BRB No. 99-0184 BLA

GERALDINE R. WENTZ (Widow of HERBERT WENTZ)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (95-BLA-0081) 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[1] filed the instant survivor's claim on

[1]Claimant is the widow of the deceased miner, who died on December 9, 1992. Director's Exhibits 31, 45. The miner's death certificate, which was signed by Dr. Comas and dated December 11, 1992, indicates that the immediate cause of the miner's death was cardiopulmonary arrest due to an acute myocardial infarction, and that cirrhosis was

March 5, 1993, which the administrative law judge initially considered together with a duplicate living miner's claim in a Decision and Order dated September 11, 1995.[2] After crediting the miner with twenty-five years of coal mine employment, the administrative law judge accepted the parties' stipulation that the miner suffered from coal workers' pneumoconiosis. With regard to the miner's claim, the administrative law judge determined that a material change in conditions was established pursuant to 20 C.F.R. §725.309. The administrative law judge further found, however, that the evidence of record was insufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(c) and, accordingly, denied benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits in the survivor's claim. Employer appealed. The Board affirmed, as unchallenged on appeal, the administrative law judge's finding under Section 718.204(c) and his consequent denial of the miner's claim. *Wentz v. Island Creek Coal Co.*, BRB No. 95-2234 BLA (Aug. 26, 1996)(unpublished). The Board then vacated the administrative law judge's finding under Section 718.205(c)(2) and the award of survivor's benefits, and remanded the case for reconsideration. *Id*.

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another significant condition contributing to the miner's death. Director's Exhibit 45.

[2]The miner filed an initial living miner's claim on April 6, 1973, which was finally denied by the district director on April 4, 1980. Director's Exhibit 28. The miner filed a duplicate claim on February 6, 1984. Director's Exhibit 1. While the miner's claim was pending before the Office of Administrative Law Judges (OALJ), and after claimant filed her survivor's claim on March 5, 1993, the parties requested consolidation of the living miner's and survivor's claims. Director's Exhibits 76, 82. In an Order dated July 14, 1994, Administrative Law Judge Gerald M. Tierney remanded the case to the district director for consolidation of the two claims. Director's Exhibit 83. The consolidated claims were referred to the OALJ on October 11, 1994, and a hearing was held before the administrative law judge on March 28, 1995.

In a Decision and Order on Remand dated May 27, 1997, the administrative law judge again found the evidence sufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c)(2) and awarded survivor's benefits. Employer appealed. The Board vacated the administrative law judge's finding at Section 718.205(c)(2), remanding the case for reconsideration of the medical opinions of Drs. Comas, Naeye and Kleinerman. *Wentz v. Island Creek Coal Co.*, BRB No. 97-1310 BLA (May 27, 1998)(unpublished). In his Decision and Order on Remand dated October 5, 1998, the administrative law judge reconsidered these medical opinions and determined that the medical opinion evidence was sufficient to establish death due to pneumoconiosis under Section 718.205(c)(2). Accordingly, the administrative law judge again awarded benefits in the survivor's claim. On appeal, employer contends that the administrative law judge erred in crediting Dr. Comas's January 14, 1993 medical opinion indicating that pneumoconiosis contributed to the miner's death. Employer further contends that the administrative law judge impermissibly rejected the contrary medical opinions of Drs. Naeye and Kleinerman. Claimant responds in support of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate 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).

On appeal, employer first contends that the administrative law judge erred in crediting Dr. Comas's January 14, 1993 medical report. Dr. Comas's report summarizes the course of the miner's hospitalization at the time of his death. Director's Exhibit 49. The miner was admitted to the hospital on December 8, 1992 with an admission diagnosis of acute pulmonary edema and a probable myocardial infarction, and died in the hospital a day later, on December 9, 1992. *Id*. Dr. Comas, the attending physician, indicated that the miner died from cardiopulmonary arrest secondary to acute myocardial infarction. *Id.* Dr. Comas listed pneumoconiosis among the discharge diagnoses, and stated that early and moderate pneumoconiosis was a contributing factor in the miner's demise. *Id*. Dr. Comas also signed the miner's death certificate on December 9, 1992. Director's Exhibit 45. On the death certificate, Dr. Comas did not mention pneumoconiosis as a factor in the miner's death. *Id*. In remanding this case to the administrative law judge, the Board instructed the administrative law judge to consider to what degree, if any, Dr. Comas's failure to list pneumoconiosis on the death certificate affected the weight to be assigned his January 14, 1993 report. *Wentz v. Island Creek Coal Co.*, BRB No. 97-1310 BLA (May 27, 1998)(unpublished). The administrative law judge concluded that the omission on the death certificate did not undermine the doctor's subsequent report. Decision and Order on Remand at 1-2. Specifically, the administrative law judge found that a death certificate is, as nothing more than a form, in and of itself an unreliable report of the miner's condition; and second, the administrative law judge found that Dr. Comas's hospital report was well-

reasoned and detailed, and that Dr. Comas was not purposely inconsistent in stating in his report that pneumoconiosis contributed to the miner's death. *Id*.

Employer argues that the administrative law judge should have given deference to the death certificate because it is an official document filed with the Commonwealth of Pennsylvania. Employer further contends that Dr. Comas's January 14, 1993 report includes no explanation whatsoever for his conclusion that pneumoconiosis was a contributing factor in the miner's death and that the administrative law judge, consequently, erred in crediting the opinion as well-reasoned and documented. Employer's contentions have merit, in part. Contrary to employer's assertion, the administrative law judge was not required to credit the death certificate as a conclusive opinion on the part of Dr. Comas that pneumoconiosis played no role in the miner's death. *See Smith v. Camco Mining, Inc.,* 13 BLR 1-17 (1989). Concerning Dr. Comas's report, however, the administrative law judge did not identify the basis for his determination that Dr. Comas "provided an adequate explanation for his conclusion that pneumoconiosis contributed to the miner's death." Decision and Order at 2. Inasmuch as it is not apparent from the face of Dr. Comas's report that he provided a rationale for his statement linking the miner's demise to pneumoconiosis, we vacate the administrative law judge's determination with respect to Dr. Comas's opinion and remand the case to the administrative law judge for reconsideration of this opinion pursuant to Section 718.205(c)(2). The administrative law judge must set forth the rationale underlying his findings on remand. *See Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983).

Employer also contends that the administrative law judge improperly rejected the medical opinions of Drs. Naeye and Kleinerman by finding that both doctors based their opinions that pneumoconiosis did not hasten the miner's death on an erroneous premise that pneumoconiosis does not progress once a miner retires from mining, *i.e.*, after the cessation of coal dust exposure. Employer argues that the administrative law judge mechanically applied the decision of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arose, in *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), in rejecting the opinions on that basis. Employer argues that the court in *Swarrow* merely noted that pneumoconiosis *may* progress, and that, at any rate, the court's recognition of this principle constitutes mere *dicta,* and was misapplied, therefore, by the administrative law judge. Employer asserts that, moreover, the administrative law judge selectively analyzed the medical opinions of Drs. Naeye and Kleinerman because he did not consider the doctors' explanation that it was the absence of any pulmonary impairment at any time prior to the miner's death which led them to conclude that the miner's death was not hastened by the disease. Employer's contentions have merit.

While it has long been recognized that pneumoconiosis is a progressive and irreversible disease, *see Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Swarrow, supra*; *Adkins*

v. Director, OWCP, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), and while the administrative law judge, as trier-of-fact, is not bound to accept the opinion or theory of any one medical expert, but must evaluate the evidence, weigh it, and draw his own conclusions, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), an administrative law judge must not selectively analyze the evidence. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984). In the instant case, although the administrative law judge reasonably determined that Drs. Naeye and Kleinerman based their conclusions, in part, on the assumption that pneumoconiosis does not progress once coal dust exposure ceases,[3] the administrative law judge failed to consider that the doctors explained that they were basing their opinions that the miner's pneumoconiosis was too mild to have hastened his death on their findings that the miner was not exhibiting any significant pulmonary impairment leading up to the time of his death. Although Drs. Naeye and Kleinerman in fact essentially testified, as the administrative law judge found, that they believe that pneumoconiosis does not progress once a miner leaves the coal mines, neither doctor indicated that this assumption led them to conclude that the miner's death was not hastened by pneumoconiosis. To the contrary, Drs. Naeye and Kleinerman specifically indicated that they based their opinions on their belief that the miner did not have any significant pulmonary impairment prior to and at the time of his death. Director's Exhibits 45, 74. Thus, the administrative law judge erred by selectively analyzing the opinions of Drs. Naeye and Kleinerman, as employer contends. Consequently, we vacate the administrative law judge's rejection of the opinions of Drs. Naeye and Kleinerman, and remand this case for the administrative law judge to consider the entirety of the opinions of Drs. Naeye and Kleinerman when weighing the evidence under Section 718.204(c)(2).[4]

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[3]The administrative law judge accurately stated that Dr. Naeye testified that simple pneumoconiosis does not advance in terms of causing more lung damage after a miner retires from coal mining. Decision and Order on Remand at 2; Employer's Exhibit 2 at 10, 25. The administrative law judge accurately stated that Dr. Kleinerman testified that normal pulmonary function studies and physical examination results four years after the miner last was exposed to coal dust suggested that there was no significant pneumoconiosis and, in addition, any abnormality in function or disease which might have occurred after that time would not likely have been the result of coal dust exposure. Decision and Order at 2; Employer's Exhibit 1 at 15.

[4]We note that employer also suggests that the administrative law judge erred in not crediting Dr. Kleinerman's opinion on the basis of the doctor's credentials. Petitioner's brief at 14. This contention lacks merit. In his prior decisions, the administrative law judge duly noted that Dr. Kleinerman is a Board-certified pathologist. 1995 Decision and Order at 21; 1997 Decision and Order on Remand at 7. The administrative law judge was not required to defer to Dr. Kleinerman's opinion on the basis of his qualifications, however. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Additionally, employer again challenges the administrative law judge's reliance on the opinion of Dr. Perper, Director's Exhibits 72, 77, arguing that Dr. Perper's finding that pneumoconiosis contributed to death by causing hypoxia is belied by the arterial blood gas study evidence of record and the medical opinions of Drs. Naeye, Kleinerman, Fino and Pickerill. We previously affirmed the administrative law judge's crediting of Dr. Perper's opinion as well-reasoned, *see Wentz v. Island Creek Coal Co.*, BRB No. 95-2234 BLA (Aug. 26, 1996)(unpublished), slip op. at 2-4; 1995 Decision and Order at 19-22, and, as stated in our May 27, 1998 Decision and Order, this prior holding constitutes the law of the case. *See Sammons v. Wolf Creek Collieries,* 19 BLR 1-24 (1994). Employer has not demonstrated any exception to warrant deviating from the doctrine of the law of the case, and there has been no change of law which would render incorrect the Board's prior ruling with respect to the administrative law judge's treatment of Dr. Perper's opinion.[5]

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

SO ORDERED.

[5]Employer also contends that the administrative law judge should have credited Dr. Fino's opinion that pneumoconiosis did not hasten the miner's death. Director's Exhibit 63. In its most recent prior Decision and Order, the Board, in rejecting employer's contention that the administrative law judge erred in discrediting Dr. Fino's opinion as imprecise, noted that the administrative law judge had not discredited Dr. Fino's opinion *per se*, but merely found it to be outweighed by the preponderance of the evidence. *Wentz v. Island Creek Coal Co.*, BRB No. 97-1310 BLA (May 27, 1998)(unpublished), slip op. at 2. The Board held that the administrative law judge's finding that the opinion was outweighed by the preponderance of the evidence was within his discretion as fact-finder, but on remand, the administrative law judge should render a specific credibility finding pertaining to Dr. Fino.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge