

BRB No. 97-1330 BLA

CONSTANCE WELKER)
(Widow of EVERT WELKER))

Claimant-Respondent)

v.)

READING ANTHRACITE COMPANY)

and)

LACKAWANNA CASUALTY)
COMPANY)

Employer/Carrier-)
Petitioners)

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

Party-in-Interest)

DATE ISSUED:

DECISION AND ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand - Awarding Benefits (95-BLA-0695) of Administrative Law Judge Ralph A. Romano with respect to 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). This is the second time that this case has been before the Board. In his initial Decision and Order, the administrative law judge credited the miner with twenty-nine years of coal mine employment and considered the claim pursuant to the regulations set forth in

20 C.F.R. Part 718.¹ The administrative law judge indicated that the sole issue before him was whether pneumoconiosis caused or contributed to the miner's death under the terms of 20 C.F.R. §718.205(c). The administrative law judge found that the evidence of record did not support such a finding. Accordingly, benefits were denied.

Claimant filed an appeal with the Board. The Board vacated the administrative law judge's determination under Section 718.205(c) on the ground that the administrative law judge neglected to consider fully the death certificate executed by Dr. Weber. *Welker v. Reading Anthracite Coal Co.*, BRB No. 96-0509 BLA (Aug. 29, 1996)(unpublished), *slip opinion* at 2-3. The Board also held that the administrative law judge did not provide an adequate explanation for his finding that the opinion in which Dr. Feudale identified pneumoconiosis as a contributing cause of death is contrary to the evidence of record. *Id.* at 3. Finally, the Board instructed the administrative law judge to determine on remand whether the evidence of record establishes that the miner received chemotherapy for his malignant melanoma and to reconsider his weighing of the medical opinions under Section 718.205(c) in light of this finding. *Id.*

On remand, the administrative law judge found that the opinions of Drs. Weber and Feudale supported a determination that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2) and in accordance with the holding of the United States Court of Appeals for the Third Circuit in *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).² In reaching this finding, the administrative law judge concluded that the contrary opinions of Drs. Spagnolo and Levinson were entitled to little weight. Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly weigh the medical opinions relevant to the cause of the miner's death. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

¹Claimant in this case is the surviving spouse of the miner, Evert Welker, who died on November 18, 1993. Director's Exhibit 3.

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 30; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). The court determined in *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989), that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death under 20 C.F.R. §718.205(c)(2).

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).

Employer alleges first that the administrative law judge erred in finding that the death certificate, prepared by Dr. Weber, constituted probative evidence under Section 718.205(c), as Dr. Weber's conclusions are not consistent with the medical records documenting the miner's final hospitalization, Dr. Weber did not possess the qualifications or personal knowledge necessary to render an opinion regarding the cause of the miner's death, and Dr. Weber did not identify the rationale underlying his conclusions. Only the latter contention has merit. With respect to Dr. Weber's alleged lack of qualifications, the administrative law judge is not required to give less weight to a physician's opinion on the ground that the physician's qualifications are not of record. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Regarding whether Dr. Weber had knowledge of the miner's status at the time of his death, the administrative law judge's finding on this issue is supported by substantial evidence. The miner's widow identified Dr. Weber as one of her husband's attending physicians and the hospital records include a report of an x-ray taken the day before the miner's death in which Dr. Weber is designated as the physician who requested the x-ray. Director's Exhibit 17 (Report of Dr. Peralta's reading of 11/17/98 chest x-ray); Hearing Transcript at 15. In addition, contrary to employer's assertion, the conditions to which Dr. Weber referred on the death certificate - pneumonia, malignant melanoma, anthracosilicosis, and coronary artery disease - are noted in the records concerning the miner's last hospitalization. Director's Exhibits 3, 17.

Employer is correct, however, in alleging that the administrative law judge did not explain his apparent determination that Dr. Weber identified the underlying basis of the conclusions set forth on the death certificate. As the Third Circuit stated in a case involving a death certificate and subsequent report prepared by the miner's treating physician, "the mere statement of a conclusion by a physician, without any explanation for the basis of that statement, does not take the place of the required reasoning." *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Moreover, it is not clear that Dr. Weber actually determined that anthracosilicosis contributed to the miner's death, inasmuch as he identified this disease in the section of the death certificate labeled "Other Significant Conditions." Director's Exhibit 3. This portion of the certificate does not include any reference as to whether the conditions identified are considered to have contributed to the conditions identified as the "Immediate Cause" of death. *Id.* The administrative law judge's finding under Section 718.205(c)(2) is vacated, therefore, and this case is remanded to the administrative law judge for reconsideration of whether Dr. Weber rendered a reasoned medical opinion relevant to Section 718.205(c)(2) when he executed the death certificate. *See Lango, supra*; *see Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Employer also maintains that the administrative law judge erred in crediting the medical opinion of Dr. Feudale, whose deposition testimony contains statements in which the doctor indicated that anthracosilicosis played a substantial role in and/or hastened the miner's demise. Claimant's Exhibit 3 at 17-18, 44. The administrative law judge indicated that he found Dr. Feudale's opinion

well-reasoned and supported by the hospital records, inasmuch as the doctor addressed the fact that the miner's last hospital admission was for the treatment of congestive heart failure rather than melanoma, provided a causal link between the miner's heart disease and his pneumoconiosis, and testified that the miner's pneumoconiosis played a more significant role in the miner's death than the melanoma. Decision and Order on Remand at 5. The administrative law judge also stated that he found Dr. Feudale's opinion to be persuasive because it established that pneumoconiosis hastened the miner's death. *Id.*

Employer asserts that the administrative law judge's decision to credit Dr. Feudale's opinion should be vacated, as the administrative law judge did not adequately address the extent to which this opinion is reasoned. Employer argues specifically that Dr. Feudale's conclusions regarding the cause of the miner's death are not well-reasoned, as Dr. Feudale did not discuss the significance of the miner's malignant melanoma and stated his determination that pneumoconiosis contributed to the miner's death in equivocal terms. In addition, employer argues that the administrative law judge erred in suggesting that Dr. Feudale's opinion is entitled to additional weight based upon his status as the miner's treating physician from 1975 until the miner's demise. These contentions have merit, in part.

As employer notes, Dr. Feudale described the miner's melanoma as an "incidental" finding, but also stated that it was an "ominous," "serious," and "life-threatening" condition. Claimant's Exhibit 3 at 20, 32-33. In addition, although Dr. Feudale noted correctly that the miner was admitted to the hospital for treatment of congestive heart failure, rather than melanoma, this does not appear to support his opinion, that melanoma could not have been a cause of the miner's death, as the miner's cancer was not discovered until after his admission to the hospital. Director's Exhibit 17. Moreover, Dr. Best, one of the miner's attending physicians, noted that by November 10, 1993, the miner had no clinical evidence of heart failure. *Id.* Employer is also correct in noting that Dr. Feudale's deposition testimony contains numerous instances in which the doctor qualified his assessment of the extent to which pneumoconiosis contributed to the miner's death. Dr. Feudale used the term "probably" and stated that he "did not know" or "had no idea" how great the contribution of the miner's lung disease was and that it was "reasonable to assume" that pneumoconiosis was a contributing factor in the miner's death. Claimant's Exhibit 3 at 17-18, 44. In contrast, Dr. Feudale also stated, without equivocation, that anthracosilicosis played a substantial role in the miner's demise. *Id.* at 17, 18.

With respect to Dr. Feudale's status as a treating physician who had examined the miner, although the administrative law judge did not explicitly refer to this status, his decision to accord less weight to the opinions of Drs. Spagnolo and Levinson on the ground that they only conducted a record review indicates that the administrative law judge relied upon this status, in part, in according greater weight to Dr. Feudale's opinion.³ Although an administrative law judge may, in the exercise of his or her discretion as fact-finder, give more weight to a medical report submitted by a treating or examining physician, these principles are not to be applied mechanically. *See Tedesco v. Director,*

³Contrary to employer's assertion, the administrative law judge acknowledged that Dr. Feudale last saw the miner on September 24, 1993. Decision and Order on Remand at 4; Claimant's Exhibit 3 at 14, 23.

OWCP, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). In the present case, it appears that the administrative law judge did so, as he did not set forth the rationale underlying his apparent determination that Dr. Feudale could better assess the cause of the miner's demise based upon his status as a treating and/or examining physician.

Inasmuch as employer has identified a number of factors that are relevant to the credibility of Dr. Feudale's opinion and the administrative law judge did not explain his decision to accept Dr. Feudale's conclusions, we vacate the administrative law judge's findings regarding this opinion. The administrative law judge must reconsider this opinion and provide a complete explanation of his findings on remand in accordance with the Administrative Procedure Act (APA), 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). See *Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983).

Concerning the administrative law judge's weighing of Dr. Spagnolo's medical report, employer argues that the administrative law judge erred in discrediting Dr. Spagnolo's opinion on the grounds that he did not examine claimant, is not a pathologist, did not acknowledge that pneumonia was identified as an immediate cause of death on the death certificate, and stated inaccurately that the miner received chemotherapy.⁴ Based upon the testimony of the miner's widow and a review of the hospital records, the administrative law judge rationally determined that the miner did not undergo chemotherapy. Decision and Order on Remand at 5; Director's Exhibit 17; Hearing Transcript at 13-14. In light of this permissible finding, one of the premises underlying Dr. Spagnolo's statement, specifically, that "the terminal worsening of [the miner's] condition was directly related to chemotherapy and the malignancy," Director's Exhibit 18, is incorrect. The administrative law judge acted within his discretion, therefore, in discrediting Dr. Spagnolo's opinion regarding the cause of the miner's death. See *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Inasmuch as the administrative law judge provided a valid alternative rationale for according little weight to Dr. Spagnolo's medical report, any error in the other grounds to which the administrative law judge referred is harmless. See *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 164 n.5 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

⁴Employer also implies that the administrative law judge should have given additional weight to the opinions of Drs. Levinson and Spagnolo because they are Board-certified in Internal Medicine and Pulmonary Disease, while Dr. Feudale is merely Board-certified in Family Medicine. We reject this argument, as the administrative law judge is not required to rely upon this factor in weighing the medical reports of record. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Employer also maintains that the administrative law judge erred in giving less weight to Dr. Levinson's opinion, that pneumoconiosis did not contribute to, or hasten, the miner's death. Employer contends that the grounds upon which the administrative law judge relied - that Dr. Levinson is not a pathologist, did not examine the miner, and did not report the miner's course in the hospital correctly - were inappropriate. These allegations of error have merit. Regarding the administrative law judge's statement that Dr. Levinson is not a pathologist and did not examine the miner, although an administrative law judge may rely upon these factors in determining the weight to which an opinion is entitled under certain circumstances, he may not apply them selectively in analyzing the medical opinions of record. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). In the present case, the administrative law judge applied his concern regarding whether the physicians who offered an opinion as to cause of the miner's demise were pathologists in a selective manner, inasmuch as the administrative law judge did not find that the credibility of Dr. Feudale's opinion was affected by the fact that he is not a pathologist. Moreover, in light of the fact that no autopsy was performed upon the miner, the administrative law judge's reference to whether a physician is qualified as a pathologist is inapposite.

In addition, the administrative law judge noted correctly that Dr. Levinson believed that the miner received chemotherapy, but the administrative law judge did not consider the significance of Dr. Levinson's testimony that, even if he assumed that the miner had not been given such treatment, his opinion that pneumoconiosis did not contribute to the miner's demise would remain unchanged. Employer's Exhibits 2, 5 at 26. Finally, the administrative law judge did not accurately summarize Dr. Levinson's statement concerning the purpose of the miner's last hospital admission. According to the administrative law judge, Dr. Levinson's conclusion that the miner did not suffer from respiratory decomposition or failure is not supported by the miner's hospital records. Decision and Order on Remand at 5. Dr. Levinson actually noted that the miner was not admitted to the hospital for the treatment of respiratory decomposition or failure. Employer's Exhibit 5 at 26. This statement is supported by the reports of the miner's presentation in the emergency room which were signed by Dr. Best. Director's Exhibit 17. Because the grounds upon which the administrative law judge rejected Dr. Levinson's opinion are not rational and are not supported by substantial evidence, we vacate the administrative law judge's findings with respect to Dr. Levinson's opinion. The administrative law judge must reconsider Dr. Levinson's report and deposition testimony on remand.

In summary, the administrative law judge's finding that claimant established that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2) is vacated and the case is remanded to the administrative law judge for reconsideration of the death certificate prepared by Dr. Weber and the opinions of Drs. Feudale and Levinson.

Accordingly, the Decision and Order on Remand - Awarding Benefits of the administrative law judge is affirmed in part and vacated in part 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

JAMES F. BROWN
Administrative Appeals Judge