

BRB No. 14-0052 BLA

LAHOMA MULLINS)
(Widow of RAYMOND MULLINS))
)
 Claimant-Petitioner)
)
 v.)
)
 PEN COAL CORPORATION)
)
 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 09/17/2014
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Adele H. Odegard,
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for
employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand (2005-BLA-5137) of
Administrative Law Judge Adele H. Odegard denying benefits on a request for

modification of a survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).² This case is before the Board for the third time.³ In the last appeal, the Board held that Administrative Law Judge Ralph A. Romano failed to properly apply the evidentiary limitation provisions pursuant to 20 C.F.R. §§725.414 and 725.310 and, thus, may have excluded evidence admissible under 20 C.F.R. §725.414(a). Therefore, the Board vacated the decision, and remanded the case for Judge Romano to allow the parties to submit medical evidence pursuant to the evidentiary limitations set forth in Sections 725.414 and 725.310(b), in accordance with *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007). The Board instructed Judge Romano, on remand, to consider all relevant medical evidence to determine whether claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. *Mullins v. Pen Coal Corp.*, BRB Nos. 11-0125 BLA and 11-0125 BLA-A (Oct. 28, 2011)(unpub.).

On remand, the parties were permitted to submit additional evidence to complete the complement of evidence permitted by Section 725.414, to resubmit and/or redesignate evidence, and to submit additional rebuttal evidence, subject to the

¹ Claimant, Lahoma Mullins, is the widow of the miner, who died on March 5, 2002. Claimant filed a survivor's claim on May 20, 2002, on behalf of herself and her two minor children. Director's Exhibit 2. The record contains no evidence that the miner filed a claim during his lifetime.

² 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 this claim prior to January 1, 2005. Director's Exhibit 2.

³ The district director initially denied claimant's claim on September 5, 2003, and claimant filed a petition for modification on May 19, 2004. Director's Exhibits 20, 22. By Decision and Order dated May 23, 2007, Administrative Law Judge Ralph A. Romano awarded benefits. On appeal, the Board vacated Judge Romano's finding of death due to pneumoconiosis at 20 C.F.R. §718.205, and remanded the case for a full explanation as to the weight he accorded the conflicting evidence of record. In addition, the Board instructed Judge Romano to render a specific finding regarding the length of the miner's coal mine employment. *L.M. [Mullins] v. Pen Coal Corp.*, BRB No. 07-0765 BLA (June 20, 2008)(unpub.). In a Decision and Order dated April 14, 2009, Judge Romano credited the miner with twenty-one years of coal mine employment, he found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205, and awarded benefits. Judge Romano summarily denied employer's subsequent Motion for Reconsideration, and employer appealed the award of benefits to the Board.

evidentiary limitations at Sections 725.414 and 725.310. In the interim, Judge Romano retired, and the case was assigned to Administrative Law Judge Adele H. Odegard (the administrative law judge), who determined that the parties' proffered evidence comported with the evidentiary limitations, and was admissible into the record. Addressing the merits of entitlement, the administrative law judge accepted employer's concession that the miner had pneumoconiosis, as supported by the record, but found that claimant failed to establish that the miner's death was due to pneumoconiosis at Section 718.205. Accordingly, benefits were denied.

In the present appeal, claimant contends that the administrative law judge erred in admitting the reports of Drs. Hippensteel and Oesterling into the record. On the merits, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that pneumoconiosis hastened the miner's death at Section 718.205. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not intend to participate in this appeal.

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, 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, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

Claimant initially contends that the medical report of Dr. Hippensteel and the autopsy report of Dr. Oesterling, which employer proffered at the November 28, 2006

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

hearing on modification before Judge Romano, should not have been admitted into evidence in this claim. While agreeing that employer correctly interprets *Rose* as allowing for the full complement of evidence to be admitted for the first time on modification, claimant maintains that employer waived the issue by failing to raise it in its first appeal to the Board. Claimant's Brief at 11-12. The Board rejected claimant's argument in the last appeal, holding that, under the facts of this case, namely that *Rose* was issued after the hearing and contemporaneously with Judge Romano's 2007 Decision and Order, "principles of fundamental fairness require that the parties be permitted to resubmit or redesignate their evidence in light of Sections 725.414 and 725.310(b)." *Mullins*, slip op. at 5. Because we have previously addressed and rejected claimant's argument, and no exception to the law of the case doctrine has been demonstrated, we hold that the law of the case doctrine is controlling on this issue. See *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-125 (1991); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting). As claimant has not challenged the administrative law judge's finding that the reports of Drs. Hippensteel and Oesterling comply with the evidentiary limitations set forth in Sections 725.414 and 725.310, we affirm her admission of this evidence into the record. Decision and Order on Second Remand at 3-4; see *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Turning to the merits of entitlement, claimant argues that the administrative law judge erred in determining that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205. Claimant maintains that the administrative law judge should have credited the opinions of Drs. Mahmoud and Perper, that coal workers' pneumoconiosis contributed to the miner's death from atherosclerotic cardiovascular disease. Claimant also argues that the administrative law judge should have discounted the contrary opinions of Drs. Bush, Crouch, Rosenberg, Oesterling, and Hippensteel, that there is no medical data demonstrating that either simple pneumoconiosis or a chronic dust disease of the lung arising out of coal mine employment contributed to the miner's demise from a myocardial infarction caused by atherosclerotic heart disease. Claimant asserts that the opinions of Drs. Bush, Crouch, Rosenberg and Oesterling contain various deficiencies that diminish the overall reliability of their opinions. Claimant's Brief at 13-23.

After consideration of the administrative law judge's Decision and Order on Second Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, is consistent with applicable law, and contains no reversible error. In assessing the probative value of Dr. Mahmoud's opinion, the administrative law judge noted that, while Dr. Mahmoud's medical qualifications were not contained in the record, he was a deputy chief medical examiner and served as the autopsy prosector. Because Dr. Mahmoud "objectively quantified" the miner's coronary artery disease with his findings of 90% stenosis in two coronary arteries and thrombosis completely occluding the third

coronary artery, the administrative law judge properly credited his opinion, that the miner died “suddenly and acutely as a result of atherosclerotic cardiovascular disease which was complicated by sudden thrombosis of one of his coronary arteries (heart attack),” as well-reasoned and well-documented. Decision and Order on Second Remand at 6, 13; Director’s Exhibit 11. However, the administrative law judge rationally discounted Dr. Mahmoud’s opinion that pneumoconiosis contributed to the miner’s death, as she found that the physician failed to explain the basis for this conclusion. Noting that Dr. Mahmoud found pneumoconiosis and emphysema, but did not address the etiology of the emphysema and provide objective information regarding the extent of the pneumoconiosis and emphysema in the miner’s lungs, nor did he explain how or why the miner’s pneumoconiosis affected the miner’s condition (in light of the heart attack that Dr. Mahmoud viewed as the precipitating cause of death), the administrative law judge permissibly concluded that Dr. Mahmoud’s opinion was not well-reasoned. Decision and Order on Second Remand at 14; Director’s Exhibit 11; *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Similarly, the administrative law judge reviewed Dr. Perper’s opinion and found that it was unpersuasive. Decision and Order on Second Remand at 6-8, 14-16. Dr. Perper, who is Board-certified in anatomical, surgical, and forensic pathology, opined that “coal workers’ pneumoconiosis and the associated [chronic obstructive pulmonary disease], was a contributory cause of [the miner’s] death and hastening cause of his death, both directly and indirectly through pulmonary insufficiency and through an increased risk of fatal arrhythmia, on a background of coronary artery disease.” Claimant’s Exhibit 1. Dr. Perper explained that the pulmonary insufficiency was caused “by direct and extensive replacement of normal lung tissue by non[-]breathing pneumoconiotic lesions and associated centrilobular chronic emphysema, cor pulmonale and resulting hypoxemia, which was also demonstrated clinically,” and that pneumoconiosis hastened death “through hypoxemia precipitating/aggravating a cardiac arrhythmia.” *Id.* However, the administrative law judge determined that the record contained no support for Dr. Perper’s finding that the miner had cor pulmonale or suffered from hypoxemia at the time of his death. Decision and Order on Second Remand at 15. Noting that Dr. Perper did not specify how the miner’s hypoxemia had been “clinically demonstrated,” the administrative law judge inferred that the physician was relying on 1999 hospitalization records which he had reviewed and which indicated that the miner had hypoxemia during his hospitalization for pneumonia and a probable pulmonary embolism some two years prior to death. *Id.*; Director’s Exhibit 12. As Dr. Rosenberg, a pulmonary specialist, opined that the autopsy results and medical records he reviewed revealed no evidence of hypoxemia or cor pulmonale with right-sided heart enlargement at the time of death, and stated that the hypoxemia exhibited during the miner’s 1999 hospitalization was related to his acute medical conditions at that time, the administrative law judge reasonably found that Dr. Perper’s conclusions were undermined. Decision

and Order on Second Remand at 17; Employer's Exhibits 4, 7. Lastly, the administrative law judge observed that Dr. Perper did not explicitly state that the miner actually suffered a fatal cardiac arrhythmia; rather, he indicated that the miner's hypoxemia placed him at increased risk for such an occurrence. Decision and Order on Second Remand at 16; Claimant's Exhibit 1. Based on the foregoing, the administrative law judge permissibly concluded that Dr. Perper's opinion was not well-reasoned and was entitled to little weight. *See Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

As the administrative law judge's credibility determinations are supported by substantial evidence, and the remaining medical opinions do not support claimant's burden, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at Section 718.205. Consequently, we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge