

BRB No. 02-0244 BLA

THELMA SHIPLEY)		
(Widow of FORREST SHIPLEY))		
)		
Claimant-Petitioner)		
)		
v.)		
)		
DIRECTOR, OFFICE OF WORKERS')	DATE	ISSUED:
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Respondent)	DECISION and ORDER	

Appeal of the Decision and Order on Remand of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (99-BLA-1277) of Administrative Law Judge Daniel L. Leland denying benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

¹Claimant is Thelma Shipley, the widow of the miner, Forrest Shipley, who filed her claim for benefits in October 1997. Director's Exhibit 1. On August 2, 1995, Administrative Law Judge George P. Morin awarded benefits on the miner's claim. Director's Exhibit 15-83.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² This case is before the Board for the second time. In the initial Decision and Order, the administrative law judge noted that the parties stipulated to thirty-six and one-half years of coal mine employment. April 4, 2000 Hearing Transcript at 3; Decision and Order at 2. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000).³ Decision and Order at 4-5. Accordingly, benefits were denied.

Claimant appealed the denial to the Board. On appeal, the Board agreed with the contentions raised by claimant and the Director, Office of Workers' Compensation Programs (the Director), that the administrative law judge's Decision and Order failed to comply with the requirements of the Administrative Procedure Act (APA). See 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); *Shipley v. Director, OWCP*, BRB No. 00-1040 BLA (July 27, 2001)(unpub.). Therefore, the Board vacated the administrative law judge's 20 C.F.R. §718.205(c) (2000) finding and remanded the case for the administrative law judge to reconsider whether the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2), (c)(5). *Id.*

On remand, the administrative law judge again found that the evidence was insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2), (c)(5). Decision and Order

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The list of contested issues in the instant claim indicates that the Director, Office of Workers' Compensation Programs (the Director), did not contest the issue of pneumoconiosis arising out of coal mine employment. Director's Exhibit 16.

on Remand at 2-3. Accordingly, the administrative law judge denied benefits.

In the current appeal, claimant contends that the administrative law judge erred in weighing the relevant evidence pursuant to 20 C.F.R. §718.205(c). Claimant's Brief at 5-10. The Director responds, urging remand because the administrative law judge again failed to fully consider the medical evidence and failed to fully explain his reasoning for finding that the miner's death was not due to pneumoconiosis. Director's Brief at 12-16.

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).

When this case was previously before the Board, the Board stated that while "the administrative law judge set forth the relevant evidence regarding the cause of the miner's death and properly characterized that evidence," the administrative law judge did not make the proper "credibility determinations concerning the conflicting medical reports," as required by the APA. See *Shiple, supra*, citing *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997). Specifically, the Board accepted claimant's assertion that the administrative law judge did not consider the entirety of Dr. Goldblatt's opinion. See *Shiple, supra*. In considering Dr. Goldblatt's opinion, the Board stated that the administrative law judge failed to explain how the issue of whether the miner suffered a myocardial infarction at the time of his death is relevant to determining whether pneumoconiosis was a cause of the miner's death. *Id.* Furthermore, the Board agreed with claimant that the administrative law judge did not consider whether Dr. Perper's statement, that he could not exclude the possibility that the miner's death "was hastened by a minute, a second, or a fraction thereof by his minimal CWP," Director's Exhibit 17, would be sufficient to meet the "hastening death standard" set forth in *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). See *Shiple, supra*.

Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). See 20 C.F.R. §718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. See 20 C.F.R. §718.205(c)(5); *Lukosevich, supra*.

The evidence of record relevant to the cause of the miner's death consists of the following. In an autopsy report, Drs. Zhang and Yakulis concluded that "[t]his patient suffered cardiopulmonary collapse of unknown etiology. Possible causes and/or contributing factors could have been fibrosis of myocardium, congestive heart failure, bilateral pleural effusion, gastrointestinal tract bleeding." Director's Exhibit 7.

Dr. Goldblatt reviewed the autopsy protocol and slides and the miner's medical records and found that the miner "died of very early acute myocardial infarction and acute respiratory failure caused by the combined effects of diffuse alveolar damage (DAD), aspiration pneumonia and simple coal workers' pneumoconiosis of longstanding [sic]. Liver failure and remote cerebrovascular accident are contributory causes of death." Director's Exhibit 11. In his deposition on August 20, 1998, Dr. Goldblatt stated that the miner died as a result of pulmonary failure whose underlying causes were the combined effects of diffuse alveolar damage, simple coal workers' pneumoconiosis, pulmonary hypertension and aspiration pneumonia, with acute myocardial infarction and cardiac arrest as the final mechanism of death. Director's Exhibit 11 at 30. He also explained that the miner's simple coal workers' pneumoconiosis was a primary cause of his death. *Id.* at 31-33.

Dr. Perper reviewed the autopsy report and slides and the miner's medical records. Dr. Perper found that the miner's coal workers' pneumoconiosis was too mild to significantly contribute to or hasten death, which was a result of complications following stomach surgery, including aspiration pneumonia, sepsis, intestinal hemorrhages and precipitated cardiac and liver failure on a background of severe cardiomegaly. Director's Exhibit 12. In answering claimant's interrogatories, Dr. Perper opined:

It is my professional opinion that Mr. Shirley's [sic] death was not caused, contributed to any significant or reasonable degree or hastened by his minimal coal workers' pneumoconiosis. Can I exclude or prove the outside possibility that the death of [the miner] was hastened by a minute, a second or a fraction thereof by his minimal CWP? Obviously I cannot, but there is no reasonable medical explanation or theory that I know, that could substantiate how [the miner's] minimal coal workers' pneumoconiosis could be significant or effective to any realistic degree in the causation or hastening of [the miner's] death.

Director's Exhibit 17.⁴ Dr. Perper additionally disagreed with Dr. Goldblatt's finding of a

⁴Dr. Goldblatt reviewed Dr. Perper's report. In a report dated May 17, 2000, he indicated his disagreement with Dr. Perper's findings. He opined:

myocardial infarction because of a lack of sufficient evidence. Dr. Perper found that the minimal coal workers' pneumoconiosis at autopsy could not have resulted in any significant pulmonary functional deficit.⁵ *Id.*

In reconsidering the relevant evidence on remand, the administrative law judge initially noted that "Drs. Goldblatt, Perper and Yakulis are all board certified pathologists," but found "the opinions of Drs. Perper and Yakulis more credible than the opinion of Dr. Goldblatt." Decision and Order on Remand at 3. Specifically, the administrative law judge found Dr. Goldblatt's opinion that the miner suffered from "a fatal myocardial infarction is not supported by the evidence of record." *Id.* The administrative law judge further stated that Dr. Goldblatt "failed to give any basis for his conclusion that the effect of pneumoconiosis caused a myocardial infarction and acute respiratory failure." *Id.* Conversely, the administrative law judge found that Dr. Perper "more than adequately explained his opinion" that the miner did not suffer a fatal myocardial infarction and that the miner's pneumoconiosis was too minimal to have resulted in any pulmonary function deficit. *Id.* Accordingly, the administrative law judge concluded that "the evidence does not establish that the decedent's pneumoconiosis made a substantial contribution to his death." *Id.*

Pursuant to Section 718.205(c), claimant first contends that the administrative law judge erred in stating that Drs. Perper and Yakulis are Board-certified pathologists inasmuch as their qualifications are not in the record. Claimant's Brief at 5-6. Second, claimant asserts that Dr. Perper's statement that the miner's pneumoconiosis was too minimal to have resulted

It was the combined effects of CWP and the more acute pulmonary pathologies (aspiration pneumonia and DAD) that caused Mr. Shipley's death. It would be incorrect to exclude CWP from the causes of death, since it is clearly a pulmonary failure death and chronic coal workers' pneumoconiosis had been a well-documented cause of his pulmonary dysfunction for many years before these more acute processes were superimposed on the chronic process and became a cumulative effect to end his live [sic].

Claimant's Exhibit 1.

⁵Additionally, Dr. Malhis completed the discharge summary for the miner's final hospitalization which terminated in his death on October 13, 1997 and listed hiatal hernia and intractable gastroesophageal reflux disease as the miner's Admitting Diagnoses. Director's Exhibit 11. He indicated that the miner expired due to cardiopulmonary failure due to multi-organ system failure. *Id.* On the death certificate, Dr. Landreneau found the immediate cause of death was liver failure. Director's Exhibit 6.

in any pulmonary function deficit undermines this physician's opinion inasmuch as the award of benefits in the miner's claim is based on a finding of total respiratory disability due to pneumoconiosis. *Id.* at 6. Third, claimant contends that the administrative law judge erred in substituting his opinion for that of Dr. Goldblatt. *Id.* at 7-10. Fourth, claimant asserts that the administrative law judge erred in not finding the opinions of Drs. Perper and Yakulis to be equivocal regarding the role that pneumoconiosis played in the miner's death. *Id.* at 9. The Director also requests that the Board remand this case and agrees with the contentions raised by claimant. Director's Brief at 13-16.

Claimant's and the Director's arguments have merit. Thus, we vacate the administrative law judge's denial of benefits and remand this case for the administrative law judge to again reconsider and adequately weigh all of the evidence to determine whether claimant has established that pneumoconiosis was a substantially contributing cause of the miner's death. See 20 C.F.R. §718.205(c)(2), (c)(5); *Lukosevic, supra*; see also *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

First, the administrative law judge failed to consider the entirety of Dr. Goldblatt's opinion on remand. The administrative law judge discredited Dr. Goldblatt's opinion because this physician "failed to give any basis for his conclusion that the effect of pneumoconiosis caused a myocardial infarction and acute respiratory failure." Decision and Order on Remand at 3. In discrediting Dr. Goldblatt's opinion because he failed to provide a basis for his conclusion that pneumoconiosis caused the miner's myocardial infarction and acute respiratory failure, the administrative law judge failed to consider all the relevant evidence. Specifically, the administrative law judge failed to discuss Dr. Goldblatt's testimony in which he explained the basis for his finding that the miner suffered from a myocardial infarction and stated why the autopsy report is in agreement with his finding that the miner suffered from a cardio-pulmonary collapse, Director's Exhibit 11 at 28-33. See generally *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Additionally, as support for discrediting Dr. Goldblatt's opinion, the administrative law judge stated that Dr. Perper "disagreed with Dr. Goldblatt's finding of a myocardial infarction." However, in doing so, the administrative law judge failed to discuss Dr. Goldblatt's May 17, 2000 report in which he stated his disagreement with Dr. Perper's findings. See Claimant's Exhibit 1. See generally *Wojtowicz, supra*; *Tenney, supra*. Moreover, the administrative law judge neglected to "explain how the issue of whether the miner suffered a myocardial infarction at the time of his demise, is relevant to the issue *sub judice*, namely whether the miner's death was due to pneumoconiosis," see *Shipley, supra*, as directed by the Board in our previous Decision and Order. See *Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

Second, the administrative law judge failed to discuss the significance of Dr. Perper's statement - that he cannot exclude or prove the outside possibility that the miner's death was hastened by a minute, a second or a fraction thereof by his minimal coal workers' pneumoconiosis - has on this physician's opinion. *See Lukosevicz, supra*. Similarly, in light of the fact that the miner established total respiratory disability due to pneumoconiosis in his living miner's claim, the administrative law judge erred in failing to discuss whether Dr. Perper's opinion regarding the cause of the miner's death is undermined by this physician's conclusion that the miner's pneumoconiosis was far too minimal to have resulted in pulmonary dysfunction of any significance. Director's Exhibits 15-83, 17; *see generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

Third, the administrative law judge erred in stating that Drs. Goldblatt, Perper, and Yakulis are Board-certified pathologists inasmuch as the record only supports the finding that Dr. Goldblatt is Board-certified in pathology.⁶ *See Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

In light of the foregoing, we vacate the administrative law judge's finding that claimant failed to establish that pneumoconiosis was a substantially contributing cause of the miner's death, *see* 20 C.F.R. §718.205(c)(2), (c)(5), and remand this case to the administrative law judge for reconsideration of the relevant evidence regarding this issue.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

⁶The record reveals that Dr. Goldblatt is Board-certified in Anatomic and Clinical Pathology, Hematology, Medical Microbiology, and Forensic Pathology. Director's Exhibit 11. The qualifications of Drs. Perper and Yakulis are not in the record.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge