BRB Nos. 13-0092 BLA
and 13-0111 BLA

SANDRA J. GODDARD (o/b/o and Widow of BENJAMIN F. GODDARD)	)	
Claimant-Respondent	)	
v.	)	
ANTELOPE COAL COMPANY	)	DATE ISSUED: 11/27/2013
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 on Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2004-BLA-6682 and 2004-BLA-6683) of Administrative Law Judge Daniel A. Sarno, Jr., awarding benefits in a miner's claim and a survivor's claim[1] filed pursuant to the provisions of the Black Lung

[1] Claimant is the widow of the miner. The miner filed a claim for black lung benefits on April 8, 2002. Director's Exhibit 2. While his claim was pending, the miner died on October 12, 2003. Director's Exhibit 41. Subsequently, claimant filed a

Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[2] This case is before the Board for the fourth time.[3] Most recently, in consideration of claimant's appeal, the Board vacated a denial of benefits, issued with regard to both claims, by Administrative Law Judge Richard K. Malamphy because he failed to follow the Board's remand instructions, as set forth in two prior decisions. *Goddard v. Antelope Coal Co.*, BRB Nos. 11-0366 BLA and 11-0439 BLA, slip op. at 6 (Feb. 29, 2012) (unpub.). The Board remanded the case for further consideration of the issues of the existence of legal pneumoconiosis,[4] disability causation, and death causation.[5] *Id*. at 7-8. On remand, the case was reassigned to Administrative Law Judge Daniel A. Sarno, Jr. (the administrative law judge), who awarded benefits in both claims.

On appeal, employer asserts that the administrative law judge was required to reconsider whether the miner had clinical pneumoconiosis, and that he erred in determining that the miner had legal pneumoconiosis. Employer also contends that the administrative law judge erred in failing to render a specific finding as to whether the

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survivor's claim for benefits on November 12, 2003. Director's Exhibit 40. The claims were consolidated by the district director for a hearing and a decision.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as both the miner's claim and the survivor's claim were filed prior to January 1, 2005. *See* Pub. L. No. 111-148, §1556(c); Director's Exhibits 2, 40.

[3] The relevant procedural history of this case is set forth in *Goddard v. Antelope Coal Co.*, BRB Nos. 11-0366 BLA and 11-0439 BLA (Feb. 29, 2012) (unpub.).

[4] Clinical pneumoconiosis " consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[5] The Board affirmed the findings that the miner worked at least ten years in coal mine employment, and that the evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and total disability at 20 C.F.R. §718.204(b)(2). *See Goddard*, BRB Nos. 11-0366 BLA and 11-0439 BLA, slip op. at 2 n.3, 4 n.5.

miner's pneumoconiosis was a substantially contributing cause of his respiratory disability. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not submitted 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.[6] 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).

I. The Miner's Claim

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in the miner's claim, claimant must establish that the miner had pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he was totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203,718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer asserts on appeal that the administrative law judge erred by not making a *de novo* determination on remand as to whether the evidence was sufficient to establish the existence of clinical pneumoconiosis. Employer maintains that because the Board instructed the administrative law judge to take a "fresh look at the evidence," he was required to review all of the evidence *de novo* on each of the relevant issues of entitlement. *Goddard*, BRB Nos. 11-0366 BLA and 11-0439 BLA, slip op. at 4. Contrary to employer's argument, however, the Board previously affirmed Judge Malamphy's determination that the miner had clinical pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.202(a)(1). *See S.G.* [*Goodard*] *v. Antelope Coal Co.*, BRB No. 07-0750 BLA, slip op. at 3 (May 29, 2008) (unpub.). The administrative law judge had discretion on remand to rely on Judge Malamphy's findings at 20 C.F.R. §718.202(a)(1), and was under no obligation to reexamine the x-ray evidence. *See generally United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950) (the doctrine of the "law of the case" is a discretionary rule of practice based on the policy that, once an issue is litigated and decided, the matter should not be re-litigated); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991). Because the administrative law judge followed the Board's specific instruction to reweigh the evidence as to the existence of legal pneumoconiosis, as discussed *infra*, we

[6] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit, as claimant was last employed in the coal mining industry in Wyoming, *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

reject employer's assertion of error. *Goddard*, BRB Nos. 11-0366 BLA and 11-0439 BLA, slip op. at 4.

Pursuant to 20 C.F.R. § 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Bennett, Smith, Perper, Oesterling, Repsher, and Rosenberg, regarding the etiology of the miner's pulmonary fibrosis.[7] Decision and Order on Remand at 3-9. The administrative law judge noted that Drs. Bennett, Smith, and Perper opined that the miner's coal dust exposure was a causative factor for his disabling respiratory condition, while Drs. Oesterling, Repsher, and Rosenberg opined that the miner's pulmonary fibrosis was idiopathic in nature and that coal dust played no part in his respiratory disability or death. *Id*. at 7-8. The administrative law judge considered the opinions of Drs. Smith, Oesterling, and Perper to be "entitled to more weight" but ultimately assigned controlling weight to Dr. Perper's conclusions, as better supported by the record as a whole. The administrative law judge concluded that "[c]laimant has established legal pneumoconiosis . . . through the medical opinions of Drs. Smith and Perper finding that [the miner's] pulmonary fibrosis was caused or worsened by his coal dust exposure." *Id*. at 9.

Employer maintains that the opinions of Drs. Smith and Bennett are too equivocal to satisfy claimant's burden of proof.[8] Employer further contends that the administrative law judge did not adequately explain why he accorded greater weight to Dr. Perper's

[7] Employer contends that the administrative law judge failed to address relevant evidence, including the opinions of Drs. Portney and Cool, and the biopsy report of Dr. Stinson, contained in Director's Exhibit 17. Contrary to employer's assertion, we see no error in the administrative law judge's description of Drs. Portney and Cool as "treating physicians who did not offer formal opinions on the issue of the existence of legal pneumoconiosis," and we affirm his finding that their treatment records are "of somewhat limited value" in resolving the etiology of the miner's interstitial fibrosis. Decision and Order on Remand at 8. Moreover, although the administrative law judge did not summarize the findings of Dr. Stinson, with regard to the June 13, 2001 biopsy, this error is harmless, as Dr. Stinson identified pulmonary fibrosis but did not discuss the etiology of the condition. *See Larioni v. Director, OWCP*, 6 BLR 6 BLR 1-1276 (1984); Decision and Order on Remand at 7.

[8] Dr. Smith stated that the miner had "a form of pulmonary fibrosis, the exact origin of which cannot be stated with absolute certainty. He had coal dust exposure and it is possible that the fibrosis in this patient was induced or aggravated by his mine exposures." Director's Exhibit 24. Dr. Bennett diagnosed the miner with idiopathic pulmonary fibrosis and testified that it was "possible" that the disease was caused by coal dust exposure. Employer's Exhibit 3.

opinion, that the miner's disabling respiratory condition was related to coal dust exposure, over the contrary opinions of Drs. Oesterling, Repsher, and Rosenberg, as required by the Administrative Procedure Act (the APA).[9] Employer's arguments are rejected as without merit.

Contrary to employer's contention, the administrative law judge explained, in accordance with the APA, why he gave less weight to employer's experts. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge permissibly assigned little weight to Dr. Repsher's opinion,[10] finding that he did not persuasively explain why coal dust exposure did not aggravate the miner's interstitial pulmonary fibrosis, even if it were not the direct cause of the disease, "beyond a statement that no literature suggests exposure could cause significant aggravation." Decision and Order on Remand at 5; *see Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 17 BLR 2-48 (10th Cir. 1993). The administrative law judge also permissibly rejected Dr. Repsher's opinion, that the miner's emphysema was caused solely by smoking, given the "approximately forty years between [the miner's] last tobacco use and his death."[11] Decision and Order on Remand at 9; *see Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-49. Additionally, the administrative law judge observed correctly that Dr. Repsher's assertion that the miner's centrilobular emphysema on biopsy was due solely to smoking because "no medical evidence links coal mine dust exposure to centrilobular emphysema," contradicts the position of the Department of Labor that centrilobular emphysema may be caused by coal dust exposure. Decision and Order on Remand at 9 citing 65 Fed. Reg. 79,941-44 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 898, 22 BLR 2-409, 426-427 (7th

[9] The Administrative Procedure Act, requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[10] Dr. Repsher opined that the miner had pulmonary fibrosis of unknown origin and centrilobular emphysema caused entirely by the miner's smoking history. Employer's Exhibit 10.

[11] We reject employer's assertion that Dr. Repsher's opinion regarding the etiology of the miner's centrilobular emphysema was not relevant. The administrative law judge acted within his discretion in considering all aspects of Dr. Repsher's opinion in determining whether Dr. Repsher provided a credible explanation as to why claimant does not have any form of legal pneumoconiosis. *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996).

Cir. 2002). Based on the foregoing, we affirm the administrative law judge's determination to give Dr. Repsher's opinion less weight.

Furthermore, the administrative law judge noted correctly that, while Dr. Rosenberg ruled out coal dust exposure as a causative factor for the miner's interstitial pulmonary fibrosis, based on the location of the fibrosis in the lower lung fields and the absence of rounded opacities in the upper and middle lung zones, "the regulations permit a finding of pneumoconiosis even when opacities are irregular in shape and are in the lower rather than upper zones." Decision and Order on Remand at 9; *see* 20 C.F.R. §718.102(b); Employer's Exhibit 10 at 24-25. The administrative law judge also had discretion to find that "Dr. Rosenberg's lack of training in pathology renders his opinion as to the biopsy slides less significant in relation to Drs. Oesterling and Perper," who are pathologists. Decision and Order on Remand at 9; *see Pickup,* 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-49. Thus, we affirm the administrative law judge's decision to accord Dr. Rosenberg's opinion less weight.

In contrast, the administrative law judge permissibly determined that Dr. Perper provided a well-reasoned opinion that was sufficient to satisfy claimant's burden of proof. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). The administrative law judge observed correctly that Dr. Perper opined, "within a reasonable degree of medical certainty," that the miner "suffered from severe coal workers' pneumoconiosis of the interstitial fibrosis type as a result of his long term exposure to mixed coal dust containing silica."[12] Decision and Order at 6; *see* Claimant's Exhibits 3, 32. The administrative law judge found that Dr. Perper provided a "detailed discussion of the medical literature linking industrial dust exposure to the development of pulmonary fibrosis" and explained that the "American Thoracic Society requires the exclusion of other know causes of fibrosis before diagnosing a pulmonary fibrosis as idiopathic." Decision and Order on Remand at 6; *see* Claimant's Exhibit 3, 30. The administrative law judge considered that Dr. Perper was "in a better position to opine as to the [c]laimant's lung dysfunction, given his access to the record as a whole in contrast to Dr. Oesterling," who discussed only the biopsy evidence in reaching his conclusion that the miner did not suffer from legal pneumoconiosis. Decision and Order on Remand at 8-9. The administrative law judge specifically noted that Dr. Perper considered the miner's work history, the biopsy slides, x-rays, and the reports of the other record physicians. *Id*. at 6.

[12] Dr. Perper observed that the miner had a history of severe shortness of breath, mucus, obstructive and restrictive defects, hypoxemia and severe impairment of his diffusion capacity. Claimant's Exhibit 3. He noted that there were x-ray findings of severe interstitial lung disease and pneumoconiosis. *Id*. Dr. Perper reviewed the lung biopsy slides and opined that the miner had severe interstitial fibrosis, interstitial fibro-anthracosis, and severe emphysema, each of which was due to coal dust exposure. *Id*.

Based on the foregoing, we affirm the administrative law judge's decision to accord Dr. Perper's opinion controlling weight in this case. *See Pickup,* 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-49. The United States Court of Appeals for the Tenth Circuit stated in *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 24 BLR 2-155 (10th Cir. 2009), "[w]e are especially mindful that 'the task of weighing conflicting medical evidence is within the sole province of the [administrative law judge]' . . . and that 'where medical professionals are in disagreement, the trier of fact is in a unique position to determine credibility and weigh the evidence.'" *Oliver*, 555 F.3d at 1217, 24 BLR at 2-164, *quoting Hansen*, 984 F.2d at 368, 17 BLR at 2-54. Because the administrative law judge acted within his discretion in weighing the evidence and rendering his credibility determinations, we affirm the administrative law judge's reliance on Dr. Perper's opinion to find that the miner suffered from a disabling respiratory condition that was substantially caused, or aggravated, by his coal dust exposure.[13] *See Oliver*, 555 F.3d at 1217, 24 BLR at 2-164; *Kaiser Steel Corp. v. Director, OWCP* [*Sainz*], 748 F.2d 1426 (10th Cir. 1984). We, therefore, affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[14] *See Pickup,* 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-49.

Additionally, contrary to employer's argument, any error by the administrative law judge in failing to render a specific finding under 20 C.F.R. §718.204(c) is harmless.[15]

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[13] Because we affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis, based on Dr. Perper's opinion, it is not necessary that we address employer's argument regarding the probative value of Dr. Smith's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Employer's argument with regard to Dr. Bennett is moot since the administrative law judge did not rely on Dr. Bennett's opinion in finding the existence of legal pneumoconiosis established. Decision and Order on Remand at 9.

[14] Citing *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012), employer resurrects its argument, previously rejected by the Board in this case, that the administrative law judge must consider whether claimant established the existence of pneumoconiosis, based on a weighing of all the evidence together at 20 C.F.R. §718.202(a). We decline to extend the holding in *Hensley* to this case, arising in the Tenth Circuit. For the reasons set forth in the Board's prior decision, we continue to reject employer's argument. *Goddard,* BRB Nos. 11-0366 BLA and 11-0439 BLA, slip op. at 2-3 n.3; *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990).

[15] Employer alleges that the administrative law judge "has made no finding in the decision as to whether the pneumoconiosis which he found was present was proven by

See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984). The Board's remand order made clear that the central issue for resolution in this case is whether the evidence established that the miner's disabling interstitial fibrosis was due to coal dust exposure, an analysis relevant to both the issues of the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c). *Goddard*, BRB Nos. 11-0366 BLA and 11-0439 BLA, slip op. at 4. As discussed *supra*, the administrative law judge permissibly credited Dr. Perper's opinion that the miner had disabling interstitial fibrosis caused by coal dust exposure.[16] Because the administrative law judge's analysis of the evidence at 20 C.F.R. §718.202(a)(4) encompassed the issue of disability causation, it is not necessary that we remand the case for a specific finding pursuant to 20 C.F.R. §718.204(c). *See Larioni*, 6 BLR at 1278.

II. The Survivor's Claim

To establish entitlement to survivor's benefits, 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. §§718.202, 718.203, 718.205(b);[17] *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Death will be considered due to pneumoconiosis where pneumoconiosis was the cause of the miner's death; where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or the death was caused by complications of pneumoconiosis; or where the presumption set forth at 20 C.F.R. §§718.304 or 718.305 is applicable. 20 C.F.R. §718.205(b). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Pickup*, 100 F.3d at 874, 20 BLR at 2-340.

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the claimant to be a material or substantially contributing cause" of his disability. Employer's Brief in Support of Petition for Review at 21.

[16] Dr. Perper's opinion supports a finding of disability causation pursuant to 20 C.F.R. §718.204(c), as he stated that the miner's "coal workers' pneumoconiosis resulted in progressive, severe and permanent respiratory disability and ultimately caused and hastened his death in respiratory failure." Claimant's Exhibit 3.

[17] The Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The language previously found at 20 C.F.R. §718.205(c) is now set forth in 20 C.F.R. §718.205(b). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

In considering claimant's entitlement to survivor's benefits, the administrative law judge stated:

> There is a general consensus among the opining physicians in this case that [the miner] died of his pulmonary fibrosis lung disease. Although Drs. Repsher and Rosenberg disagree with the above finding that [the miner] suffered from coal workers' pneumoconiosis, they do not dispute that [the miner] died from the progression of his pulmonary fibrosis. Because I have found that the pulmonary fibrosis was significantly related to or substantially caused by his coal dust exposure, I find that [the miner's] death was due to legal pneumoconiosis.

Decision and Order on Remand at 10. As we have affirmed the administrative law judge's finding that the miner suffered from legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and employer does not raise specific error with regard to the administrative law judge's determination that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(a), we affirm the award of benefits in the survivor's claim. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge