BRB No. 08-0261 BLA

E.B.K., Executor for the Estate of S.S.K., on Behalf of S.S.K., Deceased Survivor of E.L.K., and on Behalf of E.L.K., Deceased Miner	)	
Claimant-Petitioner	)	
v.	)	
PEERLESS EAGLE COAL COMPANY	)	
	)	DATE ISSUED: 11/25/2008
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 on Remand - Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand - Denying Benefits (04-BLA-6265) of Administrative Law Judge Richard A. Morgan on a miner's subsequent

[1] Both the miner, E.L.K., and his widow, S.S.K., are now deceased. Claimant is E.B.K., executor of the estate of the miner's widow.

claim and 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).[2] This case has a lengthy procedural history, and was last before the Board for review of the administrative law judge's Decision and Order denying benefits issued on August 23, 2005.[3] At that time, the administrative law judge credited the miner with at least twenty-nine years of coal mine employment,[4] as stipulated by the parties, and found that the medical evidence submitted since the prior denial of benefits in the miner's claim established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Consequently, the administrative law judge determined that claimant established a change in at least one applicable condition of entitlement. 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-3 (2004); *see also Lisa*

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[2] The miner's present claim, his third, was filed on February 8, 2001 and is considered a subsequent claim because it was filed after January 19, 2001 and more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Miner's Director's Exhibit 3. The record reflects that the miner's initial claim, filed on February 21, 1973, was finally denied on August 8, 1980 because the miner was still working in coal mine employment. Miner's Director's Exhibit 1. His second claim was filed on August 25, 1989, and was finally denied because no elements of entitlement were established. Miner's Director's Exhibit 2. The miner died on February 1, 2002, while his third claim was pending. Miner's Director's Exhibit 32; Widow's Director's Exhibit 11. The district director issued a proposed denial of the claim on February 11, 2002. Miner's Director's Exhibit 30. The miner's widow "protested" the denial on March 7, 2002, requested "reconsideration" of the denial on March 20, 2002, and filed her own claim for survivor's benefits on March 26, 2002. Miner's Director's Exhibits 32, 36; Widow's Director's Exhibit 2. The district director denied the survivor's claim on October 15, 2003, and denied the miner's claim on January 27, 2004. Miner's Director's Exhibit 36; Widow's Director's Exhibit 29. By letter dated February 5, 2004, the widow requested a hearing on the miner's claim, and the miner's claim was forwarded to the Office of Administrative Law Judges, where it was consolidated with the survivor's claim for purposes of the hearing. Miner's Director's Exhibit 38; Widow's Director's Exhibits 39, 41. The widow died on December 11, 2004. The miner's and survivor's claims are being pursued by claimant, E.B.K., executor of the estate of the miner's widow, S.S.K.

[3] *Keener v. Peerless Eagle Coal Corp*., 23 BLR 1-229 (2007)(*en banc*).

[4] Because the miner's last coal mine employment occurred in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Miner's Director's Exhibit 4.

Lee Mines v. Director, OWCP [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*). Considering the merits of both claims, the administrative law judge found that the evidence of record established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), respectively, and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), but failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or that simple pneumoconiosis caused the miner's disability and death pursuant to 20 C.F.R. §§718.204(c), 718.205(c). Consequently, the administrative law judge denied benefits on both claims.

On appeal, the Board affirmed in part and vacated in part, and remanded the case to the administrative law judge for further consideration. In relevant part, the Board vacated the administrative law judge's findings pursuant to Sections 718.304, 718.204(c) and 718.205(c), and remanded the case for reevaluation of all of the medical opinion evidence thereunder on the issues of complicated pneumoconiosis, disability causation and death causation.[5] *Keener v. Peerless Eagle Coal Corp.*, 23 BLR 1-229 (2007)(*en banc*).

On remand, the administrative law judge found that the evidence was insufficient to establish complicated pneumoconiosis pursuant to Section 718.304. The administrative law judge further found that the miner's disability and death were unrelated to the miner's simple pneumoconiosis pursuant to Sections 718.204(c), 718.205(c). Accordingly, benefits were denied on both claims.

In the present appeal, claimant challenges the administrative law judge's evaluation of the medical evidence, and asserts that he applied an improper standard on the issue of complicated pneumoconiosis. Employer responds, urging affirmance of the

[5] Additionally, the Board rendered holdings pertinent to the evidentiary posture of the instant appeal. First, the Board held that the report of a pathologist who has reviewed the autopsy tissue slides is in substantial compliance with the quality standards at 20 C.F.R. §718.106(a), and therefore can constitute a report of an autopsy for purposes of 20 C.F.R. §725.414(a)(2)(i) and (a)(3)(i); accordingly, Dr. Oesterling's slide review was properly admitted as employer's affirmative report of an autopsy. Next, the Board determined that Dr. Bush's opinion as employer's autopsy rebuttal physician, constitutes both an autopsy report and a medical report for purposes of the evidentiary limitations; the administrative law judge was therefore directed to review Dr. Bush's rebuttal opinion, addressing those portions of his opinion that exceed the scope of the autopsy report submitted by claimant. The administrative law judge's application of the Board's directives on remand are not challenged on appeal.

administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Claimant argues that the administrative law judge should have invoked the irrebuttable presumption of total disability and death due to complicated pneumoconiosis pursuant to Section 718.304(b), based on the pathology evidence of Drs. Green and Plata. While conceding that the record contains no equivalency finding, claimant asserts that "we are given no reason to believe that lesions 1.6 to 2.0 cm in diameter would not produce x-ray opacities of that size or greater than 1 cm" as required under Section 718.304(b). Claimant's Brief at 7. Further, claimant objects to the administrative law judge's application of the standard for evaluating evidence of complicated pneumoconiosis set forth in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Finally, claimant challenges the administrative law judge's reliance upon the miner's treatment records, and his analysis of the professional credentials of the physicians of record.

Based on our review, we reject, as meritless, claimant's challenge to the administrative law judge's determination that the evidence failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. As the x-ray and CT scan evidence of record was negative for both simple and complicated pneumoconiosis, the administrative law judge found that the "crux of this case rests on the relative weight to be accorded the medical opinions" of Drs. Plata, Green, Rasmussen, Bush, Oesterling, Zaldivar, and Castle. Decision and Order on Remand at 9. The administrative law judge determined that although Dr. Plata diagnosed complicated pneumoconiosis, he failed to address the question of the miner's total disability or the cause thereof.[6] Additionally, the administrative law judge noted that Dr. Plata failed to specify the role of pneumoconiosis, if any, in the miner's death, and provided an "equivocal finding" that bilateral acute bronchopneumonia was the "possible" cause of death.[7] *Id.* The administrative law judge found that Dr. Green, by comparison,

[6] Miner's Director's Exhibit 34; Widow's Director's Exhibit 12.

[7] While Dr. Plata was not required to address the role of pneumoconiosis in the miner's disability and death in order for his opinion to support a finding of invocation of the irrebuttable presumption at 20 C.F.R. §718.304, any error is harmless based on the

diagnosed progressive massive fibrosis, thereby meeting the regulatory definition of complicated pneumoconiosis, and "clearly related the miner's disability and death to clinical and legal pneumoconiosis."[8] *Id.* The administrative law judge based his resolution of the evidentiary conflict on a consideration of the professional qualifications of the physicians of record, and the quality of the documentation and reasoning underlying their opinions. Accordingly, the administrative law judge chose to credit the medical opinions of Drs. Oesterling, Zaldivar and Castle, who found only simple pneumoconiosis and opined that it did not cause or contribute to the miner's total disability, or cause, contribute to, or hasten his death.[9]

At the outset, we observe that claimant's arguments, based on the recitation of the specific findings of Drs. Green and Plata, are largely inapposite, since the administrative law judge did not conclude that the opinions of Drs. Green and Plata were insufficient, even if credited, to establish complicated pneumoconiosis.[10] In this context, we first note that claimant does not challenge the administrative law judge's identification of the respective professional credentials of the physicians of record. Instead, claimant argues that Dr. Green's medical credentials should have been found superior to those of the other pathologists of record, and that his medical opinion should have been

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administrative law judge's permissible weighing of the conflicting medical evidence of record, as set forth *infra*. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] Claimant's Exhibits 1, 7.

[9] Decision and Order at 9; Employer's Exhibit 1; Miner's Director's Exhibit 28, Employer's Exhibits 4, 7, 34; Employer's Exhibits 2, 6.

[10] Although claimant concedes that the record contains no equivalency finding respecting the x-ray evidence, he argues that Dr. Oesterling's pathological findings "were almost the same as Dr. Green's," and that Dr. Osterling's evidence therefore supports invocation of the irrrebuttable presumption of total disability and death due to pneumoconiosis pursuant to Section 718.304. Claimant's Brief at 6. However, in view of Dr. Osterling's conclusion that the identified abnormalities were not consistent with progressive massive fibrosis, his opinion would not constitute a finding of complicated pneumoconiosis. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B. Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). Claimant's assertion that the administrative law judge "misinterpreted the x-ray equivalency requirement" of *Scarbro*, Claimant's Brief at 10, is therefore inapposite, because the administrative law judge's analysis did not involve application of the equivalency standard, but turned on his credibility determinations based on the physicians' medical opinions.

determinative. Moreover, claimant submits: "although not clearly stated, it appears that the ALJ gave added weight to the opinion of Dr. Oesterling for being board-certified in clinical pathology and nuclear medicine without any evidence that either of those fields of medicine has any relevance at all to the interpretation of pathology slides." Claimant's Brief at 8. In this connection, the administrative law judge found that although Drs. Plata, Green and Oesterling are all Board-certified in Anatomic Pathology, Dr. Oesterling was also Board-certified in Clinical Pathology and Nuclear Medicine. Decision and Order at 9. Further, while the administrative law judge characterized Dr. Green as "well-credentialed," with a "very impressive" curriculum vitae, Dr. Plata's curriculum vitae was found less impressive and lacking the additional Board-certifications. Decision and Order at 9-10.

In choosing to accord greater weight to the opinions of Drs. Oesterling, Zaldivar and Castle, the administrative law judge initially considered the respective professional qualifications of the physicians, an exercise within his discretion to evaluate conflicting evidence. Decision and Order at 9; *see Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Notably, claimant provides no evidence for his assertion that the Dr. Oesterling's additional Board-certifications are irrelevant to a comparison of the physicians' professional qualifications; such a conclusion must be based on the evidence of record, *White v. New White Coal Co*., 23 BLR 1-1, 1-7 n.8 (2004), and an administrative law judge may not make determinations requiring medical knowledge. *Milburn Colliery Coal Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2- 335 (4th Cir. 1998).[11] Here, the administrative law judge accurately noted the physicians' respective medical credentials, including those of Dr. Green, as part of his overall consideration of the medical opinion evidence; such consideration was proper in determining the weight and credibility to be accorded to the medical experts. *See Mabe v. Bishop Coal Co*., 9 BLR 1067 (1986). Based on the forgoing, therefore, we reject claimant's assertion that the administrative law judge was required to accord determinative weight to Dr. Green's opinion based on his professional qualifications.

It is clear, moreover, that the administrative law judge considered the quality of the documentation and reasoning underlying the medical opinions of record to be "more important than the relative qualifications of the respective physicians." Decision and Order at 10. Specifically, the administrative law judge found that the opinions of Drs. Oesterling, Zaldivar and Castle "are better reasoned and documented than those of Drs.

[11] *See generally Helton v. P&R Coal Co., Inc.*, BRB No. 05-0374 BLA (Jan. 5, 2006)(unpub.)(Board-certification in Anatomical, Surgical and Forensic Pathology demonstrates greater pathological expertise than Board-certification in Anatomical and Clinical Pathology, or Board-certification in Anatomical Pathology only).

Plata, Green, and Rasmussen, because the former are more consistent with the miner's medical history, including his treatment immediately prior to death." *Id.* Noting that "the preponderance of the medical evidence prior to death did not establish even simple pneumoconiosis," the administrative law judge observed:

> [T]he [results of the] miner's clinical tests fluctuated, which is inconsistent with the progressive and irreversible nature of pneumoconiosis. Furthermore, the records did not establish the presence of a permanent and total pulmonary disability until shortly before the miner's death. Although the miner had respiratory failure at the time of his death, the hospital records do not establish it was related to pneumoconiosis…such records establish that the miner had lung cancer for which he received radiation treatment and chemotherapy, as well as recurrent pneumonia, sepsis, and cancer-related cachexia.

Decision and Order on Remand at 10. Accordingly, the administrative law judge validly explained the bases for his conclusion that the better reasoned and documented autopsy and non-pathology medical opinion evidence failed to establish complicated pneumoconiosis. *See generally Lucostic v. U.S. Steel Corp*., 8 BLR 1-46 (1985).

We next address claimant's assertion that the administrative law judge's use of the treatment records as a basis for not finding complicated pneumoconiosis is irrational. Specifically, claimant asserts that the administrative law judge's "only reason" for finding the opinions of Drs. Oesterling, Zaldivar and Castle better documented and reasoned is that they are "more consistent with the miner's medical history, including his treatment immediately prior to death." Claimant's Brief at 9. In support, claimant argues that "the treatment records, which fail to establish pneumoconiosis, were proven wrong by the subsequent, more credible pathology evidence." Claimant's Brief at 9. In view of our affirmance of the administrative law judge's evaluation and weighing of the pathology evidence, we reject claimant's assertion in this context as well. The administrative law judge permissibly exercised his discretion in finding that the medical opinions of Drs. Oesterling, Zaldivar and Castle were better reasoned and documented, and in crediting their opinions that the miner did not have complicated pneumoconiosis.[12]

[12] Dr. Oesterling opined that the miner did not have complicated pneumoconiosis, or progressive massive fibrosis, that his "moderate micronodular coalworkers' pneumoconiosis with a single area of confluent lesion" was "insufficient to have significantly altered pulmonary function," and was not a factor in any lifetime disability, nor could it have hastened, contributed to, or caused, the miner's death. Employer's Exhibit 1.

See Underwood, 105 F.3d at 951, 21 BLR at 2-32; *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 1189, 7 BLR 2-202, 2-207 (4th Cir. 1985). Further, contrary to claimant's assertion, the administrative law judge did not rely solely on his characterization of the reasoning and documentation underlying the credited medical opinions, but to a lesser degree, upon the physicians' professional qualifications. It is within the administrative law judge's discretion to determine whether claimant has established the existence of complicated pneumoconiosis as long as his determination is rational and based on substantial evidence. *See Scarbro*, 220 F.3d 250, 22 BLR 2-93. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the weight of the evidence failed to establish the existence of complicated pneumoconiosis. *See Sterling Smokeless Coal Co. v. Akers*, 131, F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

Finally, claimant challenges the administrative law judge's determination that the miner's simple pneumoconiosis did not contribute to his disability or death pursuant to Sections 718.204(c) and 718.205(c)(1)-(5). In support, claimant first submits that it is "irrational" for the administrative law judge "to exclude the contribution of pneumoconiosis based on the records of treating physicians who did not know he had the disease." Claimant's Brief at 11. We disagree. The administrative law judge observed in this connection that the medical records prior to the miner's death "rarely mentioned pneumoconiosis or any other occupational disease," nor was pneumoconiosis listed on the final discharge summary. Decision and Order at 9. We therefore reject claimant's assertion, as "uncertainty is not proof, and claimant must prove entitlement." *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 768, 21 BLR 2-587, 2-610 (4th Cir. 1999). Next, claimant contends that the opinions of Drs. Green and Rasmussen were based on a

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Dr. Zaldivar opined that the miner did not have complicated pneumoconiosis, but did have simple pneumoconiosis. He stated that the miner's respiratory disability was not due to his pneumoconiosis, but was a result of cancer of the lungs, radiation therapy and smoker's bullous emphysema, and that coal dust exposure did not play any role in the miner's disability or death. Employer's Exhibit 4.

Dr. Castle opined that the pathologic evidence and all the clinical evidence indicates that complicated pneumoconiosis was not present. He stated the miner was "totally and permanently disabled as a result of tobacco smoke induced bullous emphysema and lung cancer…[he] did not suffer permanent and total disability as a result of coal workers' pneumoconiosis…he was totally disabled as a whole man because of lung cancer, his age, and dementia…[conditions which are] unrelated to coal mine dust and coal workers' pneumoconiosis….[He] died as a result of bilateral pneumonia as a complication of lung cancer and the treatment thereof…further complicated by diffuse candidiasis and sepsis…his death was not caused by, contributed to, or hastened by coal workers' pneumoconiosis. Employer's Exhibit 2.

more accurate and comprehensive understanding of the miner's pulmonary condition. *Id.*[13] The administrative law judge's consideration of the miner's medical history, treatment records, clinical testing results, and the documentation of his "multiple health problems" was rational and permissible in support of the administrative law judge's determination that the miner's total respiratory disability and death were "due to conditions unrelated to pneumoconiosis or coal mine dust exposure." Decision and Order at 10. It is within the administrative law judge's discretion, as trier of fact, to assess the relevant evidence of record and draw conclusions and inferences therefrom. *See Mays*, 176 F.3d at 764, 21 BLR at 2-606; *Maddaleni v. Pittsburg & Midway Coal Mining Co*, 14 BLR 1-135 (1991); *Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989). Accordingly, claimant's assertions essentially constitute a request to reweigh the evidence, and overturn the administrative law judge's credibility findings, which is beyond the scope of our review. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). As the claimant makes no other specific challenges to the administrative law judge's findings with respect to the evidence of record, *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987), and because the administrative law judge validly discounted the only evidence supportive of claimant's burden at Sections 718.205 and 718.204(c), *see Robinson v. Pickands Mather & Co*., 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 187, 193, 22 BLR 2-253, 2-263 (4th Cir. 2000), we affirm his determination that claimant has failed to establish that the miner's total respiratory disability was due to pneumoconiosis, or that pneumoconiosis caused, contributed to, or hastened, the miner's death. Consequently, we affirm the administrative law judge's denial of benefits in the miner's claim and the survivor's claim. *See Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Robinson*, 914 F.2d 35, 14 BLR 2-68.

[13] Claimant's Exhibits 1, 7; Miner's Director's Exhibit 15; Claimant's Exhibit 2.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying 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