

BRB No. 09-0260 BLA

M.F.)
(Widow of R.F.))
)
Claimant-Petitioner)
)
v.)
)
PEERLESS EAGLE COAL COMPANY)
) DATE ISSUED: 09/21/2009
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (07-BLA-5644) of Administrative Law

¹ Claimant is the surviving spouse of the deceased miner, who died on March 29, 2006. Director's Exhibit 8.

Judge Richard A. Morgan denying benefits 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). This case involves a survivor's claim filed on August 11, 2006. After crediting the miner with at least thirteen years of coal mine employment,² the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).³ The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to adequately address whether the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant also argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the case should be remanded for the administrative law judge to address whether the evidence establishes the existence of legal pneumoconiosis, and if so, to determine whether the miner's death was due to legal pneumoconiosis.

² The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³ The administrative law judge found that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3). However, the administrative law judge found that, based on the unanimous autopsy and medical opinion evidence, claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). Although not specified by the administrative law judge when he made his pneumoconiosis finding, the type of pneumoconiosis that the physicians agreed was present in the miner's lungs was clinical coal workers' pneumoconiosis. Weighing all of the relevant evidence together, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Because this survivor’s claim was filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis.⁴ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of death, a miner’s death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a “substantially contributing cause” of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

Claimant and the Director contend that the administrative law judge erred in not resolving whether the evidence establishes that the miner’s death was due to legal pneumoconiosis⁵ pursuant to 20 C.F.R. §718.205(c). In this case, the seven physicians

⁴ Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner’s death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner’s death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) Pneumoconiosis is a “substantially contributing cause” of a miner’s death if it hastens the miner’s death.

20 C.F.R. §718.205(c).

⁵ “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

who addressed the cause of the miner's death, Drs. Wantz, Shank, Jelic, Green, Oesterling, Bush, and Rosenberg, agreed that the miner's chronic obstructive pulmonary disease (COPD), chronic bronchitis, and emphysema contributed to his death.⁶ Director's Exhibits 8-10; Claimant's Exhibit 1; Employer's Exhibits 1-5. However, they differed as to whether the miner's COPD was related to his coal mine dust exposure. Dr. Green opined that claimant's COPD (chronic bronchitis and emphysema) was due to both coal mine dust exposure and cigarette smoking. Claimant's Exhibit 1. By contrast, Drs. Oesterling, Bush, and Rosenberg⁷ opined that the miner's emphysema was due to cigarette smoking and not to coal mine dust exposure.⁸ Employer's Exhibits 1-5. The administrative law judge summarized the doctors' conflicting opinions regarding legal pneumoconiosis, but did not make a finding on that issue at Section 718.202(a)(2), (4), focusing instead on the doctors' agreement that the miner had clinical coal workers' pneumoconiosis. Decision and Order at 12, 18.

⁶ Dr. Wantz completed the miner's death summary, wherein he opined that the miner's death was the "result of his severe COPD and respiratory failure." Director's Exhibit 9. Dr. Shank, in completing the miner's death certificate, listed COPD as a cause of the miner's death. Director's Exhibit 8. Dr. Jelic, the autopsy prosector, opined that the miner's "marked emphysema" was a significant contributory factor in the miner's death. Director's Exhibit 10.

Dr. Green opined that the miner "died in respiratory failure as a result of acute complications of COPD and coal worker's pneumoconiosis." Claimant's Exhibit 1. Dr. Oesterling opined that the miner's bullous pulmonary emphysema contributed to the miner's death by causing "hypoxia and marked alterations in the hemodynamics of blood flow through the lung fields imposing [a] marked burden on the heart." Employer's Exhibit 1. Dr. Bush opined that the miner "died of respiratory failure from overwhelming chronic lung disease consisting of chronic bronchitis, centrilobular emphysema, and widespread mucus plugs within small and medium-sized airways." Employer's Exhibit 2. Dr. Rosenberg opined that the miner "died of respiratory failure consequent to his severe COPD with reported pneumonia, bronchitis, hemorrhage and fluid accumulation." Employer's Exhibit 4.

⁷ The administrative law judge noted that Dr. Rosenberg attributed claimant's "focal emphysema" to his coal mine dust exposure. Decision and Order at 18. Dr. Rosenberg, however, also diagnosed COPD, a condition that he related to the miner's smoking. Employer's Exhibit 4.

⁸ Drs. Wantz, Shank, and Jelic did not address the cause of the miner's COPD. Director's Exhibits 8-10.

Claimant and the Director argue that the administrative law judge erred in not resolving whether the autopsy and medical opinion evidence establishes that the miner's COPD arose in part out of his coal mine employment, thereby establishing the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). We agree. Whether the miner's COPD constituted legal pneumoconiosis was at issue. The administrative law judge discussed this issue only briefly, at Section 718.205(c), when he summarily concluded that "Dr. Green's opinion is inconsistent with the reasoned and documented opinions of Drs. Oesterling, Bush, and Rosenberg regarding the degree, etiology, and/or role of other pulmonary-related diagnoses such as COPD, chronic bronchitis, and/or emphysema." Decision and Order at 19. The administrative law judge, however, erred in not providing any explanation for finding that the opinions of Drs. Oesterling, Bush, and Rosenberg are more persuasive than that of Dr. Green. Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we remand the case to administrative law judge for his full consideration of whether the autopsy and medical opinion evidence establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4).

On remand, when considering whether the autopsy and medical opinion evidence establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). If the administrative law judge finds that the existence of legal pneumoconiosis is established based on all the relevant evidence, see *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), he must address whether the miner's death was due to, or hastened by, legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Claimant also argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to clinical pneumoconiosis⁹ pursuant to 20 C.F.R. §718.205(c). In addition to diagnosing COPD (chronic bronchitis and emphysema), all of the physicians diagnosed coal workers' pneumoconiosis, *i.e.*, clinical pneumoconiosis. The physicians, however, disagreed as to whether the miner's

⁹ Because no party challenges the administrative law judge's finding that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

coal workers' pneumoconiosis contributed to his death. While Drs. Shank, Jelic, and Green opined that the miner's death was due in part to his coal workers' pneumoconiosis, Director's Exhibits 8, 10, Drs. Oesterling, Bush, and Rosenberg opined that the miner's coal workers' pneumoconiosis was too mild to have contributed to his death.¹⁰ Employer's Exhibits 1-5.

In considering whether the evidence established that the miner's death was due to clinical pneumoconiosis, the administrative law judge discredited the miner's death certificate because he found that Dr. Shank did not provide any explanation for his findings.¹¹ Decision and Order at 19; Director's Exhibit 8. The administrative law judge also accorded less weight to the opinion of Dr. Jelic, the autopsy prosector, because the doctor failed to explain his rationale for listing coal workers' pneumoconiosis as one of many "significant contributing factors to [the miner's] death." Decision and Order at 19; Director's Exhibit 10.

The administrative law judge next found that Dr. Green's opinion, regarding the cause of the miner's death, was "contrary to the other reasoned and documented medical opinions by similarly well-qualified Board-certified pathologists, such as Drs. Oesterling and Bush." Decision and Order at 19. Specifically, the administrative law judge noted that, while Dr. Green diagnosed "moderately severe" simple pneumoconiosis, Drs. Oesterling and Bush characterized the miner's coal workers' pneumoconiosis as "very mild" or "mild." *Id.* The administrative law judge accorded the most weight to Dr. Rosenberg's opinion because the doctor was the "sole pulmonary specialist" of record, and because the doctor "provided the most detailed explanation regarding the pattern of impairment, which ultimately led to the miner's respiratory death." *Id.* The administrative law judge, therefore, found that the evidence did not establish that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

¹⁰ The administrative law judge found that Dr. Wantz, in completing the miner's death summary, did not indicate that the miner's coal workers' pneumoconiosis contributed to his death. Decision and Order at 19; Director's Exhibit 9. The administrative law judge, therefore, found that Dr. Wantz's opinion "is, at best, inconclusive" regarding the role, if any, that the miner's coal workers' pneumoconiosis played in his death." *Id.* Because this finding is not challenged on appeal, it is affirmed. *Skrack*, 6 BLR at 1-711.

¹¹ Because no party challenges the administrative law judge's finding that the miner's death certificate is not sufficiently reasoned, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

We reject claimant's contention that the administrative law judge erred in his consideration of Dr. Jelic's opinion. The administrative law judge permissibly discredited Dr. Jelic's opinion because the doctor provided no explanation for his finding that coal workers' pneumoconiosis was a significant contributory factor in the miner's death. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucoctic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 19.

However, we agree with claimant's contention that the administrative law judge erred in crediting the opinions of Drs. Oesterling, Bush, and Rosenberg, that the miner's coal workers' pneumoconiosis did not contribute to his death, over Dr. Green's contrary opinion. The administrative law judge failed to explain why Dr. Rosenberg's Board-certification in Internal Medicine and Pulmonary Disease provided him with an advantage over Dr. Green, a physician who is Board-certified in Anatomic Pathology.¹² Moreover, the administrative law judge erred in failing to explain why he found Dr. Rosenberg's explanation regarding the cause of the miner's death to be more probative than that provided by Dr. Green. *Wojtowicz*, 12 BLR at 1-165.

The administrative law judge also questioned Dr. Green's opinion because the doctor's description of the miner's coal workers' pneumoconiosis (moderately severe) differed from that provided by Drs. Oesterling and Bush (mild or very mild). The administrative law judge, however, did not provide any explanation for why he found the

¹² Claimant argues that the administrative law judge erred in failing to consider that Dr. Green, in addition to being Board-certified in Anatomic Pathology and a professor of pathology, is (1) a co-author of the *Pathology Standards for Coal Workers' Pneumoconiosis*; (2) a co-author of the chapter on "Occupational Lung Disease" in *Pathology of the Lung*; (3) the author or co-author of chapters in twenty-two other medical textbooks and 136 peer-reviewed manuscripts; (4) the former Chief of the Pathology Section at the National Institute for Occupational Safety and Health; and (5) a consultant/group member assigned to revise the federal regulations for the National Coal Workers' Autopsy Program. Claimant's Brief at 6. Claimant argues that these additional qualifications entitle Dr. Green's opinion to greater weight. While Dr. Green's additional qualifications do not mandate that his opinion be accorded the greatest weight, the administrative law judge should consider these additional qualifications on remand, as they may be relevant in his consideration of the relative qualifications of all the physicians of record. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

assessments provided by Drs. Oesterling and Bush of the degree of coal workers' pneumoconiosis to be more reliable than that of Dr. Green. *Wojtowicz*, 12 BLR at 1-165; *see also Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001) (holding that an administrative law judge must provide support for favoring one opinion over another).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence did not establish that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(c). On remand, when reconsidering whether the relevant evidence establishes that the miner's death was due to, or hastened by, clinical pneumoconiosis, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

In sum, on remand, the administrative law judge should address whether the autopsy and medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202)(a)(2), (4). If the administrative law judge determines that the evidence establishes the existence of legal pneumoconiosis, he should address whether the evidence establishes that the miner's death was due to, or hastened by, legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). If necessary, the administrative law judge should separately address whether the evidence establishes that the miner's death was due to, or hastened by, clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge