

BRB No. 05-0219 BLA

WILMA J. BLANKENSHIP	)	
(Widow of JERREL D. BLANKENSHIP)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 11/03/2005
	)	
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 Awarding Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Anne L. Musgrove (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits (2003-BLA-6262) of Administrative Law Judge Thomas M. Burke 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). The administrative law judge issued a decision on the record pursuant to the parties' agreement, and adjudicated this survivor's claim, filed on September 10, 2001, under the provisions at 20 C.F.R. Part 718. After accepting employer's stipulations, that the miner had eighteen years of qualifying coal mine employment and that the autopsy evidence established the existence of simple

pneumoconiosis arising out of coal mine employment, the administrative law judge found that the weight of the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge further found that claimant qualified as an eligible surviving divorced spouse of the miner pursuant to 20 C.F.R. §§725.212, 725.216. Accordingly, survivor's benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the weight of the medical opinions of record established that the miner's death was due to pneumoconiosis at Section 718.205(c). Claimant responds, urging affirmance of the award of survivor's benefits, to which employer replies in support of its position. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.<sup>1</sup>

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.<sup>2</sup> 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).

Employer challenges the administrative law judge's finding that the weight of the evidence established that the miner's death was due to pneumoconiosis at Section 718.205(c), arguing that the administrative law judge failed to weigh all relevant evidence and provide valid reasons for crediting the opinion of Dr. Perper over the contrary opinions of Drs. Naeye, Caffrey and Castle. Employer's arguments have merit.

After reviewing records of the miner's hospitalizations between June 1, 2000 and September 17, 2000, and determining that the death certificate listed the cause of the miner's death on November 21, 2000 as multiple organ failure due to metastatic lung carcinoma, the administrative law judge accurately reviewed the autopsy report and the conflicting medical opinions regarding whether pneumoconiosis hastened death.

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<sup>1</sup> The administrative law judge's acceptance of employer's stipulations, and his finding that claimant qualified as an eligible surviving divorced spouse of the miner pursuant to 20 C.F.R. §§725.212, 725.216, are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Decision and Order at 5-8. The administrative law judge determined that, of the pathologists, both Dr. Perper and the autopsy prosector, Dr. Joyce,<sup>3</sup> diagnosed moderate to severe pneumoconiosis, while Drs. Naeye and Caffrey, as well as pulmonary specialist Dr. Castle, agreed that the miner's pneumoconiosis was too mild to have hastened death,<sup>4</sup> based in part on the fact that the pneumoconiosis was not severe enough to be recognized radiographically during the miner's lifetime. Decision and Order at 9, 11. The administrative law judge acknowledged that Drs. Naeye and Caffrey possessed excellent credentials, but discounted their opinions and the opinion of Dr. Castle regarding the severity of the miner's pneumoconiosis, as he found that the objective tests relied upon to show that the miner had no significant pulmonary impairment prior to the onset of lung cancer were obtained approximately nine years prior to death; pneumoconiosis is recognized as a progressive disease; and Dr. Perper persuasively explained that the miner's pneumoconiosis was proven at autopsy to be significantly interstitial, so that corresponding radiological findings could have been easily missed, and that in any event, discrepancies in x-ray readings were the rule rather than the exception. Decision and

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<sup>3</sup> Dr. Joyce, whose credentials are not contained in the record, limited the autopsy to the miner's lungs and thoracic cavity, and did not address the cause of the miner's death. His final diagnoses of the miner's respiratory system included: "A) Coal workers' pneumoconiosis, diffuse, severe – coal macules all lobes and silicotic nodules within left upper lobe, subcarinal and right hilar and peribronchial lymph nodes. B) Squamous cell carcinoma, moderately differentiated - right upper lobe, with multiple metastatic tumor nodules throughout right upper lobe, right middle lobe, right lower lobe, left upper lobe, left lower lobe. C) Pulmonary emphysema, moderate to severe, with areas of interstitial fibrosis and atelectasis. D) Acute bronchopneumonia, extensive in left lower lobe, right lower lobe and right upper lobe, with multiple foci of microabscess formation and tissue destruction. E) Pulmonary edema and congestion, combined lung weight 1900 gm. F) Fibrous pleural adhesions, few. G) Pleural effusion, right, 100 cc – clear/yellow." Director's Exhibit 14. Dr. Joyce additionally found that the thoracic cavity contained "multiple metastatic foci of moderately differentiated squamous cell carcinoma throughout left and right chest wall with areas of bone destruction identified." *Id.*

<sup>4</sup> Dr. Naeye's microscopic findings identified the presence of moderately severe simple pneumoconiosis, but the physician indicated that the slides were not representative of the lungs as a whole, and Dr. Naeye concluded that the miner's mild to moderately severe simple pneumoconiosis was "too mild to be recognized on x-rays and too mild to have caused any disability or to have hastened his death." Director's Exhibit 35; Decision and Order at 6. Dr. Caffrey diagnosed mild to moderate simple pneumoconiosis and a moderate degree of centrilobular emphysema, neither of which caused, contributed to or hastened the miner's death, or debilitated the miner up until the time he developed carcinoma of the lung. Employer's Exhibit 9; Decision and Order at 8.

Order at 9-11. Although Drs. Naeye, Caffrey and Castle opined that the miner's death was due entirely to complications of metastatic lung carcinoma caused by smoking, and Drs. Naeye and Caffrey disputed Dr. Perper's opinion that the miner's centrilobular emphysema and cancer were related to dust exposure in coal mine employment,<sup>5</sup> the administrative law judge stated that he need not reach the etiology of the miner's emphysema and cancer, since "[w]hat is necessary is a determination of the soundness of Dr. Perper's opinion that the pneumoconiosis in and of itself was substantial enough to contribute to or hasten the miner's death." Decision and Order at 10. The administrative law judge then found that Dr. Perper's opinion, that the miner's 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 at 23, was entitled to the greatest weight because Dr. Perper possessed excellent credentials and his opinion was well reasoned, documented and best supported by the record "in that it is more in line with the findings of Dr. Joyce, the autopsy prosector."<sup>6</sup> Decision and Order at 9, 11. The administrative law judge, however, provided no reason for according enhanced weight to the findings of the autopsy prosector; moreover, Dr. Joyce did not address the cause of the miner's death, but merely supported Dr. Perper's opinion regarding the degree of severity of the miner's pneumoconiosis. As a diagnosis of severe pneumoconiosis does not necessarily compel the conclusion that pneumoconiosis hastened the miner's death, and the administrative law judge did not otherwise explain how Dr. Perper's opinion concerning the cause of the miner's death was best supported by the record,<sup>7</sup> we vacate the

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<sup>5</sup> Dr. Perper diagnosed moderate to severe simple pneumoconiosis "with associated severe centrilobular emphysema and partially associated pulmonary cancer, a combined result of exposure to coal mine dust containing silica and smoking," and concluded that "coal workers' pneumoconiosis with associated centrilobular emphysema was a substantial contributory cause of [the miner's] death and hastened his demise, both directly and through hypoxemia and complicating bronchopneumonia, and through the complicating carcinoma of lung." Director's Exhibit 43 at 24.

<sup>6</sup> The administrative law judge elaborated that "Dr. Joyce observed severe and diffuse pneumoconiosis with coal macules in all lobes and silicotic nodules within left upper lobe and bronchial lymph nodes," Decision and Order at 9, and that "Dr. Perper observed moderate to severe pneumoconiosis, with macules, micronodules, interstitial fibro-anthracotic and silicotic patterns. . . .these findings contrast with the dismissal by Dr. Naeye and Dr. Caffrey of pneumoconiosis as a condition affecting the miner's death because the pneumoconiosis was too mild." Decision and Order at 9-10.

<sup>7</sup> Employer asserts that Dr. Perper's opinion regarding the cause of the miner's death is speculative, uncorroborated, and unsupported by the record, which contains no

administrative law judge's findings pursuant to Section 718.205(c), and remand this case for a reevaluation of all relevant evidence. *See generally Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *BethEnergy Mines, Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Further, since Dr. Perper's report contains no explanation or substantiation for a finding that clinical pneumoconiosis, standing alone, hastened death, we agree with employer's argument that, on remand, the administrative law judge must, in this case, weigh the conflicting evidence and render findings of fact as to the etiology of the miner's emphysema and lung cancer, which Dr. Perper found to be caused, in part, by coal dust exposure, in order to determine whether Dr. Perper's opinion is well reasoned and supported by the record. *See generally Sparks*, 213 F.3d 186, 22 BLR 2-251; *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Kirk v. Director, OWCP*, 86 F.3d 1151, 20 BLR 2-277 (4th Cir. 1996).

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evidence of a fatal cardiac arrhythmia or hypoxemia caused by the miner's pneumoconiosis and/or emphysema, whereas the opinions of Drs. Naeye, Caffrey and Castle are fully supported by the miner's death certificate, hospital records and treatment notes of the miner's attending physicians, as well as by the x-rays, objective tests and other medical reports of record. Employer's Brief at 7-12.

Accordingly, the administrative law judge's Decision and Order Awarding Survivor's Benefits is affirmed in part and vacated in part, and this case is remanded for further proceedings 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