on the opinion of Dr. Perper to find death causation established at Section 718.205(c), without sufficiently addressing whether Dr. Perper's opinion was based on the specific circumstances of the miner's case, as opposed to a general finding that patients with pulmonary insufficiency are at greater risk for cardiac arrhythmia, which can lead to death. *See Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The administrative law judge's finding of death causation is, therefore, vacated and the case is remanded for the administrative law judge to consider whether Dr. Perper's opinion establishes that pneumoconiosis hastened death, based on the specific facts in the miner's case.

Employer also contends that the administrative law judge erred in finding that the opinions of Drs. Ranavaya and Rasmussen supported Dr. Perper's opinion. Drs. Ranavaya and Rasmussen, who examined the miner prior to his death, did not address the cause of the miner's death. Dr. Ranavaya found that the miner was disabled due to pneumoconiosis, hypertension and coronary artery disease. Dr. Rasmussen opined that both smoking and coal mine employment caused a deficiency in the miner's lung function. The administrative law judge found that these opinions supported Dr. Perper's

On examining the miner, Dr. Castle found no evidence of coal workers' pneumoconiosis, but opined that the miner had smoking induced pulmonary emphysema, in addition to coronary artery disease, angina pectoris, hypertension by history, diabetes mellitus by history, and a recent history of pneumonia. Subsequent to the miner's death, on reviewing additional medical evidence, including the available post-mortem, Dr. Castle found that the miner had pathological evidence of minimal simple coal workers' pneumoconiosis, but that the miner did not have a respiratory impairment related to that process and that the miner's death was most likely not caused by, contributed to, or hastened, in any way, by the coal workers' pneumoconiosis that was seen pathologically. Employer's Exhibit 1; Director's Exhibit 26; Employer's Exhibit 2.

opinion that a combination of factors, including pneumoconiosis, hastened the miner's death. As noted in the Board's previous decision, however, the opinions of Drs. Ranavaya and Rasmussen, which address the miner's disability, do not make a finding as to the cause of the miner's death, and the administrative law judge has not explained how their opinions, that the miner had a respiratory disability, supports a finding that the miner's death was, in fact, hastened by pneumoconiosis. Decision and Order on Remand at 4; *see Williams*, 338 F.3d at 509, 22 BLR at 2-655.

Further, regarding the opinion of Dr. Nida, who signed the miner's death certificate and listed respiratory failure due to black lung and lung mass as the immediate cause of death, Director's Exhibit 2, the Board previously instructed the administrative law judge to consider whether Dr. Nida's treatment records supported this finding. The administrative law judge found that Dr. Nida's treatment records supported his finding on the death certificate and supported Dr. Perper's opinion, because they showed that the miner suffered from several conditions and that, just before his death, he exhibited end-stage copd. This cursory finding, however, does not explain how Dr. Nida's opinion of end-stage copd shows that the miner's death was hastened by pneumoconiosis, as opposed to another condition. Moreover, we note, as employer contends, that Dr. Nida's treatment records do not reflect a diagnosis of pneumoconiosis or "black lung." Accordingly, on remand, if the administrative law judge determines that Dr. Perper's opinion establishes that the miner's pneumoconiosis hastened his death based on the *specific* facts of the miner's case, the administrative law judge must reconsider whether the opinions of Drs. Ranavaya, Rasmussen and Nida substantiate Dr. Perper's opinion. *See 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, 441-442, 21 BLR 2-269, 2-274-276 (4th Cir. 1997).

Turning to the opinions of Drs. Tomashefski and Crouch, the administrative law judge acknowledged, as instructed, that Drs. Tomashefski and Crouch were Board-certified in pulmonary pathology. Nonetheless, he permissibly found that Drs. Tomashefski, Crouch and Perper were equally credentialed because they were all Board-certified in pathology.⁹ *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). However, the administrative law judge erred in considering the opinions of Drs. Tomashefski and Crouch because they were based on a finding that the amount of pneumoconiosis seen on the miner's autopsy was insufficient to contribute to or hasten his death. The administrative law judge rejected the opinions of Drs. Tomashefski and Crouch because

⁹ In his first Decision and Order, the administrative law judge noted that Dr. Perper was Board-certified in anatomic, clinical and forensic pathology. 2006 Decision and Order at 10.

he stated that there is no standard for determining how much pneumoconiosis is required to cause death. The administrative law judge also gave little weight to Dr. Tomashefski's opinion, because Dr. Tomashefski failed to consider the possibility that there were a combination of causes for the miner's death, and gave little weight to Dr. Crouch's opinion because, even though Dr. Crouch stated that smoking was the "major factor" in the miner's death, she failed to address other factors that may have played a role in the miner's death. Decision and Order on Remand at 5; Employer's Exhibit 7. The administrative law judge may not substitute his opinion for that of a medical expert. See *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). In this case, both Drs. Tomashefski and Crouch found, on review of the miner's medical records, including the autopsy report and slides, that the amount of mild simple coal workers' pneumoconiosis seen on autopsy could not have caused or hastened the miner's death. This was a medical determination based on the evidence before them, and the administrative law judge could not substitute his opinion for those of the doctors. *Marcum*, 11 BLR at 24. The administrative law judge erred, therefore, in according little weight to their opinions for this reason. Further, contrary to the administrative law judge's finding, Dr. Crouch addressed whether factors other than smoking played a role in the miner's death, as Dr. Crouch specifically stated that the miner's pneumoconiosis did not cause, contribute to, or hasten the miner's death. Accordingly, if, on remand, the administrative law judge determines that Dr. Perper's opinion is sufficient to establish death causation, he must weigh it against the opinions of Drs. Tomashefski and Crouch.

Regarding the opinions of Drs. Castle and Dahhan, as instructed, the administrative law judge did not rely on the fact that they were not pathologists and had not reviewed the miner's autopsy slides, to accord less weight to their opinions on death causation. However, the administrative law judge's reasoning for according little weight to their opinions on death causation is faulty. Contrary to the administrative law judge's finding, while Drs. Castle and Dahhan considered the reports of Drs. Tomashefski and Crouch, the record does not support a finding that they did not render independent opinions, based on their evaluation of the evidence. See *Clark*, 12 BLR at 1-155. Further, even if Drs. Castle and Dahhan relied, in part, on the reports of Drs. Tomashefski and Crouch, because the administrative law judge erred in evaluating the opinions of Drs. Tomashefski and Crouch, we cannot affirm his rejection of their opinions on that basis. Likewise, the administrative law judge cannot reject the opinions of Drs. Castle and Dahhan, that the amount of pneumoconiosis seen on autopsy was too little to hasten death, because they were medical determinations. See *Marcum*, 11 BLR at 1-24. Further, the fact that Drs. Castle and Dahhan did not consider whether coal mine employment could have aggravated the miner's emphysema and that they did not diagnose a cause of death, does not render their opinions, that pneumoconiosis did not contribute to or cause death, unreliable. See 20 C.F.R. §718.205(c); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Also, the administrative law judge's accordance of diminished weight to Dr. Dahhan's opinion on the extent of the miner's respiratory impairment, because he was unaware that Dr. Castle had found a totally disabling respiratory impairment, does not reflect on the opinion's relevance to death causation. *See* 20 C.F.R. §718.205(c). Accordingly, if the administrative law judge determines, on remand, that Dr. Perper's opinion is sufficient to establish death causation, he must weigh Dr. Perper's opinion against those of Drs. Dahhan and Castle.

Finally, employer urges the Board to direct that this case be remanded to another administrative law judge, as the current administrative law judge has not acted impartially in evaluating the evidence and has not complied with the Board's remand instructions. In light of the Board's previous remand of this case, and the administrative law judge's repetition of error on remand, we conclude that "review of this claim requires a fresh look at the evidence...." *Hicks*, 138 F.3d at 537, 21 BLR at 2-343; *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Thus, we reluctantly direct that the case be assigned to a different administrative law judge on remand.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part, vacated in part, 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