

BRB No. 06-0173 BLA

NORMA B. WERNER)
(Widow of TODD WERNER))
)
 Claimant-Respondent)
)
 v.)
)
 NATIONAL MINES CORPORATION) DATE ISSUED: 11/24/2006
)
 and)
)
 INTERNATIONAL BUSINESS &)
 MERCANTILE REASSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 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 Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

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 – Awarding Benefits (04-BLA-6531) of Administrative Law Judge Michael P. Lesniak 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). Claimant filed her application for survivors' benefits on November 1, 2002.¹ Director's Exhibit 1. A formal hearing was held on February 10, 2005, at which time the parties stipulated that the miner had coal workers' pneumoconiosis. The administrative law judge subsequently determined that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge's analysis of the medical opinion evidence relevant to the cause of the miner's death is flawed because the administrative law judge shifted the burden of proof to employer to establish that the miner's death was not hastened by pneumoconiosis. Employer contends that the administrative law judge treated the evidence inconsistently, that he improperly applied a preference for the miner's treating physician, and thereby erred in crediting Dr. Wecht's opinion, that pneumoconiosis hastened the miner's death, over the contrary opinion of employer's expert, Dr. Oesterling. Employer further asserts that the administrative law judge failed to perform a critical analysis of the medical opinion evidence relevant to whether the miner suffered from cor pulmonale. Claimant responds, urging affirmance of the denial of benefits. Employer has also filed a reply brief. The Director, Office of Workers' Compensation Programs, has declined to file a brief 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. 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 survivors' benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *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 pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the irrebutable

¹ Claimant is the widow of the miner, who died on March 7, 2002. Claimant's Exhibit 5. The miner previously filed a claim for benefits on August 26, 1980, which was denied on November 5, 1980. Director's Exhibit 1. The miner also filed a duplicate claim on September 3, 1997, which was also denied by Administrative Law Judge Michael P. Lesniak on July 20, 1999. *Id.* No further action was taken with regard to this claim and the file was administratively closed.

presumption set forth at 20 C.F.R. § 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(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); see *Lango v. Director, OWCP*, 104 F.3d 73, 21 BLR 2-12, (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).²

In the instant case, under Section 718.205(c), the administrative law judge credited the opinion of the autopsy prosector, Dr. Wecht, that the miner's death was hastened by pneumoconiosis, over the contrary opinion of Dr. Oesterling, that the miner's death was unrelated to his coal dust exposure. Decision and Order at 10. On appeal, employer asserts that the administrative law judge's performed only a cursory analysis of the evidence, failing to adequately resolve the underlying conflicts in the medical opinions as to the degree of the miner's pneumoconiosis, the presence of cor pulmonale and ultimately whether pneumoconiosis hastened the miner's death.

Employer's assertions of error have merit. Although the administrative law judge stated that he found Dr. Wecht's opinion to be consistent with the objective evidence of record, the administrative law judge erred by failing to specifically address *how* the "the autopsy findings, the objective diagnostic findings, medical history, history of coal mine dust exposure, the results of physical examinations, and the records of the miner's last hospitalization, that indicate that the miner was on supplemental oxygen and that he had severe hypoxemia..., and the death certificate" lended greater support to Dr. Wecht's opinion as compared to Dr. Oesterling's opinion. Decision and Order at 10; see generally *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Brewster v. Director, OWCP*, 7 BLR 1-120, 1-123 (1984).

We also agree that the administrative law judge erred by failing to resolve whether the miner had cor pulmonale, a finding central to his consideration of the conflicting medical opinions. We note that Dr Wecht opined that the miner suffered from an extensive and advanced stage of coal workers' pneumoconiosis. He diagnosed that the miner would not have died when he did but for his severe respiratory disease, which resulted in cor pulmonale. Dr. Wecht defined cor pulmonale as a disproportionate enlargement or thickness of the right ventricle of the heart as compared to the left ventricle, and he also opined that the miner's autopsy revealed an enlarged right ventricle consistent with a diagnosis of cor pulmonale. Employer's Exhibit 4 at 16. However, the record reflects that Dr. Wecht's diagnosis of cor pulmonale may be contradicted by the heart measurements recorded at the time of the autopsy, indicating that the miner's left

² This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's last coal mine employment occurred in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

ventricle was actually larger than his right ventricle. Claimant's Exhibit 1. Dr. Oesterling references these measurements, and opines that they show that the miner did not suffer from cor pulmonale, but rather biventricular hypertrophy due to heart disease. Because the administrative law judge has failed to address the crucial difference in the opinions of Drs. Wecht and Oesterling, regarding the diagnosis of cor pulmonale, which influenced their conclusion as to whether pneumoconiosis hastened the miner's death, the administrative law judge's analysis at Section 718.205(c) is in error.³

The administrative law judge further erred in finding that Dr. Wecht's opinion was supported by the miner's history of severe hypoxemia without first addressing whether that condition was due to coal dust exposure. Decision and Order at 10. Dr. Wecht opined that the miner's severe hypoxemia reduced the amount of oxygen available to the heart, thereby causing an overload on the heart, which ultimately caused the miner's death. While the miner's medical records may document his treatment for severe hypoxemia as suggested by the administrative law judge, such findings may be equally consistent with Dr. Oesterling's opinion dependent on whether the miner's symptoms were due to smoking or coal dust exposure. *See* Employer's Brief at 17.

Additionally, employer correctly asserts that the administrative law judge has erred in his treatment of Dr. Oesterling's opinion. The administrative law judge found that:

Dr. Oesterling stated in his report that the level of pneumoconiosis 'in and of itself' was insufficient to have produced more than minor respiratory symptomatology and would not have produced pulmonary disability or hastened the miner's death. I find Dr. Oesterling's explanation unconvincing. Just because, in his opinion, the level of pneumoconiosis was not, in and of itself, disabling does not mean that the pneumoconiosis could not have had a negative impact in a patient with heart disease and other lung maladies [as suggested by Dr. Wecht]. In fact, Dr. Oesterling acknowledged on cross-examination at his deposition that the miner had a 'significant lung condition' that contributed somewhat to the miner's death [Employer's Exhibit 4 at 29]. *I find that Dr. Oesterling does not adequately explain how pneumoconiosis (of sufficient levels to produce at least some symptomatology as acknowledged by Dr. Oesterling) could not have in any way hastened the death of a patient with severe hypoxemia,*

³ Employer notes that Dr. Wecht's opinion "was based in large part on the cor pulmonale diagnosis and therefore, if the administrative law judge should determine that the miner did not suffer cor pulmonale, "Dr. Wecht's opinion would be severely undermined by its own terms." Employer's Brief at 17.

heart disease, and significant lung disease due to other sources. For these reasons, I accord the opinion of Dr. Oesterling less weight.

Decision and Order at 10 (emphasis added).

To the extent that the administrative law judge required Dr. Oesterling to disprove that the miner's death was not hastened by pneumoconiosis, the administrative law judge has improperly shifted the burden of proof to employer in this case. *See Lango*, 104 F.3d at 73, 21 BLR at 2-12. The administrative law judge also improperly rejected Dr. Oesterling's opinion, that the miner's death was not hastened by pneumoconiosis, simply because Dr. Oesterling acknowledged that the miner suffered from a "significant lung condition" which may have contributed to his death. The administrative law judge's analysis ignores that Dr. Oesterling specifically opined that the miner's significant lung condition was due to panlobular emphysema caused by smoking, chronic aspiration pneumonia and fibrosis caused by hemosiderin in the lungs and prior strokes. Thus, contrary to the administrative law judge's suggestion, since Dr. Oesterling does not attribute the miner's "significant lung condition" to coal dust exposure, his "acknowledgement" that the miner's death may have been due in part to a respiratory disease does not undermine the probative value of his opinion that the miner's death was not hastened by the miner's coal mine employment.⁴

Consequently, because the administrative law judge has failed to properly explain his credibility determinations, and to properly resolve the conflicts in the medical opinion evidence relevant to whether the miner's death was hastened by pneumoconiosis, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.205(c).⁵ On

⁴ Employer also asserts that the administrative law judge improperly credited Dr. Wecht's credentials, while ignoring the fact that Dr. Oesterling was equally qualified as a Board-certified pathologist. Employer's Brief at 14. Although the administrative law judge referenced Dr. Oesterling's "highly qualified" opinion, it is unclear whether the administrative law judge is referring to Dr. Oesterling's qualifications or whether the administrative law judge is suggesting that Dr. Oesterling's opinion is equivocal. Decision and Order at 10. On remand, the administrative law judge should clarify, if necessary, his findings in this regard.

⁵ Employer asserts that the administrative law judge erred in assigning some probative weight to the death certificate solely because it was signed by the miner's treating physician, and the administrative law judge found that Dr. Labuda's treatment notes documented his familiarity with the miner. Employer's Brief at 12-13. We decline to address the administrative law judge's findings regarding Dr. Labuda since we have vacated his findings pursuant to Section 718.205(c). However, we note for the purposes of remand, that while the death certificate lists chronic obstructive pulmonary disease

remand, the administrative law judge is directed to reweigh the conflicting evidence at Section 718.205(c) and explain the basis and reasons for all of his findings of fact in considering whether claimant is entitled to survivor's benefits. See Administrative Procedure Act, (APA) 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 U.S.C. §932(a); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is vacated, 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

(COPD) as a significant cause of death, Dr. Labuda did not identify the etiology of this condition. The administrative law judge therefore should reconsider on remand whether the death certificate is of any probative value to a determination of whether the miner's death was hastened by coal workers' pneumoconiosis.