

BRB No. 85-2678 BLA

CHARLES W. CONARD (deceased))
(a.k.a. CHARLES W. CONRAD))
)
Claimant-Respondent)
)
v.)
)
BETHENERGY MINES INCORPORATED)
)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

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

Arthur M. Wilson, Washington, Pennsylvania, for claimant.

Daniel J. Iler (Richman & Smith), Washington, Pennsylvania, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (80-BLA-1437) of
Administrative Law Judge Daniel Goldstein awarding benefits on a 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). This case is before the
Board for the second time. Initially, the administrative law judge credited the miner
with nineteen years of coal mine employment, found that the medical evidence
established invocation of the interim presumption pursuant to 20 C.F.R.

§727.203(a)(1), (3), and (4) and concluded that employer failed to establish rebuttal under 20 C.F.R. §727.203(b)(2)-(4). Accordingly, he awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's invocation finding pursuant to Section 727.203(a)(1), (3), and (4) and the administrative law judge's finding that rebuttal was not established pursuant to Section 727.203(b)(2), (4). *Conard v. Bethlehem Mines Corp.*, BRB No. 81-1870 BLA (Jan. 22, 1985)(unpub.). However, the Board concluded that the administrative law judge failed to provide valid reasons for his weighing of the medical opinions pursuant to Section 727.203(b)(3) and therefore vacated the administrative law judge's finding and remanded the case for further consideration. The Board denied employer's motion for reconsideration. *Conard v. Bethlehem Mines Corp.*, BRB No. 81-1870 BLA (May 2, 1985)(unpub.). On remand, the administrative law judge reweighed the medical opinions and concluded that rebuttal under Section 727.203(b)(3) was not established.

On appeal, employer contends that the administrative law judge again failed to provide valid reasons for his weighing of the medical opinions pursuant to Section 727.203(b)(3). Claimant and the Director, Office of Workers' Compensation Programs (the Director), have not responded to employer's brief.

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

There is no dispute among the physicians of record that the miner suffered from a total respiratory disability, that he had smoked, had lung cancer, and had fibrotic nodules in his lungs that were seen on x-ray, biopsy, and autopsy. In addition, the record indicates that the autopsy prosector diagnosed severe anthracosilicosis and emphysema due in part to coal dust exposure and opined that anthracosilicosis contributed to the miner's death from lung cancer. Claimant's Exhibit 1.

The administrative law judge found that the medical evidence established invocation of the presumption that the miner was disabled by and died due to pneumoconiosis pursuant to Section 727.203(a)(1), (3), and (4). To rebut this presumption under Section 727.203(b)(3), employer must rule out a possible causal connection between both the miner's disability and death and his coal mine employment. *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30, 2-49 (3d); *Carozza v. U.S. Steel Corp.*, 727 F.2d 74, 6 BLR 2-15, 2-21 (3d Cir. 1984).

Employer submitted the reports and testimony of Drs. Fisher, Morgan, and Sachs.¹ They reviewed the examination findings, chest x-rays, lung biopsy, and test results contained in the records of the miner's multiple hospitalizations. Drs. Fisher and Morgan also reviewed the autopsy report and slides. Drs. Fisher and Sachs provided written reports and were deposed, while Dr. Morgan provided a written report and testified at the formal hearing held on November 6, 1980.

Dr. Fisher, who is Board-certified in Anatomical and Clinical Pathology, concluded that the miner died due to lung cancer and stated that there is no established scientific link between cancer and coal dust exposure, but that there is a known link between smoking and cancer. Based on his study of the biopsy and autopsy lung tissue slides, he opined that the fibrotic nodules seen in the miner's lungs were old healed granulomata due to a fungal infection known as histoplasmosis and were not pneumoconiosis. Dr. Fisher opined that since the miner did not have pneumoconiosis, it did not contribute to his death due to lung cancer or to his inability to perform his coal mine employment as a motorman. Employer's Exhibits 12, 44, 45.

Dr. Morgan, who has a British Board-certification in Internal Medicine and Chest Diseases,² opined that the miner's death was due to lung cancer resulting from smoking and not coal dust exposure. He agreed with Dr. Fisher that the nodules in the miner's lungs were old, asymptomatic histoplasmosis lesions and not pneumoconiosis. Dr. Morgan concluded that the miner's inability to work as a motorman and his death were due entirely to a combination of the lung cancer and non-pulmonary impairments resulting from cirrhosis of the liver. Employer's Exhibit at 27; Hearing Transcript at 131-35.

Dr. Sachs, who is Board-certified in Internal Medicine, opined that the miner's death was due to lung cancer from smoking and was hastened by cirrhosis of the liver, and stated that there is no known etiological connection between lung cancer

¹ Employer also submitted the opinion of Dr. Gardner, but does not challenge on appeal the administrative law judge's failure to discuss it on remand.

² Dr. Morgan testified that his qualifications are equivalent to U.S. Board-certification in Internal Medicine and Pulmonary Disease.

and coal dust exposure. He further stated that the miner's pulmonary nodulation was histoplasmosis and not pneumoconiosis. Dr. Sachs concluded that the miner's total disability was due to lung cancer and was unrelated to any chronic dust disease of the lung or its sequela. Employer's Exhibit 18; Director's Exhibit 52.

On remand, the administrative law judge discredited employer's medical opinions for several reasons. The administrative law judge found that because Dr. Morgan exhibited an "openly partisan demeanor" at the 1980 hearing, his opinion should receive less weight. Decision and Order on Remand at 11, 13. The administrative law judge further discounted Dr. Morgan's opinion as based on "only a very hasty study" of the lung tissue slides. Decision and Order on Remand at 13. The administrative law judge accorded diminished weight to Dr. Morgan's discussion of the lung tissue slides because Dr. Morgan is not a pathologist.

The administrative law judge gave "very little weight" to Dr. Sachs' opinion because he was a non-examining physician "hired solely for the purpose of litigation. . . ." Decision and Order on Remand at 7. The administrative law judge also discounted Dr. Sachs' opinion because "he [was] not an expert in interpreting histological slides," and because the administrative law judge concluded that Dr. Sachs either conducted a careless review of the record or deliberately distorted facts "for partisan purposes." *Id.*

Finally, the administrative law judge accorded diminished weight to Dr. Fisher's opinion on the ground that he did not have the benefit of a gross examination of the miner's lungs. The administrative law judge concluded therefore that employer failed to meet its rebuttal burden under Section 727.203(b)(3).

After review of the administrative law judge's Decision and Order on Remand in light of the record, the Board's remand instructions, and the arguments raised by employer on appeal, we conclude that the administrative law judge failed to adequately consider the opinions of Drs. Morgan, Sachs, and Fisher under Section 727.203(b)(3). Therefore, we must vacate the administrative law judge's findings and remand this case for a proper consideration of subsection (b)(3) rebuttal that addresses the substance of the medical opinions.

Employer challenges the administrative law judge's finding that Dr. Morgan was biased. Employer's Brief at 22. The Board has held that an administrative law judge must identify specific evidence in the record to support a finding that a physician's opinion is biased. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991)(*en banc*). Because the administrative law judge's finding is not specific and the hearing transcript does not reveal Dr. Morgan's testimonial demeanor, Decision and Order on Remand at 11; Hearing Transcript at 49-185, we lack any

basis in the record for determining whether or not the administrative law judge's credibility determination is inherently incredible or patently unreasonable. See *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71, 73 (1996); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). Since the administrative law judge did not point to specific evidence of bias and we are unable to conduct a meaningful review of the administrative law judge's credibility determination, we decline to defer to it.

Employer contends that the administrative law judge selectively analyzed Dr. Morgan's opinion. Employer's Brief at 22. This contention has merit. At the hearing, Dr. Morgan was asked whether he detected the *Histoplasma capsulatum* fungus on the miner's lung tissue slides. He replied that after a brief microscopic search he did not find it, which he stated is not unusual since the fungus is difficult to detect and usually takes an expert on fungal diseases up to an hour-and-a-half to find, using a positive slide as a control. Hearing Transcript at 153. Based on this testimony, the administrative law judge discredited Dr. Morgan's entire opinion because he "admitted" that he made "only a very hasty study of the necropsy slides and did not have a positive slide for comparison purposes." Decision and Order on Remand at 13. In so doing, the administrative law judge took a small portion of Dr. Morgan's testimony out of context to discount his opinion as if it were based on a hasty review of the lung tissue slides. The administrative law judge's focus on and use of this testimony to discredit Dr. Morgan's opinion as a whole ignores most of the evidence and reasoning Dr. Morgan included as corroboration for his opinion regarding disability and death causation, and thus amounts to impermissible selective analysis. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Employer challenges the administrative law judge's decision to discount Dr. Morgan's opinion because he is not a pathologist. Employer's Brief at 21-22. In the administrative law judge's first decision, he acknowledged Dr. Morgan's status as a "well known pulmonary specialist," [1981] Decision and Order at 12 n.6, yet summarily rejected all of his testimony because he was not a pathologist. [1981] Decision and Order at 20. The Board held this complete rejection to be error. *Conard*, slip op. at 4. On remand, the administrative law judge stated that because of Dr. Morgan's "admissions" that he had only briefly reviewed the slides and was not a pathologist, his testimony regarding the slides deserved "relatively little weight." Decision and Order on Remand at 13. Employer argues that in so doing the administrative law judge overlooked Dr. Morgan's status as a pulmonary specialist and ignored the substance of Dr. Morgan's opinion. Employer's Brief at 3, 21-22.

A physician's relative lack of expertise in a particular medical specialty may be an appropriate consideration under the facts of the case, if properly explained in the

context of the record by the administrative law judge. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Here, the administrative law judge's analysis ignores that Dr. Morgan's opinion is based upon far more than his own review of the lung tissue slides, see *Justice, supra*; *Hess, supra*, and does not indicate how the administrative law judge assessed the fact that Dr. Morgan's microscopic findings were consistent with those in the detailed report of Dr. Fisher, a pathologist. Employer's Exhibits 12, 44. Furthermore, the administrative law judge did not articulate how Dr. Morgan's lack of training in interpreting tissue slides undercuts his opinion as a whole regarding disability and death causation. Therefore, we are unable to affirm the administrative law judge's weighing of Dr. Morgan's opinion.

Employer next contends that the administrative law judge erred in discrediting Dr. Sachs' opinion as presumptively biased. Employer's Brief at 17-18. The administrative law judge's decision to discredit Dr. Sachs' opinion as that of a non-examining physician who prepared a report for litigation is not in accordance with law. See *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1993); *Melnick, supra*. Employer further asserts that when the administrative law judge discredited Dr. Sachs' opinion because he is not an expert in interpreting tissue slides, he ignored Dr. Sachs' testimony that he examined the biopsy tissue slides with the assistance of pathologist Dr. Fisher, in Dr. Fisher's lab. Employer's Brief at 19. Dr. Sachs so testified, Employer's Exhibit 39 at 92-93, and although the administrative law judge mentioned it, he did not explain why, apparently, it had no significance.

Employer also argues that the administrative law judge selectively analyzed Dr. Sachs' opinion and discredited it based on insignificant details. Employer's Brief at 7-12. The administrative law judge on remand alleged several "factual errors" in Dr. Sachs' review of the miner's medical records. Decision and Order on Remand 4-8. Chief among these was "Dr. Sachs' ignorance of the color of the miner's skin. . . ." Decision and Order on Remand at 8 (unnumbered footnote). The administrative law judge discredited Dr. Sachs' opinion on this basis in his first decision, and the Board held then that he had focused on "a rather unimportant detail" *Conard*, slip op. at 4. On remand, the administrative law judge did it again, stating that he deemed this factor "significant and indicative of" Dr. Sachs' thoroughness in reviewing the record. Decision and Order on Remand at 6, 8. The deposition testimony cited by the administrative law judge as evidence of Dr. Sachs' lack of thoroughness was testimony in which Dr. Sachs indicated that an ambiguous abbreviation used in a July 17, 1979 hospital progress note made it unclear what the miner's race was. Employer's Exhibit 39 at 81-82. This testimony does not support the inference that Dr. Sachs merely skimmed through these records. See *Justice*;

Hess. After reviewing Dr. Sachs' detailed report and his four-and-a-half hours of testimony, Employer's Exhibits 8, 39, we find no support for the administrative law judge's conclusion that Dr. Sachs conducted a careless review or deliberately distorted facts.³ See *Tackett, supra*. Therefore, we conclude that the administrative law judge did not provide an affirmable rationale for his weighing of Dr. Sachs' opinion.

Finally, employer contends that the administrative law judge erred by discounting Dr. Fisher's opinion merely because he did not have the benefit of a gross examination as did the autopsy prosector, when Dr. Fisher reviewed all evidence of record, including the autopsy and biopsy slides. Employer's Brief at 26-27. When the administrative law judge relied on this rationale to discount the opinions of Drs. Fisher and Morgan in his first decision, the Board indicated that the autopsy prosector's opportunity to conduct a gross examination was a valid consideration but held that the administrative law judge mechanically accorded it determinative weight without considering that Drs. Morgan and Fisher reviewed all of the medical evidence. *Conard*, slip op. at 4 n.7. On remand, the administrative law judge weighed the autopsy prosector's opinion against Dr. Fisher's opinion and accorded greater weight to the autopsy prosector's opinion because he conducted a gross examination of the miner's lungs. Decision and Order on Remand at 14.

An administrative law judge may, in appropriate cases, credit the opinion of the autopsy prosector over the opinions of reviewing pathologists. See *United States Steel Corp. v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982); *Gruller v. BethEnergy Mines Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). However, an administrative law judge must provide an adequate rationale for concluding, under the facts of the case, that the autopsy prosector's opportunity to conduct a gross examination, rather than merely review slides, renders the autopsy prosector's opinion superior to the reviewing pathologists' opinions. *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992). Here, the administrative law judge did not set forth the reasoning underlying his conclusion that the autopsy prosector's opportunity to conduct a gross examination gave him an advantage over Dr. Fisher. See *Urgolites, supra*. Thus, he did not provide an adequate rationale for his weighing of Dr. Fisher's opinion.

³ The rest of the alleged factual deficiencies in Dr. Sachs' opinion will not be addressed at length. Essentially, the administrative law judge searched for details of the miner's social and medical history which were recorded differently from the way in which Dr. Sachs phrased them, or which were not specifically mentioned by him. Viewing Dr. Sachs' opinion in light of the record and the issues for decision at subsection (b)(3), he did not ignore or misrepresent any significant information.

Therefore, in light of all of the foregoing, we must vacate the administrative law judge's finding pursuant to Section 727.203(b)(3) and remand this case for further consideration. On remand, the administrative law judge must determine whether the medical opinions submitted by employer establish rebuttal pursuant to Section 727.203(b)(3). See *Plesh, supra*; *Carroza, supra*. If entitlement under 20 C.F.R. §727.203 is not established, the administrative law judge must consider entitlement under 20 C.F.R. Part 718. See *Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987). In addition, the administrative law judge must consider and weigh the x-ray evidence in the record relevant to the existence of complicated pneumoconiosis. Director's Exhibit 15; Employer's Exhibit 33. See 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge