BRB No. 99-1300 BLA

GERTRUDE LOCKHART (Widow of LEONARD LOCKHART)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
OLD BEN COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Raleigh, Illinois, for claimant.

Amy E. Wilmot (Arter & Hadden LLP), Washington, D.C,, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order on Reconsideration (97-BLA-1915) of Administrative Law Judge Donald W. Mosser denying benefits on a survivor's claim filed pursuant to the provisions of Title IV of

[1]Claimant is the surviving spouse of the deceased miner who died on October 1, 1996. Director's Exhibit 4.

the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The instant case involves a survivor's claim filed on October 24, 1996. After crediting the miner with forty years of coal mine employment, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(4). The administrative law judge further found that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge, however, found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. The administrative law judge subsequently denied claimant's motion for reconsideration. On appeal, claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant further contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. In a reply brief, claimant reiterates her previous contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Claimant initially argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the

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[2]The miner filed a claim for benefits on July 9, 1982. Director's Exhibit 20. In a Decision and Order dated June 2, 1986, Administrative Law Judge Bernard J. Gilday, Jr. awarded benefits. *Id.* By Decision and Order dated November 21, 1988, the Board affirmed Judge Gilday's award of benefits. *Lockhart v. Old Ben Coal Co.*, BRB No. 86-1711 BLA (Nov. 21, 1988)(unpublished). The miner's claim was in payment status when he died.

[3]Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2) and (a)(4) and 718.203(b), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge properly accorded greater weight to the interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 14; Decision and Order on Reconsideration at 2. The administrative law judge properly noted that the miner's April 5, 1990, July 14, 1993 and September 26, 1996 x-rays were read as both positive and negative for pneumoconiosis by physicians with these qualifications. Decision and Order on Reconsideration at 2; Director's Exhibits 7, 16; Claimant's Exhibits 2, 4, 5; Employer's Exhibits 1-8, 16, 18. The administrative law judge further noted that the miner's July 8, 1996 x-ray was uniformly interpreted as negative for pneumoconiosis. Decision and Order on Reconsideration at 2; Employer's Exhibits 13, 15, 17, 22. The administrative law judge, therefore, found that the weight of the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order on Reconsideration at 2. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

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[4]While Drs. Ahmed and Cappiello interpreted the miner's April 5, 1990 x-ray as positive for pneumoconiosis, Claimant's Exhibits 2, 4, Drs. Binns, Gogineni, Abramowitz and Baek interpreted this x-ray as negative for pneumoconiosis. Employer's Exhibits 1-4.
While Dr. Fisher interpreted the miner's July 14, 1993 x-ray as positive for pneumoconiosis, Director's Exhibit 7, Drs. Binns, Gogineni, Abramowitz and Baek interpreted this x-ray as negative for pneumoconiosis. Employer's Exhibits 5-8. While Drs. Ahmed and Cappiello interpreted the miner's September 26, 1996 x-ray as positive for pneumoconiosis, Director's Exhibit 7; Claimant's Exhibit 5, Drs. Wiot, Laucks and Soble interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 16; Employer's Exhibits 16, 18. Each of these physicians is dually qualified as a Board-certified radiologist and B reader.

[5]Drs. Duncan, Laucks and Soble, each dually qualified as a Board-certified radiologist and B reader, interpreted the miner's July 8, 1996 x-ray as negative for pneumoconiosis. Employer's Exhibits 13, 15, 17. There are no positive interpretations of the miner's July 8, 1996 x-ray.

The record also contains interpretations of x-rays taken on April 8, 1996 and October 1, 1996. While Dr. Cohen, a B reader, interpreted the miner's April 8, 1996 x-ray as positive for pneumoconiosis, Dr. Wiot, a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 16. Dr. Cohen indicated that the miner's October 1, 1996 x-ray was unreadable. Claimant's Exhibit 14.

Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom*. *Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Claimant acknowledges that the autopsy evidence is insufficient to establish the existence of complicated pneumoconiosis. Claimant's Brief at 11. Claimant, however, notes that Dr. Jones, the autopsy prosector, testified that the autopsy findings do not undermine the x-ray findings of complicated pneumoconiosis. Claimant, therefore, contends that the administrative law judge erred in finding that the x-ray evidence supportive of complicated pneumoconiosis was undermined by the fact that the autopsy evidence was not supportive of such a finding.

The administrative law judge, however, did not discredit the x-ray evidence of complicated pneumoconiosis solely because the autopsy evidence did not support a finding of complicated pneumoconiosis. In finding that the evidence of record was insufficient to establish the existence of complicated pneumoconiosis, the administrative law judge noted both the "difference of x-ray opinions on whether complicated pneumoconiosis was present" and the absence of autopsy evidence of the disease. Decision and Order on Reconsideration at 3. While Dr. Fisher, a Board-certified radiologist and B reader, interpreted the miner's July 14, 1993 x-ray as positive for complicated pneumoconiosis, Director's Exhibit 7, four equally qualified physicians, Drs. Binns, Gogineni, Abramowitz and Baek, found no evidence of complicated pneumoconiosis on this x-ray. Employer's Exhibits 5-8. While Dr. Cohen, a B reader, interpreted the miner's April 8, 1996 x-ray as positive for complicated pneumoconiosis, Claimant's Exhibit 12, Dr. Wiot, a dually qualified Board-certified radiologist and B reader, did not find evidence of complicated pneumoconiosis on this x-ray. Director's Exhibit 16. Finally, while Drs. Ahmed and Cappiello, each dually qualified as a Board-certified radiologist and B reader, and Drs. Aycoth, Pathak and Cohen, all B readers, interpreted the miner's September 26, 1996 as positive for complicated pneumoconiosis, Director's Exhibit 7; Claimant's Exhibit 5-7, 13, Drs. Wiot, Laucks and Soble, each dually qualified as a Board-certified radiologist and B reader, and Dr. Duncan, a B reader, found no evidence of complicated pneumoconiosis on this x-ray. Director's Exhibit 16; Employer's Exhibits 14, 16, 18. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to

establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.

Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We agree.

The administrative law judge recognized that "[a]ll of the physicians who reviewed the medical records after [the miner's] death agreed that the miner suffered from pneumoconiosis." Decision and Order at 15. Dr. Combs, Jones, Cohen, Naeye, Kleinerman, Tuteur, and Branscomb each diagnosed "pneumoconiosis." Director's Exhibits 4-5; Claimant's Exhibits 8, 17; Employer's Exhibit 19, 20-22, 24-26, 28.

While Dr. Combs, Jones and Cohen opined that the miner's death was due to his pneumoconiosis, Director's Exhibits 4, 5; Claimant's Exhibits 8, 9, Drs. Naeye, Kleinerman Tuteur and Branscomb opined that the miner's pneumoconiosis was too mild to have contributed to his death. Employer's Exhibits 19-22, 24-26, 28.

The administrative law judge noted that while Dr. Jones, the autopsy prosector, found severe pneumoconiosis on both his gross and microscopic examination of the miner's lungs, Drs. Naeye and Kleinerman found only mild pneumoconiosis after reviewing the miner's autopsy slides and medical evidence. Although the administrative law judge credited the opinions of Drs. Naeye and

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[6]Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Seventh Circuit has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

[7]Dr. Naeye opined that although the miner suffered from simple coal workers' pneumoconiosis, it was too mild to have had any effect on his lung function or to have shortened his life. Employer's Exhibits 19, 28. Dr. Kleinerman opined that the miner's death was not caused by his mild simple coal workers' pneumoconiosis. Employer's Exhibits 20, 25. Dr. Tuteur opined that the miner's minimal to mild coal workers' pneumoconiosis was not of sufficient severity to cause or hasten the miner's death. Employer's Exhibits 21, 24. Dr. Branscomb opined that although the miner suffered from minimal pneumoconiosis, it did not cause his death. Employer's Exhibits 22, 26.

Kleinerman over that of Dr. Jones regarding the extent of the miner's pneumoconiosis and its effect on the miner's death, the administrative law judge failed to provide a basis for doing so. Consequently, the administrative law judge's analysis does not comport with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, remand the case to the administrative law judge to reconsider whether the evidence is sufficient to establish that the miner's death was due to his "clinical" pneumoconiosis.

The record also contains evidence supportive of a finding that the miner's death was due to statutory or "legal" pneumoconiosis. *See* 20 C.F.R. §718.201. The administrative law judge found that the physicians who reviewed the medical

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[8]When evaluating the pathology-related evidence relevant to the cause of a miner's death, an administrative law judge must first determine the credibility and weight of the reviewing pathologists' contrary opinions before giving complete deference to a doctor's opinion based upon his status as the autopsy prosector. *See generally Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Should an administrative law judge credit the opinion of a physician based upon his status as an autopsy prosector, he must provide an adequate rationale for concluding that the prosector's additional gross examination provided him with an advantage over the reviewing physicians under the particular facts of the case. *Id.*

[9]Section 718.201 provides that:

> For the purpose of the Act, *pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §718.201.

evidence all agreed that the miner's death was due to his chronic obstructive pulmonary disease. Decision and Order at 16. The administrative law judge, however, noted that while Drs. Combs, Cohen and Jones all found that the miner's coal dust exposure was a significant contributing factor to his chronic obstructive pulmonary disease, Drs. Naeye, Kleinerman, Tuteur and Branscomb each attributed the miner's chronic obstructive pulmonary disease exclusively to his cigarette smoking. *Id.*

In his consideration of whether the miner's chronic obstructive pulmonary disease was attributable in part to his coal dust exposure, the administrative law judge stated:

> Contrary to Drs. Cohen and Jones' assertions that it is impossible to distinguish chronic obstructive pulmonary disease caused by coal dust from that caused by cigarette smoking, [Drs. Tuteur, Branscomb, Naeye and Kleinerman] explained that the medical evidence they used to determine cigarette smoke was the cause of [the miner's] respiratory problems. Drs. Tuteur and Branscomb both stated pneumoconiosis usually causes a restrictive defect unless there is advanced progressive fibrosis, which was not present in this case. Drs. Naeye and Kleinerman found the type of emphysema observed on the autopsy slides was indicative of a defect caused by smoking. I find the opinions of these physicians to be documented, well-reasoned and consistent with the medical evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1985); *Peskie v. U.S. Steel Corp.*, 8 BLR 1-126. In addition, these physicians have outstanding qualifications in the treatment of pulmonary disease and I find that their opinions are deserving of significant weight. *See Scott v. Mason Coal Co.*, 14 BLR 1-137 (1990). Thus, I find [the miner's] death was not caused or hastened by coal workers' pneumoconiosis.

Decision and Order at 16-17 (footnote omitted).

We similarly hold that the administrative law judge's analysis does not comport with the APA. *See Wojtowicz*, *supra*. Although the administrative law judge noted that Drs. Tuteur, Branscomb, Naeye and Kleinerman provided explanations for their conclusions, the administrative law judge failed to provide a basis for crediting their opinions over the contrary opinions of Drs. Cohen and Jones. The administrative law judge also failed to the extent that he credited the opinions of Drs. Tuteur, Branscomb, Naeye and Kleinerman based upon their superior qualifications. Drs. Combs, Jones and Cohen appear to have similar qualifications.

[10]Drs. Jones, Naeye and Kleinerman are Board-certified in Anatomic and

The administrative law judge also failed to resolve other conflicts in the evidence. For example, Dr. Jones opined that the miner's extensive coal workers' pneumoconiosis caused cor pulmonale which caused the miner's death. Director's Exhibit 5; Claimant's Exhibit 17. Dr. Combs also diagnosed cor pulmonale. Claimant's Exhibit 9. Dr. Cohen similarly opined that the miner's coal dust exposure caused debilitating chronic lung disease and cor pulmonale which caused the miner to go into respiratory failure and die. Claimant's Exhibit 8. Although Dr. Kleinerman opined that the miner did not suffer from cor pulmonale, another one of employer's physicians, Dr. Branscomb, opined that the miner's chronic obstructive pulmonary disease caused cor pulmonale, respiratory failure, and death. *See* Employer's Exhibit 22.

In light of the above-referenced errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c) and remand the case to the administrative law judge for further consideration.

Clinical Pathology. Director's Exhibit 5; Employer's Exhibit 23.

Drs. Cohen and Tuteur are Board-certified in Internal Medicine and Pulmonary Disease. Claimant's Exhibit 8; Employer's Exhibit 23.

Drs. Combs and Branscomb are Board-certified in Internal Medicine. Claimant's Exhibit 9; Employer's Exhibit 23.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration denying benefits are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge