

BRB No. 99-0107 BLA

BEATRICE SWIM )  
(Widow of MERVIN E. SWIM) )

Respondent Claimant- )  
Respondent )

v. )

CONSOLIDATION COAL COMPANY )

DATE ISSUED: 10/25/99

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 Survivor's Benefits of Daniel F. Sutton,  
Administrative Law Judge, United States Department of Labor.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits (97-BLA-0994) of Administrative Law Judge Daniel F. Sutton on a 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).<sup>1</sup> Based on the date of filing of this claim, the administrative law judge considered the claim under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that employer's stipulations are consistent with the record and determined that the sole issue in this case is whether the miner's death was due to pneumoconiosis.<sup>2</sup> The administrative law judge considered claimant's testimony and the medical evidence, and concluded that the opinions of Drs. Kistner and Schor, the physicians who treated the miner for his colon cancer, presented the most convincing statements that pneumoconiosis hastened the miner's death because the disease prevented the miner from recovering from an ongoing pneumonic process. Director's Exhibit 13. Accordingly, the administrative law judge found that claimant established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).<sup>3</sup> The administrative law judge ordered employer to pay survivor's benefits to claimant commencing July 1996 and ordered employer to reimburse the Black Lung Disability Trust Fund for all interim survivor's benefits which had been paid. On appeal, employer contends that the administrative law judge's weighing of the evidence is improper. Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act

---

<sup>1</sup>Claimant is the surviving spouse of the miner, Mervin E. Swim, who died on July 4, 1996. Dr. Kistner prepared the death certificate and identified respiratory failure, refractory bilateral pneumonitis, and septic shock as the immediate causes of death. Director's Exhibit 10. Claimant filed her claim for survivor's benefits on August 5, 1996. Director's Exhibit 1.

<sup>2</sup>Employer stipulated at the hearing that the claim was timely filed, Mr. Swim was a miner within the meaning of the Act and worked as a miner after December 31, 1969, the miner had twenty-seven years of coal mine employment and had pneumoconiosis arising out of coal mine employment. Employer further stipulated that claimant is the surviving dependent spouse of the miner, and employer is the responsible operator for this claim. Hearing Transcript at 21 -22.

<sup>3</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in West Virginia. Director's Exhibit 4; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *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). The United States Court of Appeals for the Fourth Circuit, under whose jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). See *Shuff, supra*.

The administrative law judge initially found the September 11, 1996 letter by Drs. Kistner and Schor to be reasoned and supported by the objective medical data, in particular the autopsy findings establishing the presence of pneumoconiosis.<sup>4</sup> Decision and Order at 9.

---

<sup>4</sup>Dr. Kistner prepared the miner's death certificate, which did not list pneumoconiosis as a significant condition or contributing cause of death. The Office of Workers' Compensation Programs requested Drs. Kistner and Schor to submit an opinion on whether pneumoconiosis contributed to the miner's death. Director's Exhibit 12. Drs. Kistner and Schor submitted a letter on September 11, 1996, in which they responded as follows:

“In our opinion, the patient's pneumoconiosis hastened Mr. Swim's death since it directly contributed to his inability to recover from an ongoing pneumonic process. The patient was found to have a lung abscess at autopsy in spite of his receiving adequate antibiotic therapy during his hospitalization.

There can be many reasons for a patient to be unable to adequately clear a pulmonary infection in spite of receiving adequate antibiotic therapy. One reason is that the patient may have underlying lung damage and in this case, that underlying lung damage was secondary to coal workers pneumoconiosis. Mr. Swim was found to have other significant pathology on autopsy including diffuse alveolar damage and focal emphysema. These also contributed in part to his inability to adequately clear his lung infection. We are

The administrative law judge further found that Drs. Kistner and Schor did not dispute employer's experts' opinions that the miner's terminal sepsis and bilateral pneumonia were caused by chemotherapy and not by pneumoconiosis, but rather, they opined that the miner's pneumoconiosis along with other lung abnormalities, caused damage to the miner's lungs which compromised his recovery from infectious complications of chemotherapy. The administrative law judge further stated that only Dr. Bush directly addressed the point made by Drs. Kistner and Schor regarding the relationship between pneumoconiosis and the miner's inability to fight off respiratory infection, but found that Dr. Bush either misunderstood or mischaracterized the Kistner/Schor opinion. The administrative law judge also found that the opinions of five other experts, that the miner's pneumoconiosis was too mild or insignificant to have caused any pulmonary impairment or to have played a role in the miner's death, were medically unsound as the objective tests that produced normal or near normal results which were the bases for the physicians' opinions were conducted in 1982 and 1985. The administrative law judge found that as claimant's treating physicians and specialists in oncology, Drs. Kistner and Schor were in the best position to determine the relative roles of pneumoconiosis, cancer and chemotherapy related complications, and to determine whether pneumoconiosis hastened the miner's death by inhibiting his ability to clear his lungs of infection. Based upon these findings, the administrative law judge determined that the report of Drs. Kistner and Schor established that pneumoconiosis hastened the miner's death. Decision and Order at 9 - 10.

Employer maintains that the administrative law judge's findings under Section 718.205(c)(2) must be vacated, as the administrative law judge erred in determining that the Kistner/Schor opinion is reasoned and documented and in finding that Dr. Bush was the only physician who directly addressed the Kistner/Schor letter. Employer also contends that the administrative law judge mischaracterized Dr. Castle's opinion and erred in relying on the credentials of Drs. Kistner and Schor to credit their opinions.

---

uncertain as to which of these individual pathologies contributed the most towards his pulmonary failure but certainly if the coal workers pneumoconiosis was not present, he may have been able to clear the pulmonary infection. Hence it is our opinion that it indeed 'hastened death'."

Director's Exhibit 13.

Employer's contentions have merit. The record does not support the administrative law judge's determination that Drs. Kistner and Schor are "specialists in oncology". Decision and Order at 10. Indeed, the administrative law judge himself recognized that the qualifications of Drs. Schor and Kistner were not established in the record. Decision and Order at 5. Nevertheless, the administrative law judge accorded weight to the miner's treating physicians based on their unsubstantiated status as specialists, without a concurrent discussion of the credentials of the pulmonary specialists and pathologists rendering contrary opinions on the role of pneumoconiosis in the miner's death. Furthermore, in finding the Kistner/Schor letter reasoned and supported by the objective evidence, the administrative law judge relied upon the autopsy findings as his basis for making this determination. The autopsy report, prepared by Dr. Pullins on July 4, 1996, however, only confirms the presence of pneumoconiosis, the existence of which all the physicians agree upon, and does not address the contributory role of pneumoconiosis in the miner's death. Other than the autopsy findings, the administrative law judge's reference to the "unrefuted medical evidence" which supports the Kistner/Schor letter fails to identify the medical evidence with specificity, and therefore, fails to comply with the Administrative Procedure Act, 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 30 U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. See *v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375 (4th Cir. 1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We additionally note that the administrative law judge failed to consider the equivocal nature of the Kistner/Schor letter before determining that the opinion was sufficient to comply with the standard articulated by the United States Court of Appeals for the Fourth Circuit in *Shuff*.<sup>5</sup> In light of the administrative law judge's failure to give sufficient reasons for crediting the Kistner/Schor letter, we must vacate the administrative law judge's findings with respect to this opinion, and remand the case for further consideration of the evidence. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

We also agree with employer that the administrative law judge failed to adequately address the opinions offered by Drs. Castle and Bush. Dr. Bush opined that because no accumulated secretions were found on autopsy, he disagreed with the opinion of Drs. Kistner and Schor that the miner was unable to clear his pulmonary infection as a result of pneumoconiosis. Employer's Exhibit 2. The administrative law judge distinguished "secretions" from "infections", found that Dr. Bush had either misunderstood or

---

<sup>5</sup>In relevant part, the Kistner/Schor opinion states "We are uncertain as to which of these individual pathologies contributed the most towards (the miner's) pulmonary failure but certainly if the coal workers pneumoconiosis was not present, he **may** (emphasis added) have been able to clear the pulmonary infection." Director's Exhibit 13.

mischaracterized the Kistner/Schor opinion, and thus, essentially found that Dr. Bush had not contradicted the Kistner/Schor theory. Decision and Order at 10. However, Dr. Bush specifically addressed the point made by Drs. Kistner and Schor, stating that the slides showed masses of bacteria in the region of the miner's lung abscesses, which correlated with a finding of neutropenia, which is why the miner was unable to fight infection. Employer's Exhibit 2. In his deposition, Dr. Bush further explained that by the gross and microscopic appearance, he was able to ascertain that the lung destruction was due to infection and not coal workers' pneumoconiosis. Employer's Exhibit 8 at p.12. With regard to Dr. Castle's opinion, the administrative law judge found that the physician's opinion was medically unsound because of his reliance on outdated objective tests which did not indicate any pulmonary impairment eleven years before the miner's death.<sup>6</sup> The administrative law judge additionally found that Dr. Castle's statement in his deposition that it would be impossible for the miner to have subsequently developed an impairment after 1985 without additional exposure was hostile to the Act in that it was tantamount to a denial that simple pneumoconiosis can ever be disabling. Decision and Order at 10. We agree with employer that the administrative law judge mischaracterized Dr. Castle's opinion because the physician did not categorically state that simple pneumoconiosis can never be disabling and he did not state that simple pneumoconiosis can never progress. Employer's Exhibit 7 at 14-16. Rather, the physician specifically addressed the results of the miner's objective tests, giving his medical opinion as to level of progression one could have expected to see in the miner's impairment in the years subsequent to his retirement from coal mine employment. Thus, the administrative law judge erred in determining that Dr. Castle's opinion was hostile to the Act. See *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985). More importantly, the physician engaged in a detailed discussion refuting the Kistner/Schor opinion, which the administrative law judge did not consider. Specifically, Dr. Castle opined that as a result of the chemotherapy the miner was receiving for his cancer, his white blood cell level became extremely low and he was unable to fight off a germ called pseudomonas aeruginosa which caused abscesses in his lungs. Employer's Exhibit 7 at 18 - 20. In light of the administrative law judge's failure to consider relevant evidence and to supply valid reasons for crediting and discrediting the relevant medical evidence, we vacate the administrative law judge's weighing of the evidence. See *Hicks, supra*; *Akers, supra*; *Wojtowicz, supra*.

---

<sup>6</sup>The administrative law judge also rejected the opinions offered by Drs. Fino, Loudon, Kleinerman and Crouch on this basis. Decision and Order at 9; Employer's Exhibits 1, 3, 4, 6.

Inasmuch as the administrative law judge did not properly weigh the medical opinions relevant to Section 718.205(c)(2), his finding that claimant established that pneumoconiosis hastened the miner's death is vacated. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). If the administrative law judge credits the Kistner/Schor opinion on remand, he must reconsider whether it is sufficient to satisfy claimant's burden of proof under Section 718.205(c)(2), in accordance with the standard set forth in *Shuff*, when weighed against the contrary opinions contained in the record.<sup>7</sup>

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

SO ORDERED.

---

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

---

JAMES F. BROWN  
Administrative Appeals Judge

---

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge

---

<sup>7</sup>The administrative law judge did not address specifically whether claimant established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (c)(3), and (c)(4). The administrative law judge need not consider these subsections on remand, however, as there is no evidence indicating that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(1), nor is there evidence that the miner suffered from complicated pneumoconiosis such that the presumption referenced in Section 718.205(c)(3) and set forth in 20 C.F.R. §718.304 is available in this case. Section 718.205(c)(4) is also not applicable in this case.