

BRB No. 09-0826 BLA

LOUISE WYSOCKI)	
(Widow of LOUIS WYSOCKI))	
)	
Claimant-Respondent)	
)	
v.)	
)	
TANOMA MINING COMPANY)	DATE ISSUED: 08/31/2010
)	
and)	
)	
REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of Decision and Order Granting Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Laura Metcoff Kaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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:

Employer appeals the Decision and Order Granting Benefits (2008-BLA-5376) of Administrative Law Judge Michael P. Lesniak (the administrative law judge), on a survivor's claim filed on January 18, 2007, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended* by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The administrative law judge accepted the parties' stipulation that the miner had forty years of coal mine employment. He found that the miner had coal workers' pneumoconiosis and that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that claimant established that the miner's death was due to pneumoconiosis.¹ 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge's Decision and Order cannot be affirmed because the administrative law judge did not explain the bases for his decision, as required by 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). Claimant responds, urging affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), declines to file a substantive brief on the merits of the appeal.²

By Order dated June 8, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amends the Act with respect to the entitlement criteria for certain claims. In response, the Director contends that the amendments are applicable, based on the filing date of this claim, but that if the Board affirms the administrative law judge's decision awarding benefits, it need not address whether claimant is entitled to benefits pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c). If, however, the Board does not affirm the award of benefits, the Director contends that the case must be remanded for consideration under Section 411(c)(4). The Director further contends that if the case is remanded for consideration under Section 411(c)(4), the administrative law judge should be instructed to allow the parties the opportunity to submit additional evidence consistent with the evidentiary limitations to address the change in law. *See* 20 C.F.R.

¹ Claimant is the widow of the miner, who died on September 28, 2006. Director's Exhibit 29.

² Because the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) are not challenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§725.456(b)(1). Employer responds, contending that the presumption at Section 411(c)(4) is applicable and that employer must be allowed the opportunity to rebut the presumption.

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.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Employer contends that the administrative law judge's Decision and Order cannot be affirmed because the administrative law judge failed to meet the requirements of the APA, *i.e.*, that he discuss his "findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); Employer's Brief at 14. Rather, employer contends that the administrative law judge "simply acknowledged that the record contained conflicting opinions and declared that the opinions of Drs. Rizkalla, Perper and Begley were sufficient to establish that "[the miner's] death was due to pneumoconiosis[.]" without explaining "why he found these opinions were reasoned and documented or why he found that the contrary opinions of Drs. Oesterling and Renn were not." Employer's Brief at 15.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

Employer, however, ignores the administrative law judge's explanation of his findings. The administrative law judge preliminarily discussed each report and deposition, and the reasoning and documentation contained therein. *See* Decision and Order at 4-11. After setting forth the medical evidence, the administrative law judge concluded that the most relevant evidence consisted of the miner's death certificate, the autopsy report of Drs. Rizkalla and Huang, and the medical opinions of Drs. Oesterling, Perper, Renn, and Dr. Begley, who was the miner's treating physician. The administrative law judge found that the death certificate listed pneumoconiosis as one of the causes of death and that the autopsy report listed pneumoconiosis as a substantially contributing cause of death. Decision and Order at 12-13; Director's Exhibits 11, 12, Claimant's Exhibit 3. The administrative law judge further found that the conclusions of Drs. Perper and Begley "closely resemble those of the prosectors", *i.e.*, that pneumoconiosis/coal dust exposure substantially contributed to the miner's death. Decision and Order at 8-9; Director's Exhibit 15; Claimant's Exhibits 1, 2, 8, 9. Regarding Dr. Oesterling's opinion, the administrative law judge found that his opinion that "[the] miner's death resulted from arteriosclerotic change in his heart" was countered by the findings of Drs. Rizkalla, Huang and Perper, who found only slight to moderate arteriosclerosis. Decision and Order at 13; Employer's Exhibit 5. Considering the opinion of Dr. Renn, that the miner's death was due to the interaction of the medications Uroxatral and Toprol XL, the administrative law judge rejected Dr. Renn's opinion because it was strongly contested by both Drs. Perper and Begley and because not even Dr. Oesterling agreed with Dr. Renn. Decision and Order at 13; Employer's Exhibits 4, 11; Claimant's Exhibits 1, 8, 9.

Consequently, based on his consideration of the relevant evidence, the administrative law judge concluded that the opinions of Drs. Begley, Rizkalla and Perper, who found that pneumoconiosis was a substantially contributing cause of the miner's death, were more persuasive than the opinions of Drs. Oesterling and Renn, who found that it was not. Accordingly, the administrative law judge found that claimant met her burden of establishing that the miner's death was due to pneumoconiosis at Section 718.205(c).

Contrary to employer's argument, the administrative law judge adequately set forth his "findings and conclusions" and the "reasons and bases therefor" in his evaluation of the medical evidence. The administrative law judge permissibly accorded little weight to the opinion of Dr. Renn because, of all the doctors, he alone believed that a drug interaction caused the miner's death. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In addition, the administrative law judge permissibly accorded little weight to the opinion of Dr. Oesterling because his opinion as to the cause of death was countered by the other physicians and because "he did not review many of the [miner's] clinical records." Decision and Order at 13; *see Clark*, 12 BLR at 1-155; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Instead, the administrative law judge

permissibly credited the opinions of the autopsy prosecutors, Drs. Rizkalla and Huang, and the opinions of Drs. Begley and Perper, who all agreed that pneumoconiosis was a substantially contributing cause of the miner's death, that the miner's slight to moderate arteriosclerosis did not cause his death, and that a drug interaction was not the cause of death. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir 2002); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). In particular, the administrative law judge found that Dr. Perper explained how objective testing showed that the miner's "pulmonary problems[,]” including pneumoconiosis, "caused [his] cardiac problems, not the reverse.” Decision and Order at 13. The administrative law judge further credited Dr. Perper's opinion because he cited "journal articles and studies" to support his opinion. Decision and Order at 13; *see Clark*, 12 BLR at 1-155. Regarding the opinion of Dr. Begley, the administrative law judge determined that his finding that the miner's cardiac condition resulted from his pulmonary problems, including pneumoconiosis, was supported by his years of treating the miner. *See* 20 C.F.R. §718.104(d); Decision and Order at 8-9, 13. Further, the administrative law judge noted that both Drs. Perper and Begley explained why they did not believe that a drug interaction was the cause of the miner's death. Decision and Order at 13; *see Clark*, 12 BLR at 1-155.

As the administrative law judge explained why he gave greater weight to the reports and opinions of Drs. Rizkalla, Huang, Begley and Perper, over the opinions of Drs. Oesterling and Renn, we reject employer's assertion that the administrative law judge erred in failing to resolve the conflicts in the medical opinion evidence in accordance with the requirements of the APA. Because the administrative law judge's findings are reasoned, supported by substantial evidence, and in accordance with law, we affirm them. We, therefore, affirm the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis at Section 718.205(c).⁴

⁴ Because we affirm the award of benefits, we need not address the parties' arguments concerning Section 411(c)(4).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge