

BRB No. 10-0224 BLA

BETTY L. WELLS)
(Widow of CHARLES E. WELLS))
)
 Claimant-Petitioner)
)
 v.)
)
 DEHUE COAL COMPANY)
) DATE ISSUED: 12/23/2010
 Employer-Respondent)
)
 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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (2007-BLA-05331) of Administrative Law Judge Adele Higgins Odegard, rendered on a survivor's claim filed pursuant to 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

¹ Claimant is the widow of the miner, Charles E. Wells, who died on April 13, 2002. Survivor's Director's Exhibit 5. Claimant filed a claim for survivor's benefits on May 13, 2002. Survivor's Director's Exhibit 2.

932(l)) (the Act). In a Decision and Order issued on March 3, 2008, the administrative law judge considered the consolidated cases involving the miner's subsequent claim and the survivor's claim.² The administrative law judge accepted the parties' stipulation that the miner had forty years of coal mine employment and found, in both claims, that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. However, the administrative law judge determined that the evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Thus, the administrative law judge denied benefits in the miner's claim. The administrative law judge also found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and, therefore, denied benefits in the survivor's claim.

Claimant appealed, and the Board affirmed the administrative law judge's denial of benefits with regard to the miner's subsequent claim. *B.W. [Wells] v. Dehue Coal Company*, BRB Nos. 08-0511 and 08-0589 BLA, slip op. at 5 (Mar. 5, 2009) (unpub.). The Board also affirmed the administrative law judge's finding, in the survivor's claim, that the miner suffered from simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. *Id.* at 2 n.3. However, the Board held that the administrative law judge erred in failing to weigh evidence relevant to the issue of whether the miner's death was hastened by pneumoconiosis, namely the miner's death certificate, the autopsy report of Dr. Racadag, and a report by Dr. Oesterling. *Id.* at 5-6. Therefore, the Board vacated the administrative law judge's denial of benefits in the survivor's claim and remanded the claim for further consideration. *Id.*

On November 10, 2009, the administrative law judge issued her Decision and Order on Remand, which is the subject of this appeal. The administrative law judge again found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant asserts that the administrative law judge erred in weighing the conflicting evidence at 20 C.F.R. §718.205(c), and improperly focused on whether the miner was totally disabled prior to his death, as opposed to whether the evidence was sufficient to show that he had a respiratory impairment, caused by coal dust exposure, that contributed to his death. Employer responds, urging affirmance of the denial of

² A procedural history of both claims is set forth in the Board's prior decision and is incorporated herein. *B.W. [Wells] v. Dehue Coal Company*, BRB Nos. 08-0511 and 08-0589 BLA, slip op. at 1-2 (Mar. 5, 2009) (unpub.).

benefits. The Director, Office of Workers' Compensation Programs, has responded that he will not file a brief, unless requested to do so by the Board.

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.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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 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. *See* 20 C.F.R. §718.205(c)(5); *Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered, on remand, the miner's death certificate, which was signed by Dr. Tuanquin and listed chronic obstructive pulmonary disease (COPD) as the immediate cause of death, with congestive heart failure and simple coal workers' pneumoconiosis identified as "other significant conditions contributing to death but not resulting in the underlying direct cause" of death. Director's Exhibit 5. He also reviewed the April 28, 2002 autopsy report of Dr. Racadag, indicating that the miner had been admitted to Logan General Hospital on April 12, 2002, due to shortness of breath, but died the following day, despite treatment. Director's Exhibit 6. The admitting diagnoses were severe COPD, respiratory failure, cardiomyopathy, "DKA vs. hyperosmolar non-kinetic state," and renal failure. *Id.* Under microscopic description, Dr. Racadag indicated that the miner had scattered coal macules and micronodules, more prominent in the upper lobes, along with focal

³ The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 6. 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, 1-202 (1989) (*en banc*).

emphysema. *Id.* The final pathological diagnosis listed: 1) simple coal workers' pneumoconiosis with macular and micronodular lesions, severe focal pleural adhesions, right lung; 3) early focal interstitial pneumonitis; and 4) bilateral hydrothorax. *Id.* Dr. Racadag wrote, "the above conditions contributed to the patient's morbidity and subsequent demise." *Id.*

The administrative law judge also considered the medical reports of Drs. Naeye, Zaldivar, Oesterling, and Perper, along with a Discharge Summary and medical records from Logan General Hospital. Dr. Naeye reviewed the miner's death certificate, autopsy slides, treatment notes from Logan General Hospital, the autopsy report of Dr. Racadag and other medical records, and prepared his consultative report on September 11, 2002. Employer's Exhibit 10. Dr. Naeye opined that the miner's lungs have "the minimum findings required to make the diagnosis of very mild, simple coal workers' pneumoconiosis" and noted that there was "no significant focal emphysema or dense fibrosis associated with the black pigment . . . so there is no way that these minimal [coal workers' pneumoconiosis] lesions could have caused any measurable abnormalities in lung function or otherwise influenced the life of [the miner]." *Id.* He noted that such a conclusion was reinforced by "the normal and near normal results of pulmonary function studies and arterial blood gas analyses during the last [two] years of his life." *Id.* Dr. Naeye concluded that coal workers' pneumoconiosis did not hasten or contribute to the miner's death as any "pulmonary impairments that were present were the consequence of [the miner's] chronic and then severe heart failure, not [coal workers' pneumoconiosis] or any other lesions in the lungs." *Id.*

Dr. Zaldivar prepared a report dated February 9, 2004, based on his review of certain medical evidence, including the miner's death certificate, the autopsy report, and treatment notes from Logan General Hospital. Director's Exhibit 31. He opined that there was sufficient evidence to justify a diagnosis of coal workers' pneumoconiosis, but that there was no evidence of any pulmonary or respiratory impairment during the miner's lifetime that would have prevented him from returning to his usual coal mine employment. *Id.* Dr. Zaldivar stated that the miner's coal dust exposure and minimal coal workers' pneumoconiosis, which "was too small to be seen radiographically even by CT scans[,] did not play any role in the shortness of breath, which [the miner] experienced in life, nor did it play any role in his death." *Id.* Dr. Zaldivar concluded that the miner's shortness of breath "was the result of heart failure, which caused the fluid in the chest cavities found by the pathology at autopsy." *Id.*

Dr. Oesterling reviewed the miner's autopsy slides and medical records and prepared a consultative report dated June 29, 2004. Employer's Exhibit 5. He diagnosed minimal micronodular coal workers' pneumoconiosis and moderately severe centrilobular emphysema. He opined that the miner's pneumoconiosis was too mild to have altered pulmonary function or to have hastened or contributed to the miner's death.

Id. Dr. Oesterling opined that the miner's respiratory problems during his lifetime were due to emphysema caused by smoking and asthma, but not coal dust exposure. *Id.* He also attributed the miner's death to cardiovascular disease with resultant congestive failure and cardiac arrest. *Id.* He noted that this disease was "documented by the presence of marked hemosiderin deposit in [the miner's] lower lung fields complicating marked passive congestion with resultant early interstitial fibrosis (hemosiderosis). His cardiac disease can in no way be attributed to his coal mine dust inhalation." *Id.*

Dr. Perper reviewed the miner's death certificate, autopsy report, autopsy slides, treatment notes from Logan General Hospital, reports of Drs. Naeye and Oesterling and other medical records, and produced a consultative report dated August 24, 2006. Director's Exhibit 48. Dr. Perper opined that Dr. Naeye's report runs "afoul of the clear medical evidence," while Dr. Oesterling's report "is flawed, incorrect and unreliable." *Id.* Based on his review of the autopsy slides, Dr. Perper diagnosed simple coal workers' pneumoconiosis, slight to moderate centrilobular emphysema, sclerosis of inter-pulmonary blood vessels, consistent with pulmonary hypertension and cor pulmonale, and silicotic lymph nodes. *Id.* He concluded that coal workers' pneumoconiosis was a substantially contributing cause of the miner's pulmonary impairment and disability, and ultimately contributed to his death, "[b]ased on the pulmonary pathological findings indicative of macular micronodular (including silicotic) and interstitial type of coal workers' pneumoconiosis, and the occupational, smoking and clinical documentation." Dr. Perper indicated that his opinion was based on the following aspects of the miner's condition:

Symptomatic inability to perform because of shortness of breath, wheezing and other respiratory symptoms[;] [w]orsening of the miner's subjective and objective pulmonary[,] clinical and radiological findings as presented . . . with an obstructive defect, hypoxemia and CO₂ retention[;] [t]he documented presence of substantial and significant coal workers' pneumoconiosis at autopsy, with macular, micronodular and interstitial fibroanthrocosis[and;] [t]he presence of causally associated centrilobular emphysema (in conjunction with smoking)[.]

Id.

In weighing the conflicting evidence pursuant to 20 C.F.R. §718.205(c), the administrative law judge gave little weight to the death certificate, because she found that it was contradicted by the Discharge Summary from Logan General Hospital, also written by Dr. Tuanquin, which did not identify pneumoconiosis as a cause of the miner's death. Decision and Order at 11. The administrative law judge noted that the opinions of the pathologists were in conflict, but stated that she did not give any additional weight to the opinions of Drs. Racadag and Perper, "because they do not explain the basis for their

conclusions, and because they did not address the role the [m]iner's congestive heart failure played in his death." *Id.* In contrast, the administrative law judge assigned controlling weight to the contrary opinions of Drs. Naeye, Zaldivar, and Oesterling, that the miner's death was not hastened by pneumoconiosis. Thus, the administrative law judge found that claimant failed to satisfy her burden of proof pursuant to 20 C.F.R. §718.205(c).

Claimant contends that the administrative law judge erred in failing to credit the opinions of Drs. Tuanquin, Racadag and Perper. Claimant argues that, contrary to the administrative law judge's finding, the miner's medical records and objective testing demonstrate that the miner's pulmonary condition steadily worsened until the time of his death, and support the conclusions of these physicians that the miner's death was hastened by pneumoconiosis. Claimant contends that "the [issue] of whether the miner's death was contributed to by his pneumoconiosis turns on the question of whether the miner had any pulmonary impairment prior to his death" and not whether the miner was totally disabled, as suggested by the administrative law judge. Claimant's Brief at 12.

Claimant's arguments are rejected as they are without merit. The administrative law judge reasonably found that the miner's death certificate, listing pneumoconiosis as a contributing cause in the miner's death, was not credible because "there is no indication, from the record, that it is based on any objective evidence" reviewed by Dr. Tuanquin and because it "appears to be contradicted by other documents [Dr. Tuanquin] authored." Decision and Order at 9; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151. The administrative law judge specifically explained:

Dr. Tuanquin could not have reviewed Dr. Racadag's autopsy report before preparing the [m]iner's death certificate. Dr. Tuanquin signed the death certificate on April 23, 2002; however, Dr. Racadag did not complete his autopsy until several days later, on April 28, 2002. Other than the autopsy report(s), the most complete evidence regarding the [m]iner's death is the Discharge Summary that Dr. Tuanquin authored. In that document, Dr. Tuanquin did not mention pneumoconiosis, and did not discuss the effect of pneumoconiosis, if any, on the [m]iner's death. Indeed, the final diagnoses Dr. Tuanquin listed in the Discharge Summary do not even mention pneumoconiosis. Therefore, any notation in the [m]iner's death certificate regarding pneumoconiosis as a cause of the [m]iner's death is inconsistent with Dr. Tuanquin's written conclusions, set forth in the Discharge Summary. Also, because the death certificate was completed prior to the autopsy, I find I cannot presume that Dr. Tuanquin's conclusion was in any way based on the objective evidence the autopsy provided.

Decision and Order at 8-9. Moreover, the administrative law judge rationally determined that Dr. Tuanquin's opinion was not sufficient to establish that the miner's death was due to legal pneumoconiosis insofar as Dr. Tuanquin "did not link the [m]iner's COPD to his coal mine employment."⁴ Decision and Order at 11; *see* 20 C.F.R. §718.201; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997).

The administrative law judge permissibly assigned less weight to the autopsy report as she concluded that Dr. Racadag did not explain the basis for his opinion that pneumoconiosis contributed to the miner's death. The administrative law judge noted that while Dr. Racadag's "visual observations of the [m]iner's body [were] much more extensive," because he "did not cite any specific observations in the autopsy that lead him to his opinion," his death causation findings were less credible than the contrary opinions of Drs. Naeye and Oesterling, who cited "specific indicia, based on their observations of the autopsy slides." Decision and Order at 9; *see Sparks*, 213 F.3d at 192, 22 BLR at 2-264; *United States Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155.

The administrative law judge also acted within her discretion in assigning less weight to Dr. Perper's opinion because she found that he did not adequately "describe or explain how the [m]iner's pneumoconiosis also played a contributing role [in his death]." Decision and Order at 10; *see Sparks*, 213 F.3d at 192, 22 BLR at 2-264; *Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155. In support of her finding, the administrative law judge noted that Dr. Perper's report "seemed to be focused on the issue of whether pneumoconiosis was present," and that Dr. Perper cited to three "factors" to justify his opinion that pneumoconiosis caused the miner's death. Decision and Order at 9-10. But the administrative law judge permissibly concluded that these factors "did not describe or discuss how the presence of pneumoconiosis (as opposed to some other condition such as the [m]iner's congestive heart failure) played a role" in the miner's death. *Id.*

⁴ Contrary to claimant's argument, the administrative law judge was not required to assign controlling weight to Dr. Tuanquin's opinion on the cause of the miner's death, based solely on his status as a treating physician. *See* 20 C.F.R. §718.104(d)(5); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994).

Moreover, because Dr. Perper cited the miner's "symptomatic inability to perform" his work as a basis for attributing his death to pneumoconiosis, the administrative law judge permissibly found Dr. Perper's causation opinion to be at odds with the administrative law judge's specific finding that the miner was not totally disabled by a respiratory or pulmonary impairment prior to his death.⁵ Director's Exhibit 48; Decision and Order at 10; *see Wells*, BRB Nos. 08-0511 and 08-0589 BLA, slip op. at 22-24; *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); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Furthermore, the administrative law judge acted within her discretion in assigning controlling weight to the opinions of Drs. Oesterling, Naeye and Zaldivar, as to whether the miner's death was hastened by pneumoconiosis. *Sparks*, 213 F.3d at 192, 22 BLR at 2-264; *Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155. The administrative law judge permissibly found that the opinions of Drs. Oesterling and Naeye were "arguably more complete, because their analys[es] of the autopsy slides [address] factors in addition to pneumoconiosis, such as congestive heart failure, that may have played a role in the [m]iner's death." Decision and Order at 10; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Clark*, 12 BLR at 1-155. The administrative law judge specifically noted that the doctors explained their findings in light of the miner's Discharge Summary, which documents the course of his treatment for congestive heart failure. Decision and Order at 10. In addition, the administrative law judge permissibly concluded, based on Dr. Zaldivar's qualifications as a Board-certified pulmonary specialist, that "his professional expertise as a pulmonary physician provides a good basis for an opinion regarding the causative factors in the [m]iner's death." *Id.*; *Sewell Coal Co. v. Director, OWCP [Dempsey]*, 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge also permissibly found Dr. Zaldivar's opinion to be well-reasoned, noting that he explained that "the shortness of breath the [m]iner experienced in his last days was caused by heart failure, and the autopsy verified the presence of fluid in the [m]iner's chest cavity,"

⁵ Claimant asserts, correctly, that the administrative law judge erred in stating that Dr. Perper did not review the Discharge Summary from Logan General Hospital in rendering his opinion in this case. We consider the administrative law judge's error, however, to be harmless as, even if Dr. Perper did review the Discharge Summary documenting the miner's terminal treatment for congestive heart failure, this fact does not alter the administrative law judge's conclusion that Dr. Perper did not discuss the miner's congestive heart failure or properly explain the bases for his opinion, notwithstanding the documentation that the physician reviewed. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

consistent with congestive heart failure. Decision and Order at 10; *Sparks*, 213 F.3d at 192, 22 BLR at 2-264; *Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155.

The administrative law judge is empowered to weigh the medical evidence and to draw her own inferences therefrom, *see Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Lane*, 105 F.3d at 166, 21 BLR at 2-34; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson*, 12 BLR at 1-113. Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because the administrative law judge permissibly exercised her discretion in rendering her credibility determinations in this case, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and further affirm the denial of benefits.⁶

⁶ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant filed her survivor's claim prior to January 1, 2005. Survivor's Director's Exhibit 2.

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge