BRB Nos.11-0499 BLA
and 11-0500 BLA

ALLIE L. BURKE (Widow of and o/b/o KENNETH R. BURKE)	)	
Claimant-Respondent	)	
v.	)	
JARISA PROCESSING, INCORPORATED	)	DATE ISSUED: 05/10/2012
and	)	
LIBERTY MUTUAL INSURANCE 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 Granting Modification and Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Jonathan Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Modification and Awarding Benefits of Administrative Law Judge Theresa C. Timlin (the administrative law judge) rendered on a miner's claim (2009-BLA-05018) and a survivor's claim (2009-BLA-05019) filed 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).

On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments, in pertinent part, revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which automatically entitles a survivor to derivative benefits, without having to establish that the miner's death was due to pneumoconiosis, if a miner was determined to be eligible for benefits at the time of his death. *See* 30 U.S.C. §932(*l*), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(*l*)). The amendments also reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, a rebuttable presumption, in a survivor's claim, that the miner died due to pneumoconiosis, if the miner had fifteen or more years of qualifying coal mine employment and the evidence establishes a totally disabling respiratory impairment, *see* 20 C.F.R §718.204(b).

Based on the filing dates of the claims, the administrative law judge determined that the amendments were not applicable to the miner's claim, but were applicable to the survivor's claim.[1] The administrative law judge credited the miner with twenty-two years of coal mine employment, as stipulated by the parties and supported by the record, and adjudicated both claims pursuant to 20 C.F.R. Part 718. In the miner's claim, the

[1] The miner filed a claim for benefits on May 9, 2002. Director's Exhibit 2. On September 29, 2006, Administrative Law Judge Pamela Lakes Wood denied benefits. Director's Exhibit 83. The miner died on October 5, 2006, while the case was pending on appeal, and the Board affirmed the denial of benefits on September 24, 2007. Director's Exhibit 90. On November 13, 2007, claimant, the miner's widow, filed a request for modification on behalf of the miner's estate. Director's Exhibits 92-97. Additionally, claimant filed a survivor's claim on November 20, 2007. Director's Exhibits 108-109. Both the miner's claim and the survivor's claim were subsequently forwarded to the Office of Administrative Law Judges, where they were consolidated for a formal hearing conducted by Administrative Law Judge Theresa C. Timlin on December 9, 2009.

administrative law judge found that the weight of the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), thereby establishing a mistake in a prior determination of fact and grounds for modification of Administrative Law Judge Pamela Lakes Wood's denial of the claim pursuant to 20 C.F.R. §725.310. The administrative law judge further found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits in the miner's claim, and found that claimant was derivatively entitled to survivor's benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

On appeal, employer challenges both awards, and asserts that Dr. Perper's review of the miner's autopsy slides exceeds the evidentiary limitations at 20 C.F.R. §725.414. Employer also challenges the administrative law judge's evaluation of the medical opinion evidence on the issues of pneumoconiosis and disability causation at 20 C.F.R. §§718.202(a) and 718.204(c). Lastly, employer challenges the constitutionality of amended Section 932(*l*), and its application to the survivor's claim. Claimant responds, urging affirmance of the administrative law judge's award of benefits in both the miner's and the survivor's claims. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response, opposing the constitutional arguments raised by employer in the survivor's claim.[2]

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).

Turning first to the evidentiary issue, employer argues that, pursuant to the Board's decision in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239-40 (2007) (en banc), Dr. Perper's review of the miner's medical records and autopsy slides constitutes both a medical report and an autopsy report. Because claimant designated the report of the autopsy prosector, Dr. Dennis, as her affirmative autopsy report, employer

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings of twenty-two years of coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibits 3-5; Decision and Order at 20.

asserts that Dr. Perper's review of the miner's autopsy slides exceeds the evidentiary limitations on autopsy evidence under Section 725.414, and should have been redacted or excluded. Employer's Brief at 4. We agree with claimant's position, that Dr. Perper's report does not violate the evidentiary limitations because it is admissible as claimant's rebuttal autopsy opinion. Claimant's Response Brief at 15.

The revised regulations at Sections 725.414 and 725.310(b) combine to establish the limitations on admissible evidence in a modification proceeding. *See* 20 C.F.R. §§725.2(c), 725.414, 725.310(b); *Rose v. Buffalo Mining Co*., 23 BLR 1-221, 1-227 (2007). Pursuant to Section 725.414(a), absent a finding of good cause, each party is entitled to submit two x-ray readings, one autopsy report, one report of each biopsy, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit, in rebuttal, one physician's interpretation of each x-ray reading, autopsy report, biopsy report, pulmonary function study, and blood gas study submitted as the opposing party's affirmative case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit certain rehabilitative evidence. *Id.* In a modification proceeding, the regulation at Section 725.310(b) provides that each party shall be entitled to submit one additional x-ray interpretation, pulmonary function study, blood gas study, and medical report as affirmative case evidence, "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414." 20 C.F.R. §725.310(b). If a party did not submit the full complement of evidence allowed by Section 725.414 in support of its affirmative case in the underlying claim, that party is permitted to submit any additional evidence allowed under Section 725.414 on modification, as well as the additional medical evidence allowed by Section 725.310(b). *Rose*, 23 BLR at 1-227. Therefore, a party may submit both an affirmative autopsy report and, where the opposing party has also submitted affirmative autopsy evidence, a rebuttal autopsy report. *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii); *Keener*, 23 BLR at 1-240. Here, the administrative law judge properly allowed the parties to "'backfill' spots if they did not submit the entire complement of evidence during the initial claim." Decision and Order at 4; *Rose*, 23 BLR at 1-227. Because employer submitted Dr. Naeye's report as its affirmative autopsy evidence, Dr. Perper's autopsy slide review is admissible as claimant's rebuttal autopsy evidence and, as such, does not violate the evidentiary limitations. Consequently, employer's argument is rejected.

Turning to the merits of entitlement in the miner's claim, employer contends that the administrative law judge erred in her consideration of the opinions of Drs. Perper, Dennis and Naeye in finding the existence of clinical pneumoconiosis established by autopsy evidence at Section 718.202(a)(2). Specifically, employer asserts that the administrative law judge improperly considered Dr. Perper's review of the autopsy slides; "overlooked [Dr. Dennis's] unsupported and inconsistent findings with regard to pulmonary massive fibrosis in assessing whether his diagnosis of simple pneumoconiosis

should be credited," Employer's Brief at 9; and mischaracterized Dr. Naeye's autopsy findings, Employer's Brief at 9-10. Employer's arguments lack merit.

We have rejected employer's argument that Dr. Perper's review of the autopsy slides must be redacted, and as employer has not identified any specific legal or factual error in the administrative law judge's crediting of Dr. Perper's diagnosis of simple pneumoconiosis, based on his observations of fibro-anthracosis, anthracotic macules, micronodules measuring up to 0.3 cm, and silicotic nodules measuring slightly more than 1.2 mm on the autopsy slides, we affirm the administrative law judge's finding that Dr. Perper's opinion is entitled to full probative weight. Decision and Order at 23; *see* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We also discern no error in the administrative law judge's crediting of Dr. Dennis's diagnosis of simple pneumoconiosis, notwithstanding her finding that the physician's diagnosis of progressive massive fibrosis was insufficient to establish complicated pneumoconiosis for failure to describe massive lesions or indicate that the abnormalities observed on autopsy would produce an opacity of greater than one centimeter if viewed on x-ray. *See* 20 C.F.R. §718.304(b)-(c); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615, 2-628-629 (6th Cir. 1999). As Dr. Dennis provided detailed descriptions of the gross and microscopic findings of anthracotic macules and micronodules, as well as anthracotic pigment with associated fibrosis, the administrative law judge acted within her discretion in finding the opinion to be well-reasoned, documented, and entitled to full probative weight. *See Director, OWCP v. Rowe*, 710 F.2d 251 5 BLR 2-99 (6th Cir. 1983). We reject employer's argument that the administrative law judge mischaracterized Dr. Naeye's findings. Employer's Brief at 9-10. To the contrary, the administrative law judge accurately summarized Dr. Naeye's report, in which he described small to moderate amounts of black pigment accompanied by rare birefringent crystals of silica small enough to be fibrogenic; indicated that "the near absence of these very tiny crystals explains why sizable areas of fibrosis are absent in the lung tissues available for microscopic review," and that "[w]hat superficially appears to be interstitial fibrosis at many sites is instead the fused walls of ruptured alveoli;" and concluded that coal workers' pneumoconiosis had no measurable role in causing the miner's very severe centrilobular emphysema, severe chronic bronchitis, bronchiolitis, disability or death. Director's Exhibit 98; Decision and Order at 6-7, 23. The administrative law judge rationally inferred that, "while Dr. Naeye explained why the sizeable areas of damaged lung tissue were not, in fact, fibrotic, he nevertheless stated that the silica particles he saw could cause fibrosis, and implied that some degree of fibrosis was present." Decision and Order at 23. Finding that Dr. Naeye's opinion did not negate the existence of pneumoconiosis and was entitled to less weight as inadequately reasoned, the administrative law judge acted within her discretion in concluding that a preponderance of the autopsy evidence established clinical pneumoconiosis at Section 718.202(a)(2). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Crockett Collieries Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 355, 22 BLR 2-472, 2-481-82 (6th Cir. 2007). As

substantial evidence supports the administrative law judge's credibility determinations, we affirm her findings thereunder.

Employer next contends that the administrative law judge erred in according determinative weight to the opinion of Dr. Perper,[4] that the miner's chronic obstructive pulmonary disease (COPD) and emphysema resulted from both smoking and coal dust exposure, and that pneumoconiosis was a significant contributing cause of disability, in finding legal pneumoconiosis and disability causation established at Sections 718.202(a)(4) and 718.204(c). Employer asserts that Dr. Perper relied on inaccurate smoking and coal mine employment histories, and failed to adequately explain how the underlying documentation supported his conclusions. Thus, employer maintains that Dr. Perper's opinion should have been discounted as unreasoned. Employer's Brief at 5-8. Employer also assigns error to the administrative law judge's consideration of the opinions of Drs. Fino, Castle and Rosenberg on the issue of disability causation at Section 718.204(c). Employer's arguments lack merit.

In evaluating the conflicting medical opinions of record, the administrative law judge accurately summarized all of the physicians' findings and the underlying bases for their conclusions. While Dr. Perper did not make a specific finding regarding the miner's smoking history, and the records he reviewed documented a coal mine employment history ranging from twenty-seven years to thirty-seven years, the physician indicated that the miner had a "significant" history of smoking, and that "a long occupational exposure of ten or more years is considered sufficient" to develop pneumoconiosis. Decision and Order at 9, 25; Claimant's Exhibit 1 at 19-20, 24. After accepting the parties' stipulation that the miner had a 22-year coal mine employment history, and determining that the miner had a 48 pack-year smoking history, Decision and Order at 2, 25, the administrative law judge permissibly found that, although Dr. Perper did not have access to all of the medical evidence of record, his opinion was well-reasoned based on the information available to him. Decision and Order at 26; *see Rowe,* 710 F.2d at 255, 5 BLR at 2-103. Noting that Dr. Perper provided a broad range of medical literature in support of his conclusions, and a "well-documented explanation of how the miner's smoking and coal mine dust exposure contributed to his respiratory impairment," the administrative law judge acted within her discretion in crediting Dr. Perper's diagnosis of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Decision and Order at 26; *see Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

[4] Dr. Perper diagnosed severe coal workers' pneumoconiosis as well as centrilobular and panacinar emphysema caused by both smoking and coal dust exposure, and stated that coal dust exposure was a significant causal or contributing factor in the miner's pulmonary impairment. Decision and Order at 28, 29, 33, 34; Claimant's Exhibit 1 at 27.

Consequently, we reject employer's arguments with regard to the administrative law judge's weighing of Dr. Perper's opinion thereunder.

We also reject employer's assertion that the administrative law judge, in finding disability causation established at Section 718.204(c), failed to adequately consider the opinions of Drs. Fino, Castle and Rosenberg, that the miner's disabling respiratory impairment was unrelated to pneumoconiosis. The administrative law judge determined that Dr. Fino attributed the miner's disability to his smoking-related emphysema, and opined that the coal-dust induced portion of the miner's emphysema was not a significantly contributing cause of impairment because Dr. Naeye found little coal dust in the miner's lungs. Decision and Order at 26; Director's Exhibit 103; Employer's Exhibit 2. Dr. Fino explained that the amount of dust deposition in the lungs is directly proportional to the amount of emphysema attributable to coal dust exposure, and noted that the miner only developed obstructive disease after he left the mines. *Id.* While acknowledging the latent and progressive nature of pneumoconiosis, Dr. Fino indicated that latency was limited to silicosis, and that clinical pneumoconiosis is progressive, but obstructive lung disease is not. *Id.* Finding that Dr. Fino's opinion was inconsistent with the regulations, and that the physician failed to adequately explain why he relied on Dr. Naeye's interpretation of the autopsy slides and not the autopsy prosector's findings of heavy coal dust deposition, the administrative law judge permissibly accorded the opinion little weight. Decision and Order at 27, 33; *see* 65 Fed. Reg. 79,920, 79,939, 79,944 (Dec. 20, 2000); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117 (2009); *Clark*, 12 BLR at 1-155; *see also Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1989), *reh'g denied* 484 U.S. 1047 (1988). The administrative law judge also acted within her discretion in according little weight to Dr. Castle's opinion, as the physician did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding. Further, while Dr. Castle indicated that pneumoconiosis generally causes a mixed, irreversible obstructive and restrictive impairment, the administrative law judge determined that he failed to adequately explain why the miner did not fall into the smaller category of those whose impairment was purely obstructive, as contemplated by the regulations. Decision and Order at 34; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Lastly, as the administrative law judge properly found that the more recent autopsy and medical opinion evidence outweighed Dr. Rosenberg's 2003 opinion that the miner did not have clinical or legal pneumoconiosis, Decision and Order at 28, *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, the administrative law judge's failure to further analyze the opinion on the issue of disability causation does not constitute reversible error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the weight of the evidence established total disability due to pneumoconiosis pursuant to Sections 718.202(a), 718.204(b), (c), and affirm the award of benefits in the miner's claim.

Turning to the survivor's claim, employer argues that the retroactive application of the automatic entitlement provisions of amended Section 932(*l*) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unlawful taking of private property. Employer's Brief at 29, 32-34.[5] Employer also contends that the operative date for determining eligibility pursuant to amended Section 932(*l*) is the date that the miner's claim was filed, not the date that the survivor's claim was filed. We reject employer's arguments for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); and *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub nom. West Virginia CWP Fund v. Stacy*, 671 F.3d 378, BLR (4th Cir. 2011); *see also B&G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, BLR (3d Cir. 2011).

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on or after March 23, 2010, and the miner has been determined eligible to receive benefits at the time of his death, we affirm the administrative law judge's finding that claimant is automatically entitled to receive benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

[5] We reject employer's request that the Board accept its monetary calculations as evidence respecting the economic impact of the amendments in the PPACA. Employer's Brief at 32-34; *see Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

Accordingly, the administrative law judge's Decision and Order Granting Modification and Awarding Benefits is affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge