

BRB No. 08-0456 BLA

L.S.J.)
(Widow of J.J.))
)
Claimant-Respondent)
)
v.)
)
ISLAND CREEK COAL COMPANY)
) DATE ISSUED: 03/31/2009
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits of Administrative Law Judge Daniel F. Solomon (2006-BLA-05791) rendered 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

¹ Claimant is the widow of the miner, who died on November 27, 2004. Director's Exhibit 13. The miner filed three claims for black lung benefits that were all finally denied. Claimant filed her survivor's claim on June 30, 2005. Director's Exhibit 1. The district director issued a Proposed Decision and Order awarding benefits on March 31, 2006. Director's Exhibit 23. Thereafter, employer requested a hearing and the case was forwarded to the Office of Administrative Law Judges. Director's Exhibits 51, 57.

credited the miner with fourteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge accepted the parties' stipulation that the evidence was sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment. The administrative law judge also determined that the evidence was sufficient to establish that the miner suffered from legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) caused, in part, by coal dust exposure. The administrative law judge further concluded that the miner's death was hastened by legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

Employer appeals, alleging that the administrative law judge erred in finding that the miner suffered from legal pneumoconiosis, which also hastened his death. Neither claimant nor the Director, Office of Workers' Compensation Programs, has 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 rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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. §718.205(a)(1)-(a)(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). 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 the direct cause of death or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

² Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

Employer asserts that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis.³ Employer contends that the administrative law judge applied two improper presumptions in this case: “(1) that COPD progresses and is always due to coal mine dust [exposure]; and (2) that Dr. Houser rationally linked causation of COPD to coal dust exposure.” Employer’s Brief at 16. Employer notes that claimant bears the burden to establish that the miner’s COPD was due to coal dust exposure without benefit of any presumptions. Employer further contends that the administrative law judge failed to adequately explain how he resolved the conflict in the medical opinions as to the existence of legal pneumoconiosis and whether the miner’s death was hastened by pneumoconiosis. Employer’s assertions of error have merit.

Although the parties’ stipulated to the existence of clinical pneumoconiosis, the administrative law judge focused his analysis on whether the miner suffered from legal pneumoconiosis, in the form of COPD due, in part, to coal dust exposure, and whether legal pneumoconiosis hastened his death. The death certificate was signed by Dr. Houser, the miner’s treating physician, and lists the immediate cause of death as anoxic encephalopathy due to cardiac arrest from atherosclerotic heart disease. Director’s Exhibit 13. Other conditions contributing to death included COPD. *Id.* An autopsy was performed by Dr. Jordan on November 29, 2004. Director’s Exhibit 15. Dr. Jordan identified atherosclerotic cardiovascular disease, cardiomegaly, pulmonary emphysema, acute bronchopneumonia and foci of pigmented macrophages with minimal fibrosis in the lungs. *Id.* Dr. Jordan attributed the cause of death to acute myocardial infarct complicated by bronchopneumonia, pulmonary emphysema and hypoxic encephalopathy. *Id.* at 15-3.

Dr. Johnson treated the miner from December 7, 1999, until his death, and prepared a report dated January 6, 2006, indicating that the miner suffered from COPD due to smoking and coal dust exposure. Director’s Exhibit 29. During a deposition conducted on March 22, 2007, Dr. Johnson characterized the miner’s condition as legal pneumoconiosis and opined that it “may have been” a contributing factor to the miner’s death because “COPD can lead to right-sided heart failure or congestive heart failure in some people.” Claimant’s Exhibit 2. Dr. Johnson further testified that because the

³ Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as “any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2). The term “arising out of coal mine employment” denotes “any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b).

miner's chronic hypoxemia from COPD was "hard on [the miner's] heart," from that standpoint, it was a contributing factor to the miner's death, although he agreed that coronary artery disease was the major factor. *Id.*

In a report dated November 2, 2006, Dr. Houser indicated that he first examined the miner on October 22, 1979 and treated him periodically from 2002 until his death. Director's Exhibit 29. Dr. Houser diagnosed that the miner suffered from chronic bronchitis and COPD due to the combined effects of coal dust exposure and cigarette smoking. *Id.* In a deposition conducted on June 8, 2007, Dr. Houser explained that there is a synergistic effect caused by smoking and coal dust exposure, such that "the two conditions together cause a worse condition than you would expect from either factor alone." *Id.* Dr. Houser indicated that he diagnosed COPD due, in part, to coal dust exposure based on the miner's coal mine history and the objective findings of obstructive lung disease. *Id.* Dr. Houser testified that the miner was severely hypoxic as a result of COPD and that "the cardiac arrhythmia, the cardiac arrest, the anoxic encephalopathy, and subsequent death . . . would have been less likely to occur" in the absence of the miners' lung disease. *Id.* When asked whether legal pneumoconiosis contributed to death, Dr. Houser responded, "Right. In conjunction with coronary artery disease." *Id.*

Dr. Repsher examined claimant on November 13, 2002 and prepared a report on December 4, 2002, at which time he found no evidence of pneumoconiosis and diagnosed chronic airways obstruction due to smoking. Employer's Exhibit 2. Dr. Repsher was deposed on July 5, 2007, and testified that the miner had minimal clinical pneumoconiosis and centrilobular emphysema, most likely caused by smoking, based on his own examination and a review of several medical records. Employer's Exhibit 5. Based on his review of the autopsy report and the clinical description of death, Dr. Repsher opined that the miner's death was not due to a pulmonary or respiratory disease and was due entirely to an acute myocardial infarction. *Id.*

Dr. Caffrey reviewed the miner's autopsy slides and certain medical evidence and prepared a report dated November 7, 2005. Director's Exhibit 28. Dr. Caffrey found minimal clinical pneumoconiosis, which he described as too mild to have caused the miner's death. *Id.* Dr. Caffrey testified at his deposition on December 7, 2006, that the miner suffered from COPD, emphysema and chronic bronchitis due to smoking. Dr. Caffrey opined that the miner did not have legal pneumoconiosis and that the miner's death was neither caused by, related to, nor hastened by clinical or legal pneumoconiosis. Employer's Exhibit 8.

Dr. Roggli reviewed the autopsy slides and certain medical records and prepared a report on August 19, 2006. Employer's Exhibit 9. Dr. Roggli indicated that there was no evidence of a coal-dust related lung condition. *Id.* He identified silicotic fibrosis in the lymph nodes and centrilobular emphysema. *Id.* Dr. Roggli opined that the miner died as

a result of an acute myocardial infarction from severe atherosclerotic cardiovascular disease and opined that coal dust exposure did not contribute to any pulmonary or respiratory impairment from which the miner may have suffered, nor did it contribute to or hasten his death. *Id.* Dr. Roggli testified at his deposition on October 24, 2006, that the miner's centrilobular emphysema was due to smoking. Employer's Exhibit 10.

Dr. Jarboe prepared a report dated September 21, 2006, based on his review of certain medical records, including the autopsy report, death certificate, and reports of Drs. Caffrey and Houser. Employer's Exhibit 3. Dr. Jarboe opined that there was evidence of clinical pneumoconiosis and a mild to moderate respiratory impairment, with a significant bronchodilator response, due to smoking, based on his review of the miner's medical records. *Id.* Dr. Jarboe opined that there was no evidence that the miner had clinical pneumoconiosis during his lifetime but diagnosed simple coal workers' pneumoconiosis based on the autopsy report of Dr. Caffrey. *Id.* Dr. Jarboe was deposed on August 23, 2007, and testified that the miner suffered from a variable and reversible respiratory impairment over time due to his smoking habit. Employer's Exhibit 4. Dr. Jarboe disagreed with Dr. Houser that hypoxemia caused by COPD contributed to the miner's heart arrhythmia and hastened the miner's death. *Id.* He concluded that the miner's death was due to his heart condition unrelated to coal dust exposure. *Id.*

After summarizing the medical opinions, the administrative law judge acknowledged that there was a conflict in the record as to whether the miner suffered from legal pneumoconiosis, in the form of COPD due, in part, to coal dust exposure, or whether the miner's COPD was due entirely to smoking. The administrative law judge discussed Dr. Houser's opinion regarding the etiology of the miner's COPD:

Dr. Houser noted the smoking history but noted that there was a combined effect from aggravation by mining exposure. He asserted that when a person smokes and also works in a dusty environment, such as coal mining, there is a synergistic effect with chronic bronchitis. The resultant disease is worse than either factor alone or cumulatively. He referred to literature from the American Thoracic Society to substantiate this position.

Decision and Order at 13-14. The administrative law judge found that Dr. Houser was one of the miner's treating and attending physicians at the time of death, and further noted that because of Dr. Houser's "relationship [with the miner] from 1979, . . . wherein he performed a full respiratory evaluation[,] . . . repeatedly observed him, examined him, [and] treated him[,]” Dr. Houser was in a position to obtain “superior information as a result.” Decision and Order at 14-15. Thus, the administrative law judge found that Dr. Houser's opinion was entitled to “significant weight.” Decision and Order at 15.

The administrative law judge stated that Dr. Caffrey “denies that legal pneumoconiosis exists in the record” but that he “did not address hypoxemia at all.” *Id.* The administrative law judge noted that Dr. Roggli specifically opined that the miner suffered from hypoxemia caused by his COPD, but that Dr. Roggli attributed the miner’s COPD to smoking and not to coal dust exposure. Decision and Order at 15. The administrative law judge stated that Dr. Repsher diagnosed moderately severe COPD, but that his findings were not “independent of Dr. Caffrey” as to the cause of the miner’s death. *Id.* The administrative law judge further noted that “[c]laimant reminds me” that while Dr. Jarboe opined that the miner did not have COPD, “he basically disagrees with everyone, although he never treated [the miner.]” Decision and Order at 15, citing Post-Hearing Brief of Claimant at 19. The administrative law judge then summarily concluded: “I find that the full weight of the evidence does disclose that the [m]iner had COPD and emphysema, in addition to pneumoconiosis.” Decision and Order at 15-16.

As to the etiology of the miner’s COPD, the administrative law judge stated, “I find that the physical facts better lend themselves to a conclusion that there had been aggravation of other respiratory conditions (i.e., the effects of smoking) by exposure to breathing materials found in mining” and thus, he found that “Dr Houser’s conclusion is the most rational in this record.” Decision and Order at 16. In addition, the administrative law judge noted that while Drs. Caffrey and Roggli acknowledged the existence of “silicosis, COPD and emphysema in this record, they do not address the synergistic effect from exposure to coal mine employment and smoking as described by Dr. Houser.” *Id.*

We agree with employer that the administrative law judge’s determination to credit Dr. Houser’s diagnosis of legal pneumoconiosis fails to comport with the Administrative Procedure Act (APA), 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), which requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge did not resolve the conflict in the evidence as to the etiology of the miner’s COPD and provided no explanation as to why Dr. Houser’s opinion, attributing the miner’s COPD to coal dust exposure and smoking, was more credible than the contrary opinions of Drs. Repsher, Caffrey, Roggli, and Jarboe, who opined that the miner’s COPD was unrelated to coal dust exposure. Decision and Order at 15-16.

Additionally, the administrative law judge erred in relying on Dr. Houser’s opinion solely based on his status as a treating physician, without consideration as to whether Dr. Houser’s diagnosis of legal pneumoconiosis was reasoned and documented. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the opinions of treating physicians are neither presumptively

correct nor afforded automatic deference. *Williams*, 338 F.3d at 514; 22 BLR at 2-648-49; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). Rather, “the opinions of treating physicians get the deference they deserve based on their power to persuade.” *Williams*, 338 F.3d at 514, 22 BLR at 2-648-49. Because the administrative law judge has failed to properly consider whether each physician’s opinion as to the existence of legal pneumoconiosis is reasoned and documented, his finding at 20 C.F.R. §718.202(a)(4) is in error. *Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165.

Additionally, we agree with employer that the administrative law judge exceeded his authority in stating that “the physical facts better lend themselves to a conclusion that there had been aggravation of other respiratory conditions (i.e., the effects of smoking) by exposure to breathing materials found in mining.” Decision and Order at 16. Although the weighing of the evidence is for the administrative law judge, the interpretation of medical data is for the medical experts. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Thus, it was error for the administrative law judge to reach his own independent medical conclusions as to the existence of legal pneumoconiosis and thereby substitute his opinion for those of Drs. Repsher, Caffrey, Roggli, and Jarboe that there has been no aggravation of the miner’s COPD by coal dust exposure.⁴

Moreover, the administrative law judge erred in failing to apply the proper burden of proof pursuant to 20 C.F.R. §718.202(a)(4). Claimant does not satisfy her burden of proving the existence of legal pneumoconiosis based solely on evidence that the miner suffered from COPD. Rather, the administrative law judge must determine whether a preponderance of the reasoned medical evidence establishes that the miner’s COPD was due, in part, to coal dust exposure, in order to find that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201. Because the administrative law judge has failed to explain the basis for his credibility findings as required by the APA, and his determination that claimant established the existence of legal pneumoconiosis is not supported by substantial evidence, *see Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we vacate administrative law judge’s finding pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for further consideration.

⁴ We agree with employer that the administrative law judge erred in attributing less weight to the deposition testimony of Drs. Caffrey and Roggli on the grounds that these doctors were not cross-examined. Employer’s Brief at 21-22. The record indicates that claimant’s counsel was properly notified of the depositions but chose not to participate or file any objection to the physicians’ testimony.

Because we vacate the administrative law judge's finding that the miner suffered from legal pneumoconiosis, we also vacate his determination that the miner's death was hastened by legal pneumoconiosis. However, in the interest of judicial economy, we address employer's assertions of error with respect to the administrative law judge's credibility determinations at 20 C.F.R. §718.205(c). In considering the issue of death causation, the administrative law judge noted that Dr. Houser "as the treating physician[,] as well as a [B]oard-certified pulmonologist[,] is qualified to determine whether there was a contribution [by legal pneumoconiosis] to [the miner's] death." Decision and Order at 16. The administrative law judge further found:

In the last year, [the miner] needed additional supplementary oxygen. In 2002, [the miner] had respiratory failure and the hypoxemia was partly masked by supplemental oxygen. But in the end, COPD[,] partly from pneumoconiosis, hypoxemia, and coronary artery disease[,] marked the demise. I find that the records from Dr. Soni and Deaconness Hospital substantiate this opinion.

Id. The administrative law judge noted that while Drs. Caffrey and Roggli opined that the amount of black pigment found in the miner's lungs was too mild to have caused or hastened the miner's death, "there is no benchmark in the law to determine what may be 'too mild,' therefore I may select a better reasoned opinion." *Id.* The administrative law judge further noted that while Drs. Caffrey and Roggli "acknowledge that there is silicosis, COPD and emphysema in this record, they do not address the synergistic effect of coal dust exposure to coal mine employment and smoking as described by Dr. Houser." *Id.* The administrative law judge then summarily concluded that "[e]mployer's experts do not fully address the concept of hastening" and found that Dr. Houser's rationale was "more consistent with the law of aggravation and hastening in this record." *Id.*

We agree with employer that the administrative law judge erred in automatically crediting Dr. Houser's opinion based on his status as a treating physician without taking into consideration whether Dr. Houser has offered a reasoned explanation as to how legal pneumoconiosis hastened the miner's death. The Sixth Circuit has held that pneumoconiosis hastens death only "if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Williams*, 338 F.3d at 518, 22 BLR at 2-655. The administrative law judge erred in failing to consider whether Dr. Houser provided a reasoned explanation as to how COPD hastened the miner's cardiac condition and death from anoxic encephalopathy. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Furthermore, the administrative law judge erred by not explaining why he finds Dr. Houser's assertion that there is a synergetic relationship between smoking and coal

dust exposure to be credible, or the significance of that synergetic theory on the issue of whether the miner's death from a heart attack was caused or hastened by coal dust exposure. We therefore conclude that the administrative law judge erred in rejecting the opinions of Drs. Caffrey and Roggli as being less credible because they did not specifically discuss this aspect of Dr. Houser's opinion.

Additionally, the administrative law judge erred in concluding that employer's experts "do not fully address the concept of hastening." Decision and Order at 16. Contrary to the administrative law judge's finding, Drs. Caffrey, Roggli and Repsher specifically explained the basis for their respective opinions that the miner's death was due entirely to his heart condition. Dr. Jarboe also specifically testified that there was insufficient evidence that claimant suffered hypoxemia at the time of death to support Dr. Houser's opinion that the miner's lung disease due, in part, to coal dust exposure, hastened his death. Each of these physicians attributed the miner's COPD and his heart condition to his lengthy smoking history and not coal dust exposure, and opined that legal pneumoconiosis did not hasten the miner's death. Employer's Exhibits 4, 5, 9, 10. Therefore, the administrative law judge erred by failing to fully consider the opinions of Drs. Houser, Repsher, Caffrey, Roggli and Jarboe and not resolving the conflict in their findings on death causation with that of Dr. Houser pursuant to 20 C.F.R. §718.205(c).

In sum, the administrative law judge must reconsider whether claimant has satisfied her burden to prove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, if necessary, whether the evidence is sufficient to establish that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In deciding these issues, the administrative law judge must examine each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explain his rationale for crediting or discrediting any of the evidence of record. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-284 (6th Cir. 2005); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-187, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). The administrative law judge must also explain the bases for all of his findings of fact and conclusions of law in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Accordingly, the Decision and Order Award of Benefits of the administrative law judge is vacated 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