

BRB No. 11-0737 BLA

SHELBY J. BLANKENSHIP)
(Widow of CLINTON BLANKENSHIP))
)
 Claimant-Respondent)
)
 v.) DATE ISSUED: 08/23/2012
)
 HARMAN MINING CORPORATION)
)
 and)
)
 TRAVELERS INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2007-BLA-5500) of Administrative Law Judge Pamela J. Lakes awarding benefits on a claim filed 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). This case involves a survivor's claim filed on July 28, 2004, and is before the Board for the second time. Director's Exhibit 34. In a Proposed Decision and Order dated June 30, 2005, the district director found that the evidence did not establish the existence of pneumoconiosis, and denied benefits. Claimant¹ timely requested modification, which the district director granted on January 9, 2007. Director's Exhibit 48. Employer then requested a formal hearing before the Office of Administrative Law Judges.

In her initial Decision and Order, the administrative law judge credited the miner with thirty-four years of coal mine employment,² based on the parties' stipulation, and found that claimant established the existence of pneumoconiosis, based on the doctrine of collateral estoppel. Therefore, the administrative law judge found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge further found that claimant established that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that claimant did not appropriately invoke the doctrine of collateral estoppel to establish the existence of pneumoconiosis in the survivor's claim, because the parties did not actually litigate the issue of the existence of pneumoconiosis in the miner's claim. *Blankenship v. Harman Mining Corp.*, BRB No. 10-0105 BLA, slip op. at 5 (Oct. 28, 2010) (unpub.). Therefore, the Board vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis based on the doctrine of collateral estoppel, and remanded the case to the administrative law judge for further consideration.³ *Id.* at 6. The Board instructed the

¹ Claimant is the widow of the miner, who died on June 30, 2004. Director's Exhibit 12. The miner filed a claim on September 29, 1995, and employer voluntarily agreed to pay benefits to the miner after the district director determined that the miner had established entitlement. Administrative Law Judge's Exhibit 2.

² The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

³ The Board noted that recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, did not apply to the present case, as claimant filed her survivor's claim before January 1, 2005. *Blankenship v. Harman Mining Corp.*, BRB No. 10-0105 BLA, slip op. at 2, n.1 (Oct. 28, 2010) (unpub.).

administrative law judge, on remand, to consider whether the medical evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203 and, if reached, to reconsider whether the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁴

On remand, the administrative law judge found that the medical opinion evidence under 20 C.F.R. §718.202(a)(4) established that the miner suffered from “a pulmonary or respiratory impairment that was caused both by his smoking and by his coal mine dust exposure.” Decision and Order on Remand at 2. The administrative law judge therefore found that claimant established the existence of legal pneumoconiosis,⁵ and demonstrated a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.⁶ *Id.* The administrative law judge further found that legal pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Therefore, the administrative law judge awarded survivor's benefits.

On appeal, employer contends that the administrative law judge erred in her analysis of the medical opinion evidence when she found that the miner suffered from legal pneumoconiosis and that legal pneumoconiosis hastened his death. Employer requests that the Board remand the case with instructions that it be assigned to a different administrative law judge. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

⁴ Although the Board instructed the administrative law judge to reconsider, if reached, whether claimant established that the miner died due to pneumoconiosis, the Board did not find any error in the administrative law judge's credibility determinations at 20 C.F.R. §718.205(c) in her initial Decision and Order.

⁵ Legal pneumoconiosis is defined as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

⁶ The administrative law judge found that claimant did not establish the existence of clinical pneumoconiosis. Decision and Order on Remand at 2. “Clinical pneumoconiosis” consists of “those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1).

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'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, and before January 1, 2005, a miner's death will be considered to be due to pneumoconiosis if 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)-(3). 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); see *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000).

In considering the medical evidence, on remand, the administrative law judge incorporated her previous summary of the facts and law. With respect to the existence of legal pneumoconiosis, the administrative law judge focused primarily on the medical opinions of Drs. Perper⁷ and Fino,⁸ the two opinions that she had found to be the most

⁷ Dr. Perper opined that the miner's chronic obstructive pulmonary disease (COPD) was related to both smoking and coal mine dust exposure. Director's Exhibit 36. Dr. Perper reasoned that the miner had a long and heavy exposure to coal mine dust, and that when he worked as a roof bolter he drilled into rock, which exposed him to silica. *Id.* at 15, 17-19. Dr. Perper noted further that the miner had an obstructive impairment that was progressive, and the prevailing medical literature establishes that coal mine dust exposure can cause obstructive lung disease. *Id.* Dr. Perper opined that the COPD contributed to the miner's death. *Id.* at 21-22.

⁸ Dr. Fino submitted two medical reports. In the initial report, Dr. Fino opined that the miner's COPD was due solely to smoking. Director's Exhibit 14. Dr. Fino cited the fact that, two years after the miner left coal mine employment, a pulmonary function study revealed that the miner had an obstructive impairment that reversed completely. Director's Exhibit 14 at 9. In Dr. Fino's view, that reversibility eliminated coal mine dust exposure as a cause of the COPD. *Id.* Dr. Fino further opined that the COPD contributed to the miner's death, but since the COPD was due solely to smoking, the miner's death was unrelated to pneumoconiosis. *Id.* at 9-10. In a second report, however, Dr. Fino

relevant to whether the miner's death was due to pneumoconiosis in her first decision.⁹ Decision and Order on Remand at 2; Decision and Order at 18-19. Alluding to her prior analysis of those two opinions, the administrative law judge found that the "preponderance of the credible evidence" established that the miner's COPD was due to both his smoking and his coal mine dust exposure, thereby establishing that the miner suffered from legal pneumoconiosis. Decision and Order on Remand at 2. With respect to whether the miner's death was due to pneumoconiosis¹⁰ pursuant to 20 C.F.R. §718.205(c), the administrative law judge relied on her prior analysis of the opinions of Drs. Perper and Fino, finding Dr. Perper's opinion, that coal mine dust-related COPD contributed to the miner's death, to be better-reasoned than Dr. Fino's opinion, which she found to be "contradictory." *Id.* Based on the foregoing findings, the administrative law judge determined that claimant established that the miner had legal pneumoconiosis, which "contributed to or hastened" his death, pursuant to 20 C.F.R. §718.205(c). Decision and Order on Remand at 3.

Employer contends that the administrative law judge did not adequately explain her findings, on remand, concerning the existence of legal pneumoconiosis and death

stated that, assuming that all the miner's COPD was due to coal mine dust exposure, it played no role in his death, which was due solely to smoking-related lung cancer. Employer's Exhibit 1.

⁹ The record also contains a 1995 medical report from Dr. Forehand, submitted in the miner's claim, diagnosing him with coal workers' pneumoconiosis due to coal mine dust, and chronic bronchitis due to smoking. Director's Exhibit 14. The administrative law judge discounted Dr. Forehand's opinion in the survivor's claim. Decision and Order at 17. Additionally, there are two reports from Dr. Naeye. In the first report, Dr. Naeye stated that a lung biopsy did not establish that the miner had clinical pneumoconiosis, and he opined that the miner's lung cancer was due to smoking. Director's Exhibit 41. In the second report, Dr. Naeye opined that Dr. Perper incorrectly diagnosed complicated pneumoconiosis, and he criticized Dr. Perper's opinion that the miner's lung cancer was related to coal mine dust exposure. *Id.* The administrative law judge explained that she did not detect a diagnosis of complicated pneumoconiosis in Dr. Perper's report, and that she found it unnecessary to resolve whether the miner's lung cancer was caused in part by his coal mine dust exposure. Decision and Order at 18 n.11, 20.

¹⁰ The miner's treating physician, Dr. Patel, completed the miner's death certificate. Dr. Patel reported that the miner died of "cardiopulmonary arrest," with underlying causes of acute respiratory failure, coal workers' pneumoconiosis, COPD, and left lingular carcinoma. Director's Exhibit 12.

causation, in accordance 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). Employer argues further that, even if the administrative law judge's findings are sufficiently explained, in that she incorporated her prior findings and credibility determinations, her decision cannot be affirmed. Specifically, employer argues that the administrative law judge, in her initial decision, found the existence of pneumoconiosis established based on the doctrine of collateral estoppel, and her prior consideration of the opinions of Drs. Perper and Fino as to whether the miner's death was due to pneumoconiosis was affected by whether these physicians' opinions were consistent with her finding of pneumoconiosis.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order on Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Contrary to employer's contention, the administrative law judge appropriately incorporated her findings from her initial Decision and Order into her Decision and Order on Remand and thus, the reasons for her findings are discernible. Additionally, there is no merit to employer's contention that the administrative law judge did not factor the physicians' credentials into her analysis of the evidence, as she explicitly considered the physicians' respective qualifications. Decision and Order at 18. Furthermore, substantial evidence supports the administrative law judge's permissible finding that Dr. Perper's opinion, relating the miner's COPD to both smoking and coal mine dust exposure, was better reasoned and documented than Dr. Fino's "contradictory" opinion on the etiology of the miner's COPD.¹¹ Decision and Order on Remand at 2; Decision and Order at 19; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-34, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order on Remand at 2; Decision and Order at 18-19. Therefore, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

¹¹ In her prior decision, the administrative law judge specifically found that Dr. Fino "contradicted himself," in the course of his two reports. Decision and Order at 18. She noted that in his first report, Dr. Fino opined that the miner's COPD was due solely to smoking, but in his second report, assumed that all of the miner's COPD was due to coal mine dust. The administrative law judge found Dr. Fino's "hypothetical that the Miner suffered from pneumoconiosis" to be unexplainedly "at odds with the position he took in his report to the effect that" the miner did not suffer from pneumoconiosis. Decision and Order at 19.

Employer also argues that the administrative law judge erred in finding that the miner's death was hastened by legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We disagree. The administrative law judge permissibly determined that Dr. Perper's opinion, that the miner's COPD contributed to his death, was well-reasoned and documented, and carried claimant's burden of demonstrating that the miner's death was hastened by legal pneumoconiosis. 20 C.F.R. §718.205(c); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). As substantial evidence supports these credibility determinations, we conclude that the administrative law judge acted within her discretion in finding Dr. Perper's opinion "entitled to the most weight." Decision and Order at 19; *see Hicks*, 138 F.3d at 533-34, 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42, 21 BLR at 2-275-76. Further, contrary to employer's contention, the administrative law judge permissibly accorded less weight to the opinions of Drs. Fino and Naeye,¹² finding their opinions to be inconsistent and undocumented. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order on Remand at 2; Decision and Order at 17-19. The determination of whether a medical opinion is adequately reasoned and documented is for the administrative law judge as the factfinder to decide, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc), and the Board is not authorized to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the administrative law judge's credibility determinations, they are affirmed.

Because substantial evidence supports the administrative law judge's findings that claimant established that the miner had legal pneumoconiosis and that his death was due to legal pneumoconiosis, those findings are affirmed. 20 C.F.R. §§718.202(a)(4), 718.205(c). As claimant established each element necessary to demonstrate entitlement to benefits in a survivor's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's award of benefits. *See Trumbo*, 17 BLR at 1-87-88. Because we have affirmed the award of benefits, employer's request to reassign this case is moot.

¹² The administrative law judge previously discounted, as unexplainedly inconsistent, Dr. Fino's statements that the miner's COPD (whether due to smoking or coal mine dust exposure), both did, and did not, contribute to the miner's death. Decision and Order at 19; Director's Exhibit 14 at 9-10; Employer's Exhibit 1 at 3. Further, since the administrative law judge found the existence of legal pneumoconiosis established, and Dr. Naeye did not diagnose the miner with any form of pneumoconiosis, the administrative law judge could accord, at most, little weight to Dr. Naeye's opinion on the cause of the miner's death. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge