

BRB No. 96-0599 BLA

EVELYN RICE)	
(Widow of CLIFTON RICE))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
BETHENERGY)	
INCORPORATED)	
)	
MINES,)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

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

Jean Zeiler (United Mine Workers of America), Belle Vernon, Pennsylvania, for claimant.

Carl J. Smith, Jr. (Ceisler Richman Smith Law Firm), Washington, Pennsylvania, for employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (87-BLA-1057) of Administrative Law Judge Pamela Lakes Wood awarding benefits on a claim¹ filed

¹ Claimant is Evelyn Rice, widow of Clifton Rice, the miner, who died on January 25, 1980. Director's Exhibit 6. Mrs. Rice filed this application for survivor's benefits

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 is before the Board for the second time. Initially, Administrative Law Judge Arthur C. White credited the miner with forty years of coal mine employment and accepted employer's concession that the medical evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge further found that

on January 14, 1981. Director's Exhibit 1.

the pneumoconiosis arose out of the miner's coal mine employment pursuant to Section 718.203(b), but concluded that the pneumoconiosis was not totally disabling and had not caused or contributed to the miner's death pursuant to Section 718.205(b)(4) and (5). Accordingly, he denied benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's findings pursuant to Section 718.205(b)(4) because he mischaracterized certain medical evidence, and at Section 718.205(b)(5) because the legal standard he applied to determine whether pneumoconiosis contributed to the miner's death was no longer applicable.² *Rice v. BethEnergy Mines, Inc.*, BRB No. 89-3300 BLA (Oct. 16, 1992)(unpub.). Accordingly, the Board remanded the case for further consideration.³

² Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, construed Section 718.205 as encompassing situations in which pneumoconiosis actually hastened the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

³ The Board granted employer's motion for reconsideration but denied the relief requested, explaining that it had not reversed the administrative law judge's findings, but rather, had vacated his findings and remanded the case for further consideration because the weight to be accorded to the evidence under the applicable legal standard was a matter within the administrative law judge's discretion as fact-finder. *Rice v. BethEnergy Mines, Inc.*, BRB No. 89-3300 BLA (Mar. 1,

On remand,⁴ the administrative law judge applied the Third Circuit court standard as instructed by the Board and found that the evidence established that pneumoconiosis hastened the miner's death pursuant to Section 718.205(b)(5) and, accordingly, awarded benefits.

1995)(Order)(unpub.).

⁴ Because Judge White is no longer with the Office of Administrative Law Judges, the case was assigned on remand, without objection, to Judge Wood.

On appeal, employer's sole contention is that the administrative law judge exceeded the scope of the Board's remand order. Employer's Brief at 6-12. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.⁵

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 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).

We reject employer's assertion that the administrative law judge on remand was not authorized to reweigh the evidence. Contrary to employer's contention, Judge Wood was not bound by Judge White's weighing of the evidence at Section 718.205(b)(5) because the Board vacated Judge White's findings. See *Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). The Board remanded the case for consideration under the new legal standard and the administrative law judge on remand complied. Nothing in the Board's remand language specifically limited her to crediting the same reports that Judge White had credited.⁶

The Board is not empowered to reweigh the evidence, see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), and the administrative law judge on remand considered all relevant evidence and explained why her weighing of the evidence differed from that of Judge White. Decision and Order on Remand at 10-13. The administrative law judge permissibly accorded determinative weight to Dr. Pareso's opinion, which is legally sufficient to support a finding under *Lukosevicz*, based on his status as the miner's treating physician, see *Berta v. Peabody Coal Co.*, 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and because she found his explanation that pneumoconiosis reduced the miner's pulmonary capacity to withstand the final onslaught of malignant colon cancer to be persuasive and supported by the miner's hospital records and death certificate. Director's Exhibits 6, 8, 15; see *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Therefore, we reject employer's contention

⁵ We affirm as unchallenged on appeal the administrative law judge's finding pursuant to 20 C.F.R. §718.205(b)(4). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁶ We note that Judge White's determinations did not involve the credibility of witness testimony, but rather the weight to be accorded to documentary evidence. Hence, he was in no better position to make credibility determinations than was Judge Wood.

and affirm the administrative law judge's finding pursuant to Section 718.205(b)(5).

Claimant's counsel has submitted a complete, itemized statement requesting a fee for services performed in the prior appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of \$818.75 for 6.25 hours of legal services at an hourly rate of \$150.00 for a portion of those hours, and at an hourly rate of \$125.00 for the remainder. However, our review of the time entries listed reveals a total of 5.75 hours, not 6.25 hours.⁷ As the fee petition appears to be otherwise in order, the fee requested and hourly rate are not excessive, and no objections to the fee petition have been received, counsel is awarded a fee of \$750.00 to be paid directly to her by employer. 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed, and counsel is awarded a fee of \$750.00.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S.
DOLDER
Administrative Appeals Judge

REGINA C.
McGRANERY
Administrative Appeals Judge

⁷ The schedule attached to the fee petition lists 4.5 hours at an hourly rate of \$125.00, and 1.25 hours at an hourly rate of \$150.00. Fee Petition at 3.