

BRB No. 99-1230 BLA

JUDITH A. PRICE )  
(Executrix of the Estate of BONNA )  
LYNN MALOTT, Deceased Widow of )  
RICHARD MALOTT) )

Claimant-Petitioner )

v. )

EASTERN ASSOCIATED COAL )  
COMPANY )

Employer- )  
Respondent )

DIRECTOR, OFFICE OF )  
WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )

DATE ISSUED:

DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand - Denying Benefits of  
Michael P. Lesniak, Administrative Law Judge, United States  
Department of Labor.

Gregory C. Hook (Hook & Hook), Waynesburg, Pennsylvania, for  
claimant.

Paul E. Frampton (Bowles Rice McDavid Graff & Love, PLLC),  
Fairmont, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges,  
and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (97-BLA-0369) of Administrative Law Judge Michael P. Lesniak 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> In his initial Decision and Order, the administrative law judge credited the miner with thirty-one years of coal mine employment and accepted the parties' stipulation that the miner suffered from pneumoconiosis arising out of coal mine employment. The administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, benefits were awarded. Employer filed an appeal with the Board which, in a Decision and Order issued on March 17, 1999, vacated the administrative law judge's findings under Section 718.205(c)(2) and remanded the case for reconsideration of the relevant medical opinions. *Price v. Eastern Associated Coal Co.*, BRB No. 98-0852 BLA (Mar. 17, 1999)(unpub.).

On remand, the administrative law judge accorded greatest weight to the opinions in which Drs. Kleinerman and Crouch determined that pneumoconiosis played no role in the miner's death. The administrative law judge found, therefore, that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not

---

<sup>1</sup>The miner died on October 26, 1993. Director's Exhibit 8. Dr. Shureiqi prepared the death certificate and identified anoxia due to right lower lobe pneumonia and severe coal workers' pneumoconiosis as the cause of death. *Id.* The miner's widow, Bonna Lynn Malott, filed a survivor's claim on April 16, 1996. Director's Exhibit 1. Bonna Lynn Malott subsequently died on February 11, 1998, the same day that the administrative law judge issued a Decision and Order awarding benefits. Claimant is Judith A. Price, the executrix of Bonna Lynn Malott's estate.

properly weigh the medical opinions of record and did not apply the correct standard in determining whether claimant met her burden under Section 718.205(c)(2). Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially alleges error in the administrative law judge's determination that the death certificate, prepared by Dr. Shureiqi, does not support a finding that pneumoconiosis caused, contributed to, or hastened the miner's death. Decision and Order on Remand at 6; Director's Exhibit 8. Contrary to claimant's contention, however, the administrative law judge acted rationally in declining to treat Dr. Shureiqi's mere identification of pneumoconiosis on the death certificate as sufficient to support a finding that pneumoconiosis contributed to the miner's death. See *Smith v. Camco Mining Co.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). In addition, although claimant is correct in noting that Dr. Shureiqi treated the miner during his final hospitalization and documented his condition at that time, Dr. Shureiqi did not diagnose pneumoconiosis in these records and did not comment on the relationship, if any, between pneumoconiosis and the miner's terminal condition. Unmarked Employer's Exhibits dated September 24, 1993 and September 29, 1993. Thus, the administrative law judge acted within his discretion in finding that Dr. Shureiqi's opinion, as expressed on the death certificate, did not establish death due to pneumoconiosis pursuant to Section 718.205(c)(2). See *Smith, supra*; *Addison, supra*.

Claimant also asserts that the administrative law judge erred in failing to explain adequately why he relied upon Dr. Franyutti's opinion to award benefits in his first Decision and Order, but then discredited Dr. Franyutti's opinion when he reconsidered it on remand. We reject this contention. The Board vacated the administrative law judge's prior determination that Dr. Franyutti's opinion was sufficient to establish that pneumoconiosis was a contributing cause of the miner's death based upon Dr. Franyutti's status as the autopsy prosector and instructed the administrative law judge to reconsider Dr. Franyutti's opinion on remand. In accordance with the Board's instructions, the administrative law judge reexamined Dr. Franyutti's opinion and acted within his discretion in finding

that it was entitled to less weight than the opinions of Drs. Crouch and Kleinerman, as Dr. Franyutti did not set forth the reasoning underlying his conclusion that pneumoconiosis was a contributing cause of the miner's death, also, he did not refer to any additional medical records or the miner's smoking history, and in contrast to Drs. Crouch and Kleinerman, Dr. Franyutti is not a Board-certified pathologist. Decision and Order on Remand at 7; Director's Exhibit 9; Claimant's Exhibit 1; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Claimant further maintains that the administrative law judge erred in according determinative weight to the opinions of Dr. Kleinerman and Crouch and in failing to find that Dr. Goldblatt's opinion established invocation of the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304. These contentions have merit, in part. In setting forth his findings with respect to the opinions of Drs. Crouch and Kleinerman, the administrative law judge stated that:

I give greater weight to the opinions of Drs. Crouch and Kleinerman over those of Drs. Franyutti and Goldblatt. The reports of Drs. Crouch and Kleinerman were based on pertinent medical records and were supported by well reasoned medical reports. Dr. Weiss'[s] opinion further supports the conclusions of Drs. Crouch and Kleinerman.

Decision and Order on Remand at 7. The administrative law judge did not, however, explain his apparent conclusion that Dr. Goldblatt's opinion, as expressed in his written report and deposition testimony, was not based upon similar documentation and, as claimant notes, the administrative law judge indicated incorrectly that Dr. Crouch based his diagnoses upon a review of x-ray readings in addition to the autopsy report and histological slides. Decision and Order on Remand at 4; Director's Exhibit 10; Claimant's Exhibit 2. Moreover, the administrative law judge did not explain his conclusion that Dr. Weiss "persuasively concluded that the miner's death was due to cancer" nor did he consider whether Dr. Weiss's statement that simple pneumoconiosis does not cause a totally disabling impairment is hostile to the Act and whether Dr. Weiss's conclusion in this regard affected his opinion regarding whether the miner's simple pneumoconiosis contributed to his death. Decision and Order on Remand at 7; Employer's Exhibits 3, 5; see *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985). We must, therefore, vacate the administrative law judge's finding under Section 718.205(c)(2) and remand the case to the administrative law judge for

reconsideration of whether the medical reports of record establish that pneumoconiosis was a contributing cause of the miner's death.<sup>2</sup> See *Tackett v. Director, OWCP*, 7 BLR 1-700 (1985).

Finally, with respect to whether claimant established invocation of the Section 718.304 presumption, the administrative law judge found that Dr. Goldblatt's diagnosis of complicated pneumoconiosis was not confirmed by any other pathologist and that "the overwhelming weight of the pathologists' opinion evidence is that the miner's lungs showed evidence, at most, of simple pneumoconiosis." Decision and Order on Remand at 8. The administrative law judge concluded, therefore, that claimant was not entitled to the irrebuttable presumption of death due to pneumoconiosis. *Id.* We hereby affirm the administrative law judge's finding as it is rational and supported by substantial evidence. Of the four pathologists of record, only Dr. Goldblatt diagnosed complicated pneumoconiosis and, as the administrative law judge found, Dr. Kleinerman "gave a clear and concise explanation of his belief that the area diagnosed by Dr. Goldblatt as complicated pneumoconiosis was in fact an apical cap and not complicated pneumoconiosis." Decision and Order on Remand at 7; Employer's Exhibit 6 at 13-14, 19-21. Although claimant alleges that two of the

---

<sup>2</sup>Contrary to claimant's argument, however, the administrative law judge did not err in determining that Dr. Kleinerman stated unequivocally that pneumoconiosis did not cause, contribute to, or hasten the miner's death nor did the administrative law judge apply an improper standard in weighing the medical reports of record. Employer's Exhibits 2, 6 at 15-16. Dr. Kleinerman indicated in one phrase at his deposition that silicosis and pneumoconiosis did play "any significant role" in the miner's bronchopneumonia. Employer's Exhibit 6 at 18. When considered in context and in conjunction with the other statements made by Dr. Kleinerman regarding the cause of the miner's demise, the administrative law judge's interpretation of Dr. Kleinerman's ultimate conclusion is a rational one. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In addition, although the administrative law judge stated at the conclusion of his Decision and Order on Remand that "the preponderance of the evidence fails to establish that the miner's death was due to pneumoconiosis," it is apparent that the administrative law judge considered, under 20 C.F.R. §718.205(c)(2), whether pneumoconiosis was a substantial contributing cause of the miner's death under the "hastened death" standard adopted by the United States Court of Appeals for the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Decision and Order on Remand at 6, 8.

pathologists of record, Drs. Crouch and Franyutti, did not view the slide on which the nodule of complicated pneumoconiosis was present, there is no evidence in the record to support this assertion. In addition, in light of his reasonable conclusion that the weight of the evidence established that the miner did not have complicated pneumoconiosis, the administrative law judge was not required to make a determination as to whether the nodule viewed by Dr. Goldblatt would appear on a chest x-ray as an opacity greater than one centimeter in size. See *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). The administrative law judge's finding that the evidence of record is insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304 is, therefore, affirmed.

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge