

BRB No. 05-0972 BLA

LINDA C. TOLLIVER )  
(O/B/O and Widow of RUFUS W. )  
TOLLIVER) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
MAPLE MEADOW MINING COMPANY ) DATE ISSUED: 09/29/2006  
 )  
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 – Awarding Benefits on Both Claims of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Washington and Lee University School of Law Legal Clinic), Lexington, Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy 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, McGRANERY and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (2004-BLA-121 and 2004-BLA-6356) of Administrative Law Judge Gerald M. Tierney awarding benefits on a miner's claim and 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). The administrative law judge credited the miner with at least thirty-four years of qualifying coal mine employment, and adjudicated both claims pursuant to the provisions at 20 C.F.R. Part 718. After accepting the stipulation of the parties that the miner had clinical pneumoconiosis and some form of chronic obstructive pulmonary disease (COPD), the administrative law judge found that the weight of the evidence established that the miner also had legal pneumoconiosis pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b); that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c); and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded in both claims.

On appeal, employer challenges the administrative law judge's weighing of the evidence in both claims, and contends that by applying the evidentiary limitations at 20 C.F.R. §725.414 to the survivor's claim, the administrative law judge erred in failing to consider all relevant evidence. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, declining to take a position on the merits of either claim, but urging the Board to reject employer's arguments regarding the administrative law judge's evidentiary rulings in the survivor's claim.

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. 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).

Turning first to the procedural issue, employer maintains that the administrative law judge failed to consider all relevant evidence in the survivor's claim. Employer asserts that because the two claims were consolidated for hearing pursuant to 20 C.F.R. §725.460, all of the evidence introduced by the parties in both claims should have been admitted into a single record and considered by the administrative law judge.<sup>1</sup> Employer

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<sup>1</sup> We reject employer's argument that the administrative law judge erroneously failed to notify the parties that he would "overrule" the order of Administrative Law Judge Michael P. Lesniak consolidating the claims by bifurcating the evidence to be considered in each claim. Employer's Brief at 34. Claimant accurately notes that Judge's Lesniak's consolidation order specifically stated that "[i]n deciding the two

also argues that the district director has improperly altered the procedures in processing claims, without notice or explanation, by excluding the miner's record which he had previously included in the survivor's claim. The Director counters that employer has not identified the relevant evidence that failed to receive due consideration in the survivor's claim, and that regardless of any inconsistency by the district director in compiling records for claims, employer has not shown that it has suffered prejudice resulting from any alleged change.

After determining that the miner's claim, filed on June 1, 2000, was not subject to the revised regulatory limitations on evidence, the administrative law judge admitted into the record all exhibits submitted by the parties for inclusion. Hearing Transcript at 18. However, as the survivor's claim was filed on May 8, 2003, after the effective date of the amendments to the regulations, the administrative law judge applied the evidentiary limitations at Section 725.414 thereto, and found that good cause did not exist for the admission of evidence which exceeded those limitations. Hearing Transcript at 33-34.

It is well settled that the administrative law judge is allowed considerable discretion in the admission of evidence. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Moreover, the Board has previously addressed and rejected employer's argument that revised Section 725.414 is arbitrary and invalid, holding that it does not conflict with the provisions of the Administrative Procedure Act or the requirement at 30 U.S.C. §932(b) that all relevant evidence be considered, and we decline to revisit this issue. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*); *see also Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002). As employer has not demonstrated that it was prejudiced by the application of Section 725.414 to the survivor's claim, we affirm the administrative law judge's evidentiary rulings as a proper exercise of his discretion. *See Dempsey*, 23 BLR 1-47.

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claims, the administrative law judge will ensure that the proper evidentiary limits will be applied to each." Director's Exhibit 50 at 1; Claimant's Brief at 18.

Additionally, we reject employer's assertion that, pursuant to *Boyd & Stevenson Coal Co. v. Director, OWCP*, 407 F.3d 663 (4th Cir. 2005), the survivor's claim is not a separate claim but is derivative of the miner's claim, and therefore all evidence considered in the miner's claim should also be considered in the survivor's claim. Employer's Brief at 35. The Director correctly maintains that the narrow holding in *Boyd & Stevenson* is inapplicable under the facts of this case, and that pursuant to the controlling statute and regulations, since the miner filed his claim after January 1, 1982, his survivor was required to file a separate claim and prove that the miner's death was due to pneumoconiosis. Director's Brief at 4; *see* 30 U.S.C. §932(1), 20 C.F.R. §§718.1(a), 718.205(c).

Turning to the merits, employer challenges the administrative law judge's weighing of the evidence on the issues of legal pneumoconiosis, total respiratory disability, disability causation, and the cause of the miner's death. Specifically, employer asserts that the administrative law judge mischaracterized the opinions of employer's experts, substituted his own opinion for that of a qualified physician, and provided an inadequate rationale for crediting the opinions of Drs. Perper and Koenig over the contrary opinions of employer's experts. Some of employer's arguments have merit.

In finding that the miner's COPD constituted legal pneumoconiosis as defined at 20 C.F.R. §718.201(a)(2), the administrative law judge concluded, without explanation, that the opinions of Drs. Naeye, Rosenberg, Tomashefski, Fino and Bush, and/or the medical studies they relied on, were hostile to the Act, but credited the opinions of Drs. Perper and Koenig on the ground that their reports were "consistent with the miner's subjective complaints, medical history, objective diagnostic testing, history of coal mine employment, smoking history, and autopsy findings." Decision and Order at 17. Employer correctly maintains, however, that the administrative law judge offered no basis for finding that employer's experts were hostile to the Act, *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997), and failed to explain how the opinions of Drs. Perper and Koenig, and not those of employer's experts, were consistent with the factors listed by the administrative law judge. Similarly, while the administrative law judge determined that Drs. Perper and Koenig "clearly articulated the basis for their opinions and cited to medical studies in support of their conclusions," Decision and Order at 17, employer asserts that its experts did the same, and argues that the administrative law judge did not subject the opinions of claimant's experts to the same scrutiny or explain why they were better supported and more persuasive. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-291 (4th Cir. 1989). As the administrative law judge provided an insufficient rationale for his findings of fact, his Decision and Order does not comport with the requirements of 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), 30 U.S.C. §932(a). *See Webber v. Peabody Coal Co.*, 23 BLR 1-127 (2006)(*en banc*)(Boggs, J., concurring); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Accordingly, we vacate his finding of legal pneumoconiosis pursuant to Sections 718.201(a)(2), 718.202(a)(4), and remand this case for the administrative law judge to reweigh the conflicting medical opinions and fully articulate the rationale and underlying support for his credibility determinations.

There is also merit in employer's contention that the administrative law judge mischaracterized the opinions of employer's experts and substituted his own opinion in some instances. *See Hicks*, 138 F.3d 524, 21 BLR 2-291; *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). In evaluating the evidence on the issues of disability causation and death due to pneumoconiosis, the administrative law judge incorrectly equated the assessment of employer's experts, that the amount of

pneumoconiosis seen on the autopsy slides encompassed 1-5% of the lung tissue, *see* Decision and Order at 7-8, 14-16, with a 1-5% loss of lung *function*, *see* Decision and Order at 21-23. Consequently, the administrative law judge gave less weight to the opinions of Drs. Naeye, Tomashefski, Bush and Caffrey at Section 718.204(c) because he found that they “failed to explain or discuss the effects of a 1-5% loss of lung function due to CWP in a patient with metastatic lung cancer,” Decision and Order at 21; and gave less weight to the opinions of Drs. Naeye, Tomashesfski, Rosenberg and Castle at Section 718.205(c) for failure to adequately answer the question: “[e]ven if one were to accept that the miner had only 1-5% of his lung function destroyed by clinical pneumoconiosis, would this be enough to contribute or hasten a death in a person who has metastatic lung cancer, emphysema, chronic bronchitis, and pneumonia?” Decision and Order at 23. Further, in crediting Dr. Perper’s conflicting opinion as well reasoned, the administrative law judge found Dr. Perper’s conclusion, that pneumoconiosis affected 40-50% of the miner’s lung tissue on autopsy, to be consistent with the observations of Dr. Pia, the autopsy prosector, whereas the opinions of Drs. Naeye, Tomashefski, Caffrey, and Bush, that pneumoconiosis was mild and affected only 1-5% of lung tissue, were more consistent with the mostly negative chest x-rays and computerized tomography scans. Decision and Order at 21, 23. However, employer’s experts also relied on the autopsy findings in formulating their conclusions, and the administrative law judge provided no reason for finding the autopsy prosector’s opinion more probative than that of any other qualified pathologist, *see generally Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000), plus there was no basis for the administrative law judge’s finding that Dr. Perper’s opinion was more consistent with that of the autopsy prosector, since Dr. Pia did not specify the profusion or degree of the pneumoconiotic abnormalities he observed, nor did he state the percentage of lung tissue affected by pneumoconiosis, *see* Director’s Exhibit 45; Claimant’s Exhibit 24. In view of the foregoing, and as the administrative law judge’s findings on the issue of legal pneumoconiosis affected his weighing of the evidence on the issues of disability causation and cause of death, *see* Decision and Order at 22-23, we also vacate his findings at Sections 718.204(c) and 718.205(c). On remand, the administrative law judge must reassess the medical opinions of record thereunder, and provide an analysis which comports with the requirements of the APA. *See Webber*, 23 BLR 1-127; *Hicks*, 138 F.3d 524, 21 BLR 2-291.

We find no merit, however, in employer’s challenge to the administrative law judge’s finding that claimant established total respiratory disability pursuant to Section 718.204(b)(2). Although all of the miner’s pulmonary function studies and two blood gas studies produced non-qualifying values, the administrative law judge reasonably found them to be of little probative value as they were obtained at least one year prior to the miner’s death. Decision and Order at 3, 18-19. Contrary to employer’s arguments, the administrative law judge properly accorded little weight to the opinions of Drs. Crisalli, Rosenberg, Castle and Spagnolo, that the miner was not totally disabled before he developed lung cancer, as the appropriate inquiry was whether the miner was totally

disabled at the time of his death. Decision and Order at 19-20; *see* 20 C.F.R. §718.204(a); *Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). While Drs. Tomashefski and Bush concluded that the miner's pneumoconiosis was too mild to cause a disabling impairment, the administrative law judge determined that they did not address whether the miner suffered a totally disabling pulmonary impairment at the time of his death. Decision and Order at 20; *Roberts*, 74 F.3d 1233, 20 BLR 2-67. Additionally, the administrative law judge permissibly discounted the opinions of Drs. Fino, Tomashefski and Zaldivar on the grounds that they did not discuss the exertional requirements of the miner's job as an electrician,<sup>2</sup> *see Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker*, 927 F.2d 181, 15 BLR 2-16, and Drs. Fino and Zaldivar did not consider the medical evidence developed after the miner was diagnosed with lung cancer.<sup>3</sup> Decision and Order at 20; *see Roberts*, 74 F.3d 1233, 20 BLR 2-67. The administrative law judge determined that Dr. Koenig thoroughly analyzed the miner's condition and the heavy exertional requirements of his last coal mine employment, and properly credited the opinions of Drs. Perper and Koenig, that the miner had a totally disabling respiratory impairment prior to his death, as buttressed by the miner's most recent blood gas study obtained on January 17, 2001, which produced qualifying values, and medical records documenting the miner's rapidly declining pulmonary condition between 2002 and 2003 following the diagnosis of metastatic lung cancer. Decision and Order at 19; *Roberts*, 74 F.3d 1233, 20 BLR 2-67. As substantial evidence supports the administrative law judge's findings at Section 718.204(b)(2), they are affirmed.

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<sup>2</sup> The administrative law judge determined that the miner's job as an electrician required him to perform heavy labor, at least intermittently throughout the work day, which included lifting 75 to 80 pounds and carrying a tool belt that weighed 80 pounds. Decision and Order at 19.

<sup>3</sup> We reject employer's argument that the administrative law judge should have accorded greater weight to Dr. Zaldivar's opinion based on his status as the miner's treating physician pursuant to 20 C.F.R. §718.104(d), as the administrative law judge provided valid reasons for finding that the opinion was not credible on the issue of whether the miner was totally disabled at the time of his death. *See* 20 C.F.R. §718.104(d)(5); *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits on Both Claims is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL  
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge:

I concur in the result only.

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REGINA C. McGRANERY  
Administrative Appeals Judge