

BRB No. 07-0453 BLA

E.B.)
(Widow of O.B.))
)
Claimant-Respondent)
)
v.)
)
INDIAN MOUNTAIN COAL COMPANY) DATE ISSUED: 02/29/2008
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2005-BLA-05307) of Administrative Law Judge Pamela Lakes Wood 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 The administrative law judge found that the evidence established that the miner had a coal mine employment history of 19.22 years, Decision and Order at 25, and that the weight of the evidence supported a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), Decision and Order at 19-23. In addition, the administrative law judge found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), based on the miner's length of coal mine employment, and that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis. Employer alleges error in the administrative law judge's analysis of the opinions of Drs. Perper, Fino, Naeye and Castle. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.²

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends that the administrative law judge erred in applying the holdings of the United States Court of Appeals for the Fourth Circuit, within whose

¹ Claimant is the widow of a miner who died on June 5, 2003. Claimant filed her claim for survivor's benefits on October 31, 2003. The miner's death certificate lists the cause of death as respiratory failure and pneumonia due to pulmonary fibrosis with coal workers' pneumoconiosis. Director's Exhibit 9. During his lifetime, the miner filed several claims. The denial of the miner's last claim, because the miner failed to establish that his total disability was due to either clinical or legal pneumoconiosis, was affirmed by the Board in [*O.B.*] *v. Indian Mountain Coal, Inc.*, BRB No. 01-0787 BLA (May 5, 2002) (unpublished). No further action was taken on this claim and the issue of the miner's entitlement to benefits is not before us.

² We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination as well as her findings that claimant established that the miner suffered from pneumoconiosis arising out of coal mine pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

jurisdiction this case arises, in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), to discredit the opinions of Drs. Castle and Naeye regarding the cause of the miner's death.³ Specifically, employer contends that the administrative law judge erred in discrediting the opinions of Drs. Castle and Naeye because they did not find that the miner had pneumoconiosis. Employer contends, citing *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), that the Fourth Circuit has held that an administrative law judge may credit a physician's opinion regarding the cause of a miner's disability, even when the physicians do not find pneumoconiosis, if the physicians acknowledge the presence of a respiratory or pulmonary impairment. Thus, employer contends that the administrative law judge should have made this inquiry in evaluating the opinions of Drs. Castle and Naeye, since Dr. Castle acknowledged that the miner had risk factors for coal workers' pneumoconiosis and that there were varied opinions in the record concerning the existence of pneumoconiosis but, nonetheless, opined that pneumoconiosis could not have caused, contributed to, or hastened the miner's death. Similarly, employer contends that the administrative law judge erred in according less weight to Dr. Naeye's opinion on the basis that Dr. Naeye failed to find pneumoconiosis, since Dr. Naeye did, in fact, find pneumoconiosis, but opined that the pneumoconiosis present in the miner was too minimal to have caused the lung damage that ultimately caused the miner's death.

In this case, the administrative law judge accorded greatest weight to the medical report of Dr. Perper, who opined that pneumoconiosis contributed to the miner's death, as Dr. Perper found pneumoconiosis,⁴ consistent with the administrative law judge's finding. Claimant's Exhibit 3; Decision and Order at 27. The administrative law judge accorded less weight to the opinions of Drs. Castle and Fino, that the miner's death was not due to pneumoconiosis, because neither physician diagnosed the presence of pneumoconiosis. Employer's Exhibits 6, 11.

³ In *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit held that a physician's opinion regarding the cause of disability may be discredited if, contrary to an administrative law judge's determination, the doctor finds that the miner did not have pneumoconiosis.

⁴ Dr. Perper found that pneumoconiosis was both a primary cause and a hastening factor in the miner's death, because normal lung tissue was replaced by pneumoconiotic lesions leading to hypoxemia which, in turn, contributed to the miner's death. Claimant's Exhibit 3.

As employer contends, however, the opinion of Dr. Castle, that the miner's death was not due to pneumoconiosis, was based on his acknowledgement that the risk factors for the disease were present and the fact that the record contained medical reports that varied concerning the presence of the disease. Likewise, as employer contends, Dr. Castle opined that, even assuming the existence of pneumoconiosis, it did not contribute to the miner's death. Additionally, as employer contends, Dr. Naeye did not state that the miner did not have pneumoconiosis but stated that the level of pneumoconiosis present was insufficient to have contributed in any way to the miner's death. We agree with employer, therefore, that these opinions should be evaluated pursuant to the Fourth Circuits holdings in *Mays*, *Ballard* and *Hobbs*. The administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) is, therefore, vacated and the case is remanded for further consideration of the medical opinion evidence.

In the interest of judicial economy, and in order to avoid repetition of error on remand, we address the remainder of employer's allegations of error at Section 718.205(c). Employer argues that the administrative law judge erred in according less weight to the opinions of Drs. Castle and Fino based on their lack of credentials in pathology. Employer asserts that the record does not support the administrative law judge's conclusion that preference should be accorded the opinion of Dr. Perper, solely because he was a pathologist, as to the cause of death over the opinions of Drs. Castle and Fino, who were highly-credentialed pulmonologists. We agree.

On remand, if the administrative law judge finds that Dr. Perper's opinion is reasoned and documented, he must explain the basis for his decision to credit the opinion and he must specifically explain why Dr. Perper's position as a pathologist places him in a superior position to that of Drs. Castle and Fino, to render an opinion as to the cause of the miner's death. See *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *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); see *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-22-23 (1992).

Further, employer contends that the administrative law judge erred in failing to explain why Dr. Perper's additional qualification in *forensic* medicine made his opinion superior to that of Dr. Naeye since both physicians were qualified in anatomical and clinical medicine. As employer asserts, the administrative law judge did not explain how Dr. Perper's additional expertise in *forensic* pathology entitled his opinion to superior weight on the issue of whether pneumoconiosis played a role in the miner's death. On remand, the administrative law judge must explain his reasoning. See generally *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

Employer also argues that the administrative law judge ignored the inconsistency in Dr. Perper's opinion with respect to the miner's smoking history, *i.e.*, that Dr. Perper stated, on the one hand, that the miner was a "life-long non-smoker" and at the same time he stated that the miner had been a "light smoker." The administrative law judge must, on remand, address this inconsistency. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), *see generally Stark v. Director, OWCP*, 9 BLR 1-36 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Further, in considering Dr. Perper's opinion on remand, since Dr. Perper relied on medical literature to support his finding that the miner's death was caused by pneumoconiosis, the administrative law judge must, as employer contends, also consider the contrary opinions of Drs. Fino and Naeye, who also used medical literature to support their opinions. *See U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Lastly, employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Fino and Castle on death causation because they did not recognize that pneumoconiosis was a latent and progressive disease. Employer asserts, however, that the administrative law judge erred in discrediting their opinions for this reason because neither doctor ever stated that pneumoconiosis could never be a latent and progressive disease. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002). On remand, therefore, the administrative law judge must reconsider the opinions of Drs. Castle and Fino.

In conclusion, the administrative law judge's finding of death causation is vacated, and this case is remanded for the administrative law judge to consider the opinions of Drs. Castle and Fino in light of the Fourth Circuit's holdings in *Mays*, *Ballard*, and *Hobbs*. Additionally, the administrative law judge must reconsider whether the opinions on death causation are reasoned and what role the physicians' qualifications play on the credibility of their opinion.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part, vacated in part, and the case is remanded 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