

BRB No. 09-0135 BLA

K.B.	)	
(Widow of L.B.)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/26/2009
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
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 – Awarding Benefits of Administrative Law Judge Michael P. Lesniak, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2007-BLA-6086) of Administrative Law Judge Michael P. Lesniak with respect to a survivor’s claim<sup>1</sup> filed on December 22, 2006, 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). After crediting the miner with thirty-six years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that

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<sup>1</sup> Claimant is the surviving spouse of the miner, L.B., who died on November 15, 2006. Director’s Exhibit 8.

claimant met her burden of proving the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and 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 erred in rejecting the opinions of Drs. Fino and Farney pursuant to 20 C.F.R. §718.205(c). Employer contends that because the administrative law judge did not make a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he should not have credited the opinions of Drs. Celko and Gretz at 20 C.F.R. §718.205(c), that legal pneumoconiosis was a contributing cause of the miner's death. Further, employer asserts that the administrative law judge impermissibly assigned greater weight to the opinions of Drs. Celko and Gretz, based upon their status as treating physicians, pursuant to 20 C.F.R. §718.104(d). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.<sup>2</sup>

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.<sup>3</sup> 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 survivor's benefits pursuant to 20 C.F.R. Part 718, 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(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence

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<sup>2</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of thirty-six years of coal mine employment and that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), as well as his determination that, because the evidence does not establish complicated pneumoconiosis, claimant is unable to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In analyzing the issue of death causation at 20 C.F.R. §718.205(c), the administrative law judge considered the miner's death certificate and the medical reports of Drs. Gretz, Celko, Fino and Farney. The death certificate was prepared by Dr. Rhody and identified "[a]bdominal [a]ortic [a]neurysm" as the immediate cause of the miner's death. Director's Exhibit 8. Under "Other Significant Conditions[.]" he listed "[b]lack [l]ung" and a "[c]ongenital [k]idney [m]ass[.]" *Id.*

As noted by the administrative law judge, Dr. Gretz treated the miner from 2003 to 2006 for chronic obstructive pulmonary disease (COPD). Director's Exhibit 9. In an undated report received by the Department of Labor on February 1, 2007, Dr. Gretz indicated that, beginning in November 2004, the miner suffered "significant cardiopulmonary decompensation." *Id.* He stated that the miner had severe COPD and that "it is likely with his occupational history that coal workers' lung disease is the likely culprit for his gradual pulmonary decompensation." *Id.* Dr. Gretz opined that "because of his severe lung disease the [miner] was unable to undergo any surgical correction of his heart valvular problem or aneurysm." *Id.* He further stated that if the miner "had not suffered from coal workers' pneumoconiosis, his life expectancy may have been prolonged." *Id.* Dr. Gretz was deposed on April 18, 2008, and reiterated his opinion that COPD contributed to the miner's death. Employer's Exhibit 8 at 37.

In a report dated April 10, 2008, Dr. Celko reviewed the miner's medical records and noted that he treated the miner in conjunction with the Chronic Respiratory Disease Program at Canonsburg General Hospital. Claimant's Exhibit 3. Dr. Celko determined that the miner's pulmonary impairment, valvular heart disease, and age contributed to his death. *Id.* Further, Dr. Celko opined, "I do believe if [the miner] had not suffered from legal coal workers' pneumoconiosis/centrilobular emphysema he may have been able to undergo the valve surgery." *Id.* Since no autopsy was performed and the miner died at home, it was Dr. Celko's opinion that the cause of his death "could have been a combination of his co-morbid health problems." *Id.* Dr. Celko concluded that if the miner had not suffered from a pulmonary impairment, his life expectancy would have increased but he was unable to determine the extent of the additional time. *Id.*

Dr. Fino reviewed the miner's treatment and hospitalization records, death certificate and the opinion of Dr. Gretz, and prepared a report dated February 5, 2008.<sup>4</sup> Employer's Exhibit 6. Dr. Fino disagreed with Dr. Gretz that the miner had a pulmonary impairment and that the miner's respiratory condition would have prevented surgery to repair his heart valve problems or his thoracic aortic aneurysm. *Id.* Dr. Fino criticized Dr. Gretz's diagnosis of a respiratory impairment based on the pulmonary function testing of record. *Id.* According to Dr. Fino, the pulmonary function study (PFS) results from October 1, 2003 and May 21, 2004 were invalid because tracings were not present in the record. *Id.* Dr. Fino concluded that coal mine dust did not cause, contribute to, or hasten the miner's death. *Id.* In his deposition testimony on May 19, 2008, Dr. Fino stated that he was unable to determine specifically what caused the miner's death, but concluded that lung disease played no role because the miner "had no measureable [sic] respiratory impairment." Employer's Exhibit 9 at 24-25. Dr. Fino also reviewed tracings from the October 1, 2003 PFS and opined that the study was invalid due to poor effort. *Id.* at 29-30.

In a report dated January 25, 2008, Dr. Farney reviewed the miner's medical records and opined that the miner "could have died from other cardiovascular causes since he had chronic heart failure but there is no rationale to suggest that he would have died due to a primary respiratory disease or that whatever simple [coal workers' pneumoconiosis] that was present would have had any bearing on his demise." Employer's Exhibit 4. Further, Dr. Farney explained, "[t]he assertion that pulmonary disease and specifically [coal workers' pneumoconiosis] was the factor which increased [the miner's] surgical risk and precluded him from having aortic valve surgery is absurd . . . . The patient was simply too old and frail unrelated to any specific pulmonary condition to undergo cardiac surgery." *Id.*

In a supplemental report dated June 12, 2008, Dr. Farney reviewed the results of Dr. Gretz's examination on December 2003, and his opinion remained the same, that the miner had no respiratory impairment. Employer's Exhibit 11. Dr. Farney was deposed on May 2, 2008, and testified that the miner "lived as long as he did because he did not have pulmonary disease" and that the reason for not performing valve replacement surgery was due to the patient's wishes and not based on a pulmonary condition. Employer's Exhibit 10 at 26-27, 29.

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<sup>4</sup> Dr. Fino had examined the miner prior to his death and prepared a report dated January 29, 2003, in which he stated that there was "sufficient evidence to justify a diagnosis of clinical or legal pneumoconiosis," but that the miner had no respiratory impairment. Employer's Exhibit 2.

The administrative law judge considered this evidence, and with respect to the death certificate, found that it “may support a finding that black lung disease contributed to the miner’s death, but it is insufficient to establish that the miner’s death was due to coal workers’ pneumoconiosis.” Decision and Order at 14. Regarding the credentials of the physicians, the administrative law judge noted that all four of the doctors are Board-certified in internal medicine, but that Drs. Fino and Farney are also Board-certified in pulmonary disease. *Id.* The administrative law judge ultimately determined that while the additional credentials of Drs. Fino and Farney “add weight to their opinions, such credentials do not make up for the lack of documentation and reasoning of their opinions.” *Id.* at 16.

The administrative law judge found that the opinions of Drs. Celko and Gretz were the “most persuasive.” Decision and Order at 15. He noted that all of the physicians agreed that the miner’s cardiac problems could have been treated with surgery, but that the opinions of Drs. Celko and Gretz were supported by the 2003 and 2004 PFS results. *Id.* The administrative law judge further noted that both Drs. Celko and Gretz accurately reported the miner’s extensive coal mine employment history in comparison to his limited smoking history, and found that the miner’s age alone would not have prevented the heart valve surgery. *Id.* Further, the administrative law judge determined that “Drs. Gretz and Celko had the opportunity to treat the miner on multiple occasions over several years which adds weight to their conclusions.” *Id.*

The administrative law judge agreed with Dr. Fino that the May 21, 2004 PFS was invalid but disagreed with his findings regarding the October 1, 2003 PFS. Decision and Order at 15. He also noted that the December 19, 2002 PFS was qualifying under 20 C.F.R. §718.204(b)(2)(i). *Id.* As a result, the administrative law judge found that Dr. Fino’s “conclusions that the miner lacks any pulmonary impairment [are] inconsistent with the more recent pulmonary function evidence.” *Id.* at 15-16. The administrative law judge determined that Dr. Fino’s finding that the miner’s age was the sole reason for not having the surgery was “based, at least in part, on his opinion that the miner’s 2002 [pulmonary function studies] were normal,” contrary to the administrative law judge’s findings. *Id.* at 16. Consequently, the administrative law judge found that Dr. Fino’s “conclusions regarding the miner’s ability to undergo surgery are unpersuasive.” *Id.*

The administrative law judge also found Dr. Farney’s opinion, that the miner’s lung function was normal, to be “inconsistent with the more recent evidence of record.” Decision and Order at 16. The administrative law judge found that Dr. Farney’s suggestion, that any respiratory impairment suffered by the miner would be due to smoking, was undermined by Dr. Farney’s erroneous belief that the miner’s smoking

history was forty-five pack years, well in excess of the miner's actual smoking history.<sup>5</sup> *Id.* Furthermore, while Dr. Farney concluded that the miner was unable to undergo valve replacement surgery due solely to his advanced age and cardiovascular problems, the administrative law judge considered Dr. Farney's opinion to be "less persuasive" as it was "based in part on his conclusion that the miner had no pulmonary impairment." *Id.*

Thus, the administrative law judge gave controlling weight to the opinions of Drs. Celko and Gretz, which identified COPD, related to coal dust exposure, as a contributing cause of the miner's death. The administrative law judge, therefore, found that claimant satisfied her burden of proof pursuant to 20 C.F.R. §718.205(c). *Id.*

On appeal, employer argues that in discrediting the opinions of Drs. Fino and Farney, the administrative law judge, contrary to the Board's holding in *K.J.M. v. Clinchfield Coal Company*, 24 BLR 1-41 (2008), ignored medical evidence establishing that the miner's PFS results were normal for his age. Employer also alleges that the administrative law judge's findings regarding Dr. Fino's analysis of the October 1, 2003 PFS are in error because he neglected to consider the totality of Dr. Fino's opinion regarding the validity of the study. Further, employer asserts that the administrative law judge erred in determining that Drs. Fino and Farney based their finding, that the miner was an unacceptable surgical candidate, on their conclusions that the miner did not have a pulmonary or respiratory impairment. Regarding the opinions of Drs. Celko and Gretz, employer argues that the administrative law judge did not evaluate their opinions in compliance with 20 C.F.R. §718.104(d), or address the speculative nature of their opinions. Employer's assertions of error have merit.

Upon consideration of the administrative law judge's Decision and Order, the evidence of record and employer's arguments on appeal, we are compelled to vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.205(c), and remand this case for further consideration. Employer correctly asserts that the administrative law judge did not address all of the relevant evidence regarding whether the miner had a respiratory impairment prior to his death. In *K.J.M.*, the Board held that, when determining whether the PFS results of an individual over seventy-one years of age indicate total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), an administrative law judge must consider evidence that the qualifying values for age seventy-one do not demonstrate a totally disabling pulmonary or respiratory impairment. *K.J.M.*, 24 BLR at 1-47-48. In this case, employer introduced evidence to establish that the miner's PFS was normal for his age. However, because it is unclear from the administrative law

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<sup>5</sup> Based on claimant's testimony and a review of the medical evidence, the administrative law judge determined that "the miner had a remote smoking history of less than [ten] pack years." Decision and Order at 11 n.6.

judge's Decision and Order whether he considered the testimony of Drs. Fino and Farney, that the miner had normal pulmonary function for his age, prior to discrediting their opinions, we instruct the administrative law judge on remand to make such findings, consistent with the Board's decision in *K.J.M.*

We also agree with employer that the administrative law judge erred in failing to address Dr. Fino's deposition testimony as to the validity of the October 1, 2003 PFS. Employer's Exhibit 9 at 29-30. Although the administrative law judge rejected Dr. Fino's invalidation of the October 1, 2003 PFS, on the ground that Dr. Fino erroneously stated in his written report that the tracings for the study were not available for review, the administrative law judge did not discuss Dr. Fino's deposition testimony. *See* Decision and Order at 15-16. Dr. Fino clarified in his deposition that the basis for his invalidation of the October 1, 2003 PFS was not that the tracings were unavailable but, rather, that the miner had not exhibited sufficient effort in performing the test. Employer's Exhibit 9 at 29-30. On remand, the administrative law judge must consider the entirety of Dr. Fino's opinion regarding the validity of the October 1, 2003 PFS.

There also is merit to employer's assertion that the administrative law judge mischaracterized the conclusions of Drs. Fino and Farney regarding whether the miner was an acceptable surgical candidate. The administrative law judge discounted Dr. Fino's opinion, stating that:

Dr. Fino's conclusion that the miner's age alone prevented his heart surgery is based, at least in part, on his opinion that the miner's 2002 [pulmonary function tests] were normal, contrary to my findings that the 2002 [pulmonary function test] results meet the regulatory standards for a totally disabling pulmonary impairment; consequently, his conclusions regarding the miner's ability to undergo surgery are unpersuasive.

Decision and Order at 16. Additionally, the administrative law judge discounted Dr. Farney's opinion stating that:

Dr. Farney opined that the miner's age and cardiovascular problems alone prevented him from undergoing surgery; however, I find Dr. Farney's opinions were also based in part on his conclusion that the miner had no pulmonary impairment, and that his opinion is less persuasive as a result.

*Id.* However, contrary to the administrative law judge's determination, both physicians stated that the miner's age and/or cardiac condition alone made him an unacceptable surgical candidate, irrespective of any pulmonary or respiratory impairment. *See* Employer's Exhibits 4, 6. In addition, we have instructed the administrative law judge, *supra*, to reconsider whether the PFS results show total disability in light of the testimony

of Drs. Fino and Farney that the miner's results were normal for his age. Thus, on remand, the administrative law judge must reconsider the opinions of Drs. Fino and Farney as to whether the miner's death was due to pneumoconiosis and provide a rationale for his credibility determinations, as required by the 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). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Additionally, the administrative law judge did not explain why the opinions of Drs. Celko and Gretz were entitled to controlling weight, based on their status as treating physicians. The United States Court of Appeals for the Third Circuit, wherein jurisdiction for this claim arises, has held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician; however, the court has also indicated that automatic preferences are disfavored. *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Pursuant to 20 C.F.R. §718.104(d), an administrative law judge may give determinative weight to a treating physician's opinion, after considering the nature and duration of the relationship with the miner, the extent and frequency of the treatment, and the credibility of the opinion, in light of its reasoning and documentation. 20 C.F.R. §718.104(d). In this case, the administrative law judge summarily stated that "Drs. Gretz and Celko had the opportunity to treat the miner on multiple occasions over several years which adds weight to their conclusions," without specifically addressing the factors set forth in 20 C.F.R. §718.104(d). Decision and Order at 15. Consequently, we instruct the administrative law judge, on remand, to determine whether the opinions of Drs. Gretz and Celko are reasoned and documented, and entitled to controlling weight, based on a discussion of the factors set forth in 20 C.F.R. §718.104(d), and in accordance with applicable law.<sup>6</sup>

Finally, because employer only stipulated to the existence of simple clinical coal workers' pneumoconiosis, in order to credit the opinions of Drs. Celko and Gretz that COPD (legal pneumoconiosis) contributed to the miner's death pursuant to 20 C.F.R.

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<sup>6</sup> Employer asserts that the opinions of Drs. Celko and Gretz are *speculative* as to whether pneumoconiosis contributed to the miner's death. Because the administrative law judge did not specifically address whether any speculative or qualified language used by Drs. Celko and Gretz served to undermine the credibility of their opinions, we instruct the administrative law judge to do so on remand and explain the basis for his findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501 (1984).

§718.205(c), the administrative law judge must first render a specific finding as to whether the evidence is sufficient to establish that the miner had COPD due to coal dust exposure at 20 C.F.R. §718.202(a)(4). We, therefore, instruct the administrative law judge, on remand, to initially determine whether legal pneumoconiosis has been established at 20 C.F.R. §718.202(a)(4), and then determine whether, based upon the evidence as a whole, claimant has established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). If the administrative law judge determines that claimant established that the miner suffered from legal pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a), 718.203(b), he should then consider whether legal pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to 20 C.F.R. §718.205(c).<sup>7</sup> In reaching his credibility determinations, the administrative law judge must address all of the evidence of record and clearly explain the basis for his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

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<sup>7</sup> The administrative law judge should address the extensive medical and treatment documents in the record in reaching his determination as to whether claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and death causation at 20 C.F.R. §718.205(c). *See* Director's Exhibits 10, 11; Claimant's Exhibits 4, 5; Employer's Exhibit 1.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge