BRB No. 03-0110 BLA

ALDONA MAE KLEE (Widow of JEROME L. KLEE) Claimant-Respondent v. PEABODY COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/25/2003 DECISION and ORDER

Appeal of the Decision and Order On Remand - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Vernon L. Plummer, II (Plummer Law Offices, P.C.), Shelbyville, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (1997-BLA-243) of Administrative Law Judge Gerald M. Tierney awarding benefits 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] This case is before the Board for the second time. In the initial Decision and Order, the administrative law judge credited the miner with at least thirty years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(2) (2000). The administrative law judge also found that claimant met her burden of proof to establish that pneumoconiosis hastened the miner=s death under 20 C.F.R. '718.205(c)(2) (2000). Accordingly, benefits were awarded. By Supplemental Decision and Order Granting Attorney Fees dated February 2, 1999, the administrative law judge awarded claimant=s counsel $18,900.50, constituting the requested fee for services performed while the case was pending before the Office of Administrative Law Judges, but denied counsel=s request for $266.70 for expenses which were disallowed. Employer moved for reconsideration and on April 7, 1999, the administrative law judge denied employer=s motion.

On appeal, in *Klee v. Peabody Coal Company, Inc.*, BRB No. 99-0301 BLA (Aug. 31, 2000)(unpub.), the Board determined that the administrative law judge properly accorded more weight to the opinion of Dr. Slifer, the autopsy prosector, over the physicians who merely reviewed the autopsy slides or did not review the slides at all, and rationally credited the supporting consultative opinion of Dr. Jones, a pathologist. In addition, the Board determined that the administrative law judge properly found that Dr. Naeye=s opinion was contrary to the premise of the Act and implementing regulations that pneumoconiosis is a progressive and irreversible disease, but that the administrative law judge provided invalid reasons for discrediting the opinions of Drs. Kleinerman, Hutchins, Caffrey, Renn, Fino and Tuteur. Thus, the Board vacated the administrative law judge=s finding at Section 718.205(c)(2) (2000), and remanded the case for reconsideration of the relevant evidence thereunder. Moreover, the Board determined that the record reflected that employer did not timely object to the fee petition and held that employer thereby waived any objection to the fee petition. Since there was no proper appeal of the administrative law judge=s fee award

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, are to the amended regulations.

before the Board, the Board concluded that the fee award of $18,900.50 stood as issued.

On reconsideration, the Board modified its Decision and Order in part and remanded the case for further explanation of the administrative law judge=s preference for the medical opinion of Dr. Slifer, the autopsy prosector, relative to the cause of the miner=s death, citing *Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 16 BLR 2-57 (7th Cir. 1992). *Klee v. Peabody Coal Company, Inc.*, BRB No. 99-0301 BLA (June 27, 2001)(unpub.).

On remand, the administrative law judge gave greatest weight to Dr. Slifer=s opinion based on his status as the autopsy prosector, buttressed by the opinion of Dr. Jones, and found that these opinions established that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c)(2), (4) and/or (5). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical opinion evidence pursuant to 20 C.F.R. '718.205(c) and substituted his own judgment for that of the medical experts. Claimant has not filed a brief in this appeal. The Director, Office of Workers= Compensation Programs, has declined to participate in this appeal.

The Board=s scope of review is defined by statute. If the administrative law judge=s findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

To establish entitlement to survivor=s benefits pursuant to 20 C.F.R. '718.205(c), 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. ''718.201, 718.202, 718.203, 718.205(a)(1)-(3); *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). For survivor=s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. '718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner=s death if it hastens the miner=s death.[2] 20 C.F.R. '718.205(c)(5);

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit as the miner was last employed in the coal mine industry in the State of Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Peabody Coal Co. v. Director, OWCP [Railey], 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992). 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).

Employer contends that the administrative law judge erred in his weighing of the medical evidence pursuant to Section 718.205(c) and substituted his own judgment for that of the medical experts. Employer asserts that the administrative law judge provided invalid reasons for finding Dr. Slifer=s status as autopsy prosector rendered his opinion superior to the other pathologists, in giving more weight to Dr. Jones based on his credentials and in discounting the opinions of Drs. Naeye.[3]

Employer contends that the reasons given by the administrative law judge for according more weight to the opinion of Dr. Slifer are irrational and do not satisfy the more recent controlling authority from the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). In addressing the credibility of this opinion, the administrative law judge found that Dr. Slifer, as the autopsy prosector, was in the unique position of actually examining, measuring and weighing the miner=s heart. Decision and Order on Remand at 11. In addition, the administrative law judge noted that since Dr. Slifer provided the histologic slides to the reviewing pathologists, he had the most direct personal knowledge of whether the slides were representative. *Id.* Subsequent to the issuance of the Board=s Decision and Order on Reconsideration, the United States Court of Appeals for the Seventh Circuit held in *McCandless*, 255 F.3d 465, 22 BLR 2-311, that the administrative law judge erred in crediting the autopsy prosector=s diagnosis of pneumoconiosis merely because the prosector performed the autopsy, where there was no apparent medical basis in the record for concluding that the prosector=s gross examination made his opinion any more reliable than those of the competing physicians who reviewed the tissue slides and detected no pneumoconiosis.

In this case, the administrative law judge found that one of the reasons Dr. Slifer=s opinion is entitled to controlling weight is because he had access to the miner=s body in his

[3]While employer also asserts that the administrative law judge appears to have discounted Dr. Hutchins=s report relating the miner=s chronic obstructive lung disease to smoking and not coal mine employment, despite pathology evidence of pneumoconiosis and a lengthy coal mine employment history, Employer=s Brief at 20, the administrative law judge merely acknowledged that Dr. Hutchins opined that the miner died due to cardiac and pulmonary problems unrelated to pneumoconiosis. Decision and Order on Remand at 11-12.

role as prosector. Decision and Order on Remand at 11. In addition, the administrative law judge found that the opinions of Drs. Slifer and Jones were well-reasoned and supported Dr. Naeye=s initial report, and were most persuasive because they are Amost consistent with the significant coal worker=s pneumoconiosis found on autopsy, the miner=s long history of respiratory complaints, hospital records which established the presence of chronic obstructive pulmonary disease and heart disease, and the miner=s 30+ years of coal mine employment.@ Decision and Order on Remand at 11-12.

The administrative law judge=s finding, however, fails to satisfy the requirements of *McCandless*, 255 F.3d 465, 22 BLR 2-311, in that the administrative law judge does not provide a medical reason for preferring Dr. Slifer=s opinion over employer=s experts as required by *McCandless*.[4] *Id.* We therefore vacate the administrative law judge=s credibility determination with respect thereto, and remand this case for the administrative law judge to reevaluate the credibility of the conflicting opinions thereunder based on his view of the reliability of the physicians= medical analyses and the depth of support for their conclusions. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

Employer also contends that the administrative law judge improperly determined that Dr. Jones=s opinion was entitled to more weight because he not only possessed Board-certifications in Clinical and Anatomical Pathology, credentials also held by Drs. Naeye, Kleinerman, Hutchins and Caffrey, but Board-certification in Forensic Pathology as well. Employer=s Brief at 17-18; *see* Decision and Order on Remand at 12. Although the administrative law judge concluded that the opinion of Dr. Jones, in conjunction with the opinion of Dr. Slifer, who is Board-certified in Clinical and Surgical Pathology and who was the prosector, were most persuasive, employer correctly asserts that the administrative law judge failed to explain how Dr. Jones=s additional credential contributes to the weight of his opinion. Consequently, we vacate the administrative law judge=s finding that the evidence established that the miner=s death was due to pneumoconiosis pursuant to Section 718.205(c), and remand this case for the administrative law judge to reevaluate the medical opinions of record consistent with *McCandless*, 255 F.3d 465, 22 BLR 2-311; *see Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 16 BLR 2-74 (7th Cir. 1992); *Railey*, 972 F.2d 178, 16 BLR 2-121; *Peabody Coal*

[4]Drs. Kleinerman, Hutchins and Caffrey diagnosed pneumoconiosis by autopsy evidence, but also provided opinions stating that the miner=s death was unrelated to pneumoconiosis.

Co. v. Shonk, 906 F.2d 264, (7th Cir. 1990); *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990).

We reject employer=s argument that the administrative law judge improperly discredited Dr. Naeye=s supplemental opinion on the issue of the cause of death. Dr. Naeye opined that while present, pneumoconiosis was too mild to have contributed to the miner=s death, based on the negative x-rays of record, the nonqualifying clinical test results which were obtained after the miner left coal mine employment, and the doctor=s belief that simple pneumoconiosis does not progress after a miner quits working in the industry. Decision and Order on Remand at 7, 11; Employer=s Exhibits 4, 14. The administrative law judge correctly determined that this belief was inconsistent with the regulations and Seventh Circuit case law. Decision and Order on Remand at 11; *see* 20 C.F.R. ' 718.201(c); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*). Thus, the administrative law judge could reasonably conclude that Dr. Naeye=s beliefs were inconsistent with the regulatory definition of pneumoconiosis and improperly affected his medical conclusions; for that reason the administrative law judge permissibly accorded it less weight. *See generally Blakley*, 54 F.3d 1313, 19 BLR 2-192.

Accordingly, the administrative law judge=s Decision and Order - Awarding Survivor=s
Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge