

BRB No. 99-0130 BLA

MAUREEN HARTMAN)
(Widow of DARYL HARTMAN))
)
 Claimant-Petitioner)
)
 v.)
)
KOCHER COAL COMPANY,)
INCORPORATED/LACKAWANNA)
CASUALTY COMPANY)
)
 Employer/Carrier -)
 Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)

DATE ISSUED: 10/27/99

DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order Denying Benefits of Ainsworth H. Brown,
Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

George E. Mehalchick (Lenahan & Dempsey), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-0932) of Administrative Law Judge Ainsworth H. Brown 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).¹ 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 considered the medical evidence, and concluded that the opinions of Drs. Naeye and Oesterling, that pneumoconiosis was not a substantially contributing cause of the miner's death, were reasoned and supported by Dr. Dittman's normal lung function findings in 1992. Accordingly, the administrative law judge found that claimant failed to establish 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 Third Circuit in *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).² On appeal, claimant contends that the administrative law judge erred in his consideration of the evidence and failed to adequately explain his findings in accordance with the Administrative Procedure Act. Employer responds, urging affirmance. 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 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 substantial 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.³ 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c),

¹Claimant is the surviving spouse of the miner, Daryl Hartman, who died on July 16, 1996. The immediate cause of death was adenocarcinoma of the colon, with anthracosilicosis listed as a significant condition on the death certificate. Director's Exhibit 7. Claimant filed her claim for survivor's benefits on August 1, 1996. Director's Exhibit 1.

²This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment occurred in Pennsylvania. Director's Exhibit 2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³We note that the parties agreed to twenty-two years of coal mine employment at the hearing, and employer stated that "medically the only issue is the cause of death", Hearing Transcript at 9. Thus, the administrative law judge properly considered the only issue for resolution to be whether pneumoconiosis caused the miner's death.

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 Third Circuit, under whose jurisdiction the present 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 *Lukosevicz, supra*.

After discussing the medical evidence of record, the administrative law judge found that there was a conflict between the opinions of Drs. Miller and Bindie, the miner's treating physician for cancer and the autopsy prosector respectively, who opined that pneumoconiosis was a contributing factor in the miner's death, and the opinions of Drs. Naeye and Oesterling, both board-certified pathologists, who opined that pneumoconiosis was not a factor in the miner's death. Decision and Order at 5. The administrative law judge found that Dr. Miller's opinion, that the miner's right sided heart enlargement was secondary to coal worker's pneumoconiosis because of the recency of the extension of the tumor to the lungs, did not take into account the miner's significant smoking history. The administrative law judge further stated that "the clear import of Dr. Miller's hospital comment was that the tumorous lung involvement did not bode well for a prognosis." *Id.* Regarding Dr. Bindie's opinion, the administrative law judge found that Dr. Bindie also failed to consider the miner's smoking history as an etiologic factor and further only conducted a partial examination of cardiac tissue. *Id.* The administrative law judge then found that Drs. Naeye and Oesterling provided a well reasoned analysis based on their review of the slides and Dr. Bindie's description. Decision and Order at 6. The administrative law judge further found that Dr. Dittman, the last pulmonary consultant to examine the miner, found no pulmonary dysfunction in 1992 and that Dr. Miller, who first examined the miner for his cancer in 1995, also found normal chest findings at that time. Thus, the administrative law judge concluded that although coal worker's pneumoconiosis was established by autopsy, the probative evidence demonstrated that it was not a factor in the miner's death.

Claimant first contends that the administrative law judge failed to explain his findings with regard to Dr. Bindie's opinion. Dr. Bindie performed the autopsy and determined that pneumoconiosis hastened the miner's death based on biopsies of the lung and examination of the right ventricle and a review of limited medical records. Director's Exhibit 8; Employer's Exhibit 3; Claimant's Exhibit 7. Dr. Bindie stated that he reviewed the miner's records, including history as given by the miner's family, and medical records obtained from Hershey Medical Center, but never specifically indicated his awareness of the miner's smoking history. Thus, the administrative law judge permissibly questioned the reliability of Dr. Bindie's opinion on the contributory role of pneumoconiosis in the miner's death, as the physician failed to discuss the impact of the miner's thirty year smoking history. See *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-136 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). With regard to the administrative law judge's finding that Dr. Bindie only conducted a partial examination of cardiac tissue, Decision and Order at 5, the physician stated that he performed a limited autopsy, examining only the heart and lungs. Claimant's Exhibit 7 at 7. Dr. Naeye raised the

issue that there was a discrepancy between postmortem and clinical findings because the autopsy prosector took tissue samples from the most abnormal parts of the lungs for microscopic examination. Director's Exhibit 11. Dr. Bindie was specifically asked in his deposition to address Dr. Naeye's speculation, and the physician responded that he took biopsies from all lobes and representative portions of the cancer and black lung. Claimant's Exhibit 7 at 9 - 10. Thus, the record does not support the administrative law judge's finding that Dr. Bindie performed a partial examination; the physician conducted a **limited** (emphasis added) autopsy taking representative tissue samples. Any error made by the administrative law judge in this regard, however, is harmless in that he rationally considered Dr. Bindie's failure to discuss the miner's smoking history a limiting factor in the physician's assessment. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Claimant also contends that Dr. Bindie's opinion should have been accorded more weight as he was the autopsy prosector in this case. Contrary to claimant's contention, the administrative law judge need not defer to the autopsy prosector over the physicians who reviewed the autopsy slides, and may accord greater weight to the reviewing physicians if their opinions are better reasoned. *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Cadwallader v. Director, OWCP*, 7 BLR 1-879 (1985); see also *Dipyatic v. Bethlehem Mines Corp.*, 7 BLR 1-758 (1985).

Claimant next contends that the administrative law judge erred in rejecting Dr. Miller's well-reasoned opinion. Dr. Miller was the miner's treating physician for his colon cancer and treated the miner from August 1995 until his death in July 1996. Dr. Miller signed the death certificate, in which he listed the immediate cause of death as adenocarcinoma of the colon with anthracosilicosis as a significant condition. In his deposition, dated August 21, 1997, Dr. Miller stated that his opinion that pneumoconiosis hastened the miner's death was based upon the autopsy findings, which revealed right ventricular hypertrophy which could not have developed in the time that the miner's colon cancer spread to his lungs. The physician opined that the miner had increased pressure in his lungs which was multifactorial in nature, due to emphysema from smoking and coal workers' pneumoconiosis. Claimant's Exhibit 5. We agree with claimant that the administrative law judge erred in stating that Dr. Miller did not consider the miner's smoking history. Dr. Miller's deposition testimony indicates his awareness and consideration of the role of the miner's significant smoking history in the impairment of the miner's lung. Claimant's Exhibit 5 at 12. Claimant also contends that the administrative law judge's statement regarding the "import" of the physician's "hospital comment" is an impermissible substitution of the administrative law judge's opinion for that of the physician of record. The administrative law judge's finding in this regard is vague in that it is unclear which specific statement by Dr. Miller the administrative law judge is addressing, and thus constitutes a violation of 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. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order at 5. We further note that the administrative law judge may only weigh the medical evidence, but may not interpret the medical data. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal*

Co., 6 BLR 1-1000 (1984). In light of the administrative law judge's failure to give sufficient reasons for discrediting Dr. Miller's opinion, we vacate the administrative law judge's findings in this regard, and remand for further consideration of Dr. Miller's opinion.

Inasmuch as the administrative law judge did not properly weigh the medical opinions relevant to Section 718.205(c)(2), his finding that claimant did not establish 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 Dr. Miller's opinion on remand, he must then consider whether this evidence is sufficient to satisfy claimant's burden of proof under Section 718.205(c)(2), in accordance with the standard set forth in *Lukosevicz*, when weighed against the contrary opinions contained in the record.⁴

Accordingly, the Decision and Order Denying 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

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

⁴The 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.

Administrative Appeals Judge