

BRB No. 05-0196 BLA

ROSIE TUCKER )  
(Widow of JERRY TUCKER) )  
 )  
 Claimant-Respondent )  
 )  
 v. ) DATE ISSUED: 11/07/2005  
 )  
 T &T KENTUCKY COAL COMPANY )  
 )  
 and )  
 )  
 KENTUCKY COAL PRODUCERS SELF- )  
 INSURANCE FUND )  
 )  
 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 Survivor Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Survivor Benefits (01-BLA-0149) of Administrative Law Judge Joseph E. Kane on a 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 case is before the Board for the second time. The Board previously affirmed the administrative law judge's denial of benefits on the miner's claim and affirmed the award of benefits on the survivor's claim. *Tucker v. T&T Kentucky Coal Co.*, BRB Nos. 02-0261 BLA and 02-0261 BLA-A (Oct. 10, 2002)(unpub.). Upon review of employer's motion for reconsideration, the Board modified in part its Decision and Order and remanded the case for further consideration of the medical evidence in the survivor's claim regarding whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Specifically, the Board instructed the administrative law judge to consider and weigh the miner's death certificate, which made no mention of pneumoconiosis as a factor in the miner's death, and to consider the opinions of Drs. Fino and Branscomb that the miner's death was not due to pneumoconiosis. *Tucker v. T&T Kentucky Coal Co.*, BRB Nos. 02-0261 BLA and 02-0261 BLA-A, slip op. at 3 (Aug. 27, 2003)(unpub.). The Board also instructed the administrative law judge to provide the basis for his conclusion that the opinion of Dr. Dennis was entitled to greater weight because of Dr. Dennis's status as the autopsy prosector. *Tucker*, slip op. at 4. Additionally, the Board instructed the administrative law judge to explain specifically how Dr. Dennis's opinion that the miner died of pulmonary disease which included anthracosilicosis supported claimant's burden to establish that the miner died due to pneumoconiosis under 20 C.F.R. §718.205(c). *Id.* The Board further instructed the administrative law judge to provide the basis for his finding that Dr. Perper's opinion, that the miner's death was due to pneumoconiosis, was better reasoned and documented than the contrary opinions of Drs. Naeye, Caffrey, and Hansbarger. *Id.*

On remand, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical evidence when he found that the miner's death was due to pneumoconiosis. Additionally, employer requests a remand to the Office of Administrative Law Judges for this case to be reassigned to a new administrative law judge. In response, claimant argues that the administrative law judge's award of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the

Act 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. §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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors’ claims filed on or after January 1, 1982, 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. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge’s Decision and Order, the issues on appeal, and the evidence of record, we conclude that several of employer’s allegations of error have merit. As employer asserts, the administrative law judge on remand did not consider Dr. Fino’s December 20, 2000 report or Dr. Caffrey’s July 18, 2000 report. Director’s Exhibit 200; Employer’s Exhibit 2. Because the administrative law judge did not consider all relevant evidence, we must vacate his finding pursuant to Section 718.205(c) and remand this case for him to consider these reports. *See* 30 U.S.C. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Further, although the administrative law judge summarized the findings on the miner’s death certificate,<sup>1</sup> employer notes correctly that the administrative law judge did not indicate how much weight, if any, he accorded to the death certificate when he found that the miner’s death was due to pneumoconiosis. *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Tucker*, slip op. at 3.

Employer alleges further that the administrative law judge did not comply with the Board’s instruction to explain the basis for his finding that Dr. Dennis had greater insight into the miner’s condition.<sup>2</sup> On remand, the administrative law judge explained that he

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<sup>1</sup> The death certificate lists the cause of the miner’s death as respiratory arrest due to metastatic lung cancer. Director’s Exhibit 180. The death certificate lists no other causes or contributing conditions.

<sup>2</sup> Based on an examination of portions of the miner’s lungs and heart, Dr. Dennis opined that the miner had, among other conditions, extensive moderate to severe anthracosilicosis. Director’s Exhibit 186. Dr. Dennis stated that the miner “died as a

gave greater weight to Dr. Dennis's opinion because Dr. Dennis relied on his gross examination of the lungs to reach his conclusions. Decision and Order at 13-14. The administrative law judge noted that, by contrast, the other physicians of record who reviewed the lung tissue slides did not have the benefit of viewing the lungs in gross in reaching their opinions.

Review of the portions of Dr. Dennis's report cited by the administrative law judge discloses evidence to support a finding that Dr. Dennis's review of the gross anatomy of the lungs played a role in his determination of the extent of pneumoconiosis that was present. See *Urgolites v. Bethenergy Mines Inc.*, 17 BLR 1-20, 1-23 (1992); Decision and Order on Remand-Awarding Survivor's Benefits at 13-14; Director's Exhibit 186 at 1, 3. However, as employer notes, the administrative law judge did not go on to explain specifically how Dr. Dennis's opinion as to the cause of death, even if due greater weight, satisfied claimant's burden at Section 718.205(c), as we instructed him to do. *Tucker*, slip op. at 4. The administrative law judge summarized Dr. Dennis's opinion and stated briefly that Dr. Dennis opined that "extensive anthracosilicosis along with other diseases, contributed to the miner's death." Decision and Order at 8-9, 12. We again instruct the administrative law judge to explain how he reached his conclusion, based on the specific wording of Dr. Dennis's report. 20 C.F.R. §718.205(c); see *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003)(explaining that pneumoconiosis only hastens death if it does so through a defined process that shortens life by an estimable time).

Employer argues that the administrative law judge erred in finding that Dr. Perper's report was the best reasoned and documented. The administrative law judge found Dr. Perper's opinion that pneumoconiosis hastened the miner's death to be the most thoroughly documented and reasoned opinion of record. However, the administrative law judge reached this conclusion without considering all relevant evidence, that is, the reports of Drs. Fino and Caffrey. 30 U.S.C. §923(b). In particular, Dr. Caffrey's report that was not considered directly addressed Dr. Perper's reasoning and conclusions. Director's Exhibit 200. The administrative law judge on remand should take all relevant evidence into account in assessing Dr. Perper's opinion. See *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer further contends that the administrative law judge engaged in prohibited medical reasoning when he discounted the opinions of Drs. Caffrey, Naeye, and Branscomb that the miner's coal workers' pneumoconiosis was too mild to hasten his

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result of pulmonary disease," which "included anthracosilicosis, moderate to severe." Director's Exhibit 186 at 3.

death, because those doctors relied on lifetime x-rays and pulmonary tests to draw conclusions about the miner's condition later, at the time of his death. Under Section 718.205(c), the issue is whether pneumoconiosis caused or hastened the miner's death. 20 C.F.R. §718.205(c)(1), (2), (5). Additionally, administrative law judges are authorized to assess the validity of the physicians' reasoning. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Thus, we cannot say that the administrative law judge necessarily exceeded his authority by considering the extent to which doctors relied on evidence predating the miner's death to determine whether pneumoconiosis hastened the miner's death. See *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 210, 22 BLR 2-467, 2-480 (3d Cir. 2002)(explaining that lifetime evidence detecting no disability or impairment is not necessarily dispositive of whether pneumoconiosis hastened death). However, as just discussed, the administrative law judge has not yet considered and weighed all relevant evidence or explained his findings and conclusions, as instructed. Thus, we remand this case for the administrative law judge to consider all relevant evidence and to explain fully his resolution of the conflicting medical opinions. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Lafferty v. Cannelton Indus.*, 12 BLR 1-190, 1-192 (1989).

Finally, employer requests that we remand this case for reassignment to a different administrative law judge. Employer argues that the administrative law judge ignored the Board's remand instructions and asserts that this case needs a "fresh perspective" on the evidence. Employer's Brief at 6, 20. However, employer points to no evidence of bias or recalcitrance by the administrative law judge. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Moreover, based on our review of the administrative law judge's Decision and Order on Remand, we do not agree with employer that this case has reached the point where a "fresh look" at the evidence is required. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998). We therefore decline to remand this case for reassignment to a different administrative law judge.

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding Survivor Benefits is vacated and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

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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JUDITH S. BOGGS  
Administrative Appeals Judge