BRB Nos. 06-0130 BLA
and 06-0130 BLA/A

EMOGENE M. COOLEY (Widow of JAMES E. COOLEY)	)	
Claimant Cross-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 10/30/2006
Employer-Respondent Cross-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Miner's Benefits and Survivor's Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Emogene Cooley, Prestonsburg, Kentucky, *pro se*.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Miner's Benefits and Survivor's Benefits (04-BLA-5421 and 04-BLA-5422) of Administrative Law Judge Joseph E. Kane issued with respect to claims filed by the miner and his widow 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). This case involves a subsequent claim filed by the miner on October 11, 2002, prior to his death.[1] Claimant is pursuing the miner's claim on behalf of her deceased husband, and she also filed a survivor's claim on November 18, 2002. Director's Exhibit 6. The district director issued a Proposed Decision and Order denying benefits in both claims. Director's Exhibit 33. Claimant requested a hearing, which was held on November 3, 2004.[2] In evaluating the miner's subsequent claim, the administrative law judge

[1] The miner first filed a claim for benefits on October 2, 1978, which was adjudicated under the Part 727 regulations. Following a lengthy procedural history due to changes in the law as it pertained to rebuttal of the interim presumption in the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, Administrative Law Judge Donald W. Mosser finally denied the miner's claim on November 3, 1997. Director's Exhibit 1; *see also Cooley v. Island Creek Coal Company*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Cooley v. Island Creek Coal Co.*, BRB No. 84-0386 BLA (Mar. 19, 1987) (unpub.) and BRB No. 89-1402 BLA (Sept. 17, 1993) (unpub.). Judge Mosser determined that the miner was entitled to a rebuttable presumption, based on the positive x-ray evidence, that he was totally disabled due pneumoconiosis, but he also found that employer had rebutted that presumption by showing that the miner's total disability was not due to pneumoconiosis pursuant to 20 C.F.R. §718.203(b)(3). *Id*. The miner subsequently filed a request for modification on August 24, 1998. The case was assigned to Administrative Law Judge Daniel J. Roketenetz, who denied benefits on May 15, 2000, finding that the miner failed to establish either a mistake in fact or a material change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Id*. Judge Roketenetz's Decision and Order denying benefits was affirmed by the Board on appeal, *see Cooley v. Island Creek Coal Co.*, BRB No. 00-0937 BLA-A (Jun. 14, 2001) (unpub.). Director's Exhibit 1.

[2] At the hearing, employer proffered Employer's Exhibits 10 and 12, consisting of the medical reports of Drs. Ghio and Jarboe, which were in excess of the evidentiary limitations since employer had already submitted the reports of Drs. Repsher and Roggli as its two affirmative medical opinions pursuant to 20 C.F.R. §725.414(a)(3)(i). Employer, however, asked that the exhibits be admitted into the record "for appeal purposes only." Hearing Transcript at 8-9. In its closing argument brief, employer specifically designated the reports of Drs. Rephser and Roggli as its two affirmative medical reports, Dr. Caffrey's medical report as its one affirmative autopsy opinion, and Dr. Bush's report as autopsy rebuttal evidence. Employer also relied on the deposition testimony of Dr. Caffrey. In his September 27, 2005 Decision and Order, the

determined that the newly submitted evidence failed to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and thus, that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). With respect to the survivor's claim, the administrative law judge further found that claimant failed to establish the miner's death was caused or hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the miner's subsequent claim and the survivor's claim for benefits.

In response to claimant's *pro se* appeal, employer has filed a brief urging affirmance of the administrative law judge's findings on the merits of entitlement. Employer, however, has also filed a cross-appeal, challenging the validity of the evidentiary limitations at 20 C.F.R. §725.414 and the administrative law judge's exclusion of four of employer's exhibits, consisting of the reports of Drs. Ghio, Jarboe, Caffrey and Bush, along with the deposition testimony of Dr. Caffrey.[3] The Director,

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administrative law judge further reflected on employer's submissions, and decided to exclude Dr. Caffrey's report and deposition testimony, along with Dr. Bush's report, ruling that the evidence exceeded the evidentiary limitations:

> Having now reviewed the employer's exhibits, I find that the reports of Drs. Caffrey and Bush, as well as Dr. Caffrey's deposition, exceed the limitations of evidence found at [Section] 725.414, which limit the number of physicians' interpretations of the autopsy report to one. On its evidence summary form, [e]mployer selected Dr. Roggli's report addressing the autopsy report, and that is the only report I will consider.

Decision and Order at 2.

[3] Employer maintains that the Section 725.414 evidentiary limitations are invalid and therefore that the administrative law judge erred by not admitting the reports of Drs. Ghio and Jarboe as relevant evidence. Employer's Brief at 27-31. We reject employer's arguments based on *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004), which upheld the validity of the evidentiary limitations.

Employer also argues that the administrative law judge erred in designating Dr. Roggli's report as employer's one affirmative autopsy report, thereby excluding Dr. Caffrey's report in favor of Dr. Roggli's report, even though employer had designated Dr. Caffrey's report as its one affirmative autopsy report. Employer's Brief at 30-31. Employer also asserts that the administrative law judge improperly excluded Dr. Bush's

Office of Workers' Compensation Programs (the Director), has filed a brief, addressing only employer's evidentiary challenges.[4] The Director has declined to address the merits of claimant's entitlement to benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP,* 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After our review of the administrative law judge's Decision and Order, the briefs of the parties, and the issues presented on appeal, we affirm the administrative law judge's findings on the merits of entitlement as they are supported by substantial evidence. Based on our affirmance of the administrative law judge's denial of benefits in both the miner's and survivor's claims, we consider the administrative law judge's evidentiary errors, if any, to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

A. The Miner's Claim

The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim must be denied on the grounds of the prior denial of benefits unless claimant is able to establish a change in one of the applicable conditions of entitlement since the prior denial. 20

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report, which had been proffered by employer as autopsy rebuttal evidence. Employer's Brief at 31-32.

[4] The Director maintains the validity of the evidentiary limitations and asserts that the reports of Drs. Ghio and Jarboe were properly excluded. Director's Brief at 4-6. The Director, however, agrees that if the case is remanded for any reason, then the administrative law judge should reconsider whether to designate the opinions of Drs. Roggli, Caffrey, and Bush in a manner consistent with "employer's classification of that evidence as either medical reports or autopsy evidence." Director's Brief at 10.

[5] Because the miner's last coal mine employment occurred in the State of Kentucky, these claims arise within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

C.F.R. §725.309(d). In this case, the administrative law judge properly noted that the prior miner's claim was denied because employer established rebuttal of the interim presumption as the evidence presented in that case was sufficient to rule out the causal relationship between the miner's total disability and his coal mine employment. *See* 20 C.F.R. §§727.203(b)(3); Decision and Order at 11. In considering the new evidence, submitted in conjunction with the miner's subsequent claim, relevant to the issue of causation of disability, the administrative law judge noted that Dr. Kendrick, the miner's treating physician, had completed a pre-printed form on February 24, 2003, indicating the miner had been treated for breathing problems prior to his death, and diagnosing that the miner had coal workers' pneumoconiosis and respiratory disability due to his coal mine employment, citing the autopsy as evidence for his opinion. As noted by the administrative law judge, however, although Dr. Kendrick "referred to his prior treatment of the miner for breathing problems, the record confirms only that he followed [the miner] during hospitalizations within a month of [the miner's] death for a total of four days." Decision and Order at 11. The administrative law judge also properly found that while Dr. Kendrick cited to the autopsy report as support for his opinion, the autopsy report fails to "illuminate Dr. Kendrick's position," since the autopsy reports states only that the miner's death was due to pneumoconiosis and fails to address whether that condition would have contributed to any respiratory disability that the miner suffered prior to his death.[6] *Id*.

In contrast, the administrative law judge noted that employer's expert, Dr. Repsher, had reviewed the extensive medical record, including the objective studies conducted with respect to the miner's prior claim, and the records of the miner's hospitalization prior to his death, along with the autopsy report. Dr. Repsher specifically opined, based on his review of the miner's pulmonary function study evidence, that the miner's respiratory impairment was not due to coal dust exposure. The administrative law judge had discretion to credit Dr. Repsher's opinion because he found it to be better reasoned and more persuasive than Dr. Kendrick's opinion. *See Eastover Mining Co., v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 117 (6th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987);

[6] The administrative law judge's analysis of Dr. Kendrick's opinion is consistent with the requirements of Section 718.104(d), which provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of a treating physician: 1) Nature of relationship; 2) Duration of relationship; 3) Frequency of treatment; 4) Extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation further requires that the administrative law judge consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Decision and Order at 12. The administrative law judge specifically noted that unlike Dr. Kendrick, Dr. Repsher based his opinion "on a thorough review of almost all of the evidence of record, thereby providing him with a very broad base from which to draw his conclusions." Decision and Order at 12. The administrative law judge also deferred to Dr. Repsher's opinion in light of his "great expertise in the field of pulmonary medicine,[7] *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), and because Dr. Respher's conclusions were supported by "the miner's long medical history of problems such as lung cancer, pneumonia, and heart disease." Decision and Order at 12. The administrative law judge further noted that Dr. Repsher's opinion was corroborated by Dr. Roggli, a pathologist who reviewed the miner's autopsy slides on behalf of employer, and who also had "painstakingly" explained why the miner was disabled from conditions other than coal dust exposure prior to his death. *See Clark*, 12 BLR at 1-149 (1989); Employer's Exhibit 5; Decision and Order at 12.

Because the administrative law judge properly found that the newly submitted medical opinion evidence failed to establish that the miner's total disability arose in whole or in part out of his coal mine employment, consistent with the rebuttal provision of Section 727.203(b)(3), he properly noted that "this finding is equivalent to a finding that [claimant] has failed to establish that [the miner's] total disability [was] due to pneumoconiosis under [Section] 718.204(c)." Decision and Order at 12. Consequently, we affirm the administrative law judge's determination that claimant failed to establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309. We therefore affirm the administrative law judge's denial of benefits with respect to the miner's subsequent claim.

B. Survivor's Claim

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 816 (6th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under Section 718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Claimant may establish that pneumoconiosis was a substantially contributing cause of a miner's death if it hastened

[7] The Board notes that while Dr. Dennis identified himself as a "pathologist" in the autopsy report, the record does not contain a copy of his curriculum vitae.

the miner's death. 20 C.F.R. §718.205(c)(5); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 186 (6th Cir. 1995).

In this case the medical evidence relevant to the survivor's claim consisted of three death certificates, an autopsy report, and the opinions of employer's experts, Drs. Repsher and Roggli. As noted by the administrative law judge, there were three death certificates prepared by Dr Kendrick, the miner's treating physician. The first death certificate was filed on October 21, 2002, listing the date of the miner's death as October 11, 2002, and the cause of the miner's death as "[metastatic cancer] metastatic ca." Director's Exhibit 12; Decision and Order at 8. The second death certificate is identical to the first one except that the word "anthracosilicosis" was added as an additional cause of death, printed below "metastatic ca." *Id*. As noted by the administrative law judge, the second death certificate is a much darker copy of the first death certificate and "the added printing is larger than the original printing and it is difficult to determine whether the penmanship is the same." Decision and Order at 8. The third death certificate also differs from the two prior certificates, in that the word "ANTHRACOSILICOSIS" was added in all capital letters as a second cause of death. The administrative law judge further noted that the author of the third death certificate elaborated after the words "metastatic" as follows: "patient with history of colon cancer and probable lung metastases. CEA > refused." Decision and Order at 8, citing Director's Exhibit 14.

An autopsy was performed by Dr. Dennis on October 11, 2002, which identified evidence of a malignant lung tumor, bronchopneumonia, pulmonary congestion and edema, progressive massive fibrosis with anthracosilicosis, and left ventricle hypertrophy compatible with hypertensive cardiovascular disease. Director's Exhibit 15. In a cover letter dated November 11, 2002, Dr. Dennis explained that in addition to a significant lung tumor, the autopsy revealed "progressive massive with anthracosilicotic pigment deposition and macule formation greater than 1.5 to 2 centimeters scattered throughout the pulmonary architecture admixed with the tumor." *Id*. Dr. Dennis attributed the miner's death to lung cancer, but also opined that the miner's death was hastened by anthracosilicosis and progressive massive fibrosis. Director's Exhibit 15.

The administrative law judge noted that Dr. Roggli reviewed the autopsy report and seventeen autopsy slides, from which he saw no evidence of progressive massive fibrosis or simple coal workers' pneumoconiosis. Employer's Exhibits 5. He opined that the miner's death was due to acute bronchopneumonia superimposed on extensive bronchogenic carcinoma due to smoking. Employer's Exhibit 5. He specifically opined that the miner's death was not hastened by pneumoconiosis or his coal mine employment. *Id*.

Dr. Repsher reviewed medical records and the available medical evidence. He felt there was insufficient evidence on autopsy to support a diagnosis of pneumoconiosis and

that the miner's carcinoma and chronic obstructive pulmonary disease were due to smoking and not coal dust exposure. *Id*. He specifically concluded that that the miner's death was not hastened by pneumoconiosis. *Id*. Similarly, based on his review of the autopsy slides and medical records, Dr. Roggli found no evidence of massive progressive fibrosis or simple coal workers' pneumoconiosis. Dr. Roggli attributed the miners' death to lung cancer and emphysema due to smoking. Employer's Exhibit 5. Dr. Roggli likewise opined that pneumoconiosis neither caused nor hastened the miners' death from lung cancer. *Id*.

In evaluating the survivor's claim, the administrative law judge determined that Dr. Dennis's findings of anthracosilicosis and progressive massive fibrosis were "aptly refuted" by Dr. Roggli, and therefore, that Dr. Dennis's opinion was entitled to less probative weight. The administrative law judge permissibly rejected Dr. Dennis's diagnosis of progressive massive fibrosis, which would have entitled claimant to an irrebuttable presumption that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.304, since the administrative law judge found Dr. Roggli's opinion to be more persuasive that the miner did not suffer from either complicated or simple pneumoconiosis prior to his death. Although Dr. Dennis diagnosed that the miner suffered from progressive massive fibrosis with macule formation greater than 1.5 to 2 centimeters, the administrative law judge permissibly decided to reject Dr. Dennis's finding based on Dr. Roggli's contrary opinion and credible testimony:

> [Dr. Roggli] cogently explained why he disagreed with Dr. Dennis's findings. He explained that the nodules Dr. Dennis mentioned on gross description were really areas of tumor and unrelated to coal dust exposure. He was not influenced by the areas of pigment that were found because that is typical of anyone and increases with age. Dr. Roggli testified that the large lesions were actually diffuse subpleural fibrosis and that none of the pigmented areas had the features of a coal dust macule. In considering this diametrically opposed evidence, I find I am somewhat more persuaded by Dr. Roggli's opinion based on his credentials and logical explanations.

Decision and Order at 13.

As to the issue of whether the miner suffered from simple pneumoconiosis, which may have hastened his death, the administrative law judge also permissibly found that claimant failed to carry her burden of proof. Since there were no statements in the record from Dr. Kendrick to explain why he prepared three death certificates, and the administrative law judge was unable to discern whether Dr. Kendrick had even authorized the additions that were made to those certificates, the administrative law judge recognized the possibility that the certificates were fraudulently prepared, and thus gave them no probative weight. We affirm the administrative law judge's decision to credit

only the original death certificate, and thus we affirm his finding that the death certificate failed to support claimant's burden of proof as it listed the cause of the miner's death as metastatic cancer, failing to identify pneumoconiosis as a factor in the miner's death.

We also affirm the administrative law judge's decision to credit Dr. Roggli's interpretation of the miner's autopsy slides as showing no evidence of anthracosilicosis, based on Dr. Roggli's credentials in pathology, which included the doctor having authorized "several chapters in textbooks regarding coal workers' pneumoconiosis." Decision and Order at 9; *see Dillon*, 11 BLR at 1-113. The administrative law judge had discretion to find that Dr. Roggli's opinion that the miner's death was not hastened by pneumoconiosis was more credible than Dr. Dennis' contrary opinion. He properly found that Dr. Roggli's reasoning was logical in view of the objective evidence (autopsy and CT scan evidence), and the miner's medical history. Decision and Order at 14. The administrative law judge further found that Dr. Roggli's opinion was corroborated by the reasoned and documented opinion of Dr. Repsher, who agreed that the miner did not have simple coal workers' pneumoconiosis, and who opined that the miner's death was hastened by conditions unrelated to coal dust exposure. *Id*.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), and to assess the evidence of record and draw his own conclusions and inferences there from, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when his findings are rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because substantial evidence supports the administrative law judge's conclusion that the miner's death was not hastened by pneumoconiosis, we affirm his finding pursuant to 20 C.F.R. §718.205(c) and his denial of benefits in the survivor's claim.

Accordingly, the Decision and Order – Denying Miner's Benefits and Survivor's Benefits of the administrative law judge is hereby 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