



BRB Nos. 19-0546 BLA
and 19-0547 BLA

HELEN SIZEMORE)
(o/b/o and Widow of JOHN H. SIZEMORE))

Claimant-Respondent)

v.)

SHAMROCK COAL COMPANY)

and)

AMERICAN RESOURCES INSURANCE)
COMPANY)

DATE ISSUED: 09/30/2020

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 Awarding Benefits on Remand of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan and Richard Couch (John Hunt Morgan, PSC), Harlan, Kentucky, for Claimant.

Cameron Blair and John W. Beauchamp (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer/Carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Richard M. Clark's Decision and Order Awarding Benefits on Remand (2011-BLA-05036, 2015-BLA-05186) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on July 2, 2007, and is before the Benefits Review Board for a second time.

In a Decision and Order Denying Benefits in Living Miner's Claim and Awarding Benefits in Survivor's Claim dated September 29, 2016, Administrative Law Judge William J. King credited the Miner with thirty-five years of coal mine employment, but found Claimant did not establish a totally disabling respiratory of pulmonary impairment.¹ 20 C.F.R. §718.204(b)(2). Thus he found Claimant did not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2012). Considering entitlement under 20 C.F.R. Part 718,³ he found Claimant established clinical pneumoconiosis and legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to cigarette smoking and coal mine dust exposure.⁴ 20 C.F.R.

¹ In his Decision and Order, Judge King adjudicated the miner's subsequent claim and the survivor's claim, as both claims were consolidated before him. The Miner had filed his subsequent claim on February 2, 2001. Director's Exhibit 3. He died on April 25, 2007, however, while that claim was pending. Director's Exhibit 10. Claimant, the Miner's widow, pursued the Miner's subsequent claim on his behalf and also filed a survivor's claim. Based on the finding that Claimant failed to establish total disability, Judge King found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), or establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309. Therefore he denied the Miner's subsequent claim.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

³ Judge King also found the evidence did not establish the existence of complicated pneumoconiosis and Claimant, therefore, could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3).

⁴ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions

§718.202(a). He further found the Miner’s death was due to legal pneumoconiosis and awarded benefits. 20 C.F.R. §718.205. Employer requested reconsideration, which he denied on May 23, 2017.

Considering Employer’s appeal of the survivor’s claim, the Board affirmed, as unchallenged, Judge King’s finding the Miner had clinical pneumoconiosis and legal pneumoconiosis in the form of COPD.⁵ *Sizemore v. Shamrock Coal Co.*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 4 n.10. (Aug. 10, 2018) (unpub.); 20 C.F.R. §718.202(a). The Board also rejected Employer’s argument that Judge King applied an incorrect standard in evaluating whether the evidence established the Miner’s death was due to pneumoconiosis.⁶ *Sizemore*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 5-6. A majority of the Board’s three-member panel vacated the award of benefits, however, because Judge King erred in weighing Dr. Varghese’s opinion on the issue of death causation. *Id.* at 6-7. It also held he erred in failing to adequately weigh the contrary opinions of Drs. Westerfield and Caffrey that the Miner’s death was due to cardiac problems. *Id.* at 7-8. The majority⁷ instructed him to reconsider the medical opinions on

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).

⁵ The Board also affirmed, as unchallenged by the parties, Judge King’s denial of benefits in the Miner’s claim. *Sizemore v. Shamrock Coal Co.*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 4 n.10. (Aug. 10, 2018) (unpub.)

⁶ In a Motion to Remand, Employer urged the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). The Board held Employer waived its Appointments Clause challenge by failing to raise the issue in its opening brief. *Sizemore*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 3 n.9.

⁷ Administrative Appeals Judge Greg J. Buzzard would have affirmed Judge King’s finding Claimant established the Miner’s death was due to legal pneumoconiosis and the award of benefits. *Sizemore*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 10-16; 20 C.F.R. §718.205(b). Judge Buzzard would have affirmed the finding that “Dr. Varghese, as the miner’s treating physician, had a detailed understanding of the miner’s pulmonary condition and credibly attributed his death to his COPD.” *Sizemore*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 14. He also would have affirmed the finding that Dr. Westerfield failed to “credibly address the impact, if any, that the miner’s COPD/legal pneumoconiosis had on his death.” *Id.* at 11-12. Finally, he would have affirmed, as unchallenged, Judge King’s discrediting of Dr. Caffrey for failing to “discuss

the issue of death causation and render findings that comply with the explanatory requirements of the Administrative Procedure Act (APA).⁸ *Id.* at 8-9; *see* 20 C.F.R. §718.205(b).

Due to Judge King's retirement, the case was reassigned to Administrative Law Judge Richard M. Clark (the administrative law judge). In a September 8, 2019 Decision and Order Awarding Benefits on Remand that is the subject of this appeal, the administrative law judge found Claimant established the Miner's death was due to legal pneumoconiosis in the form of COPD. 20 C.F.R. §718.205(b). Thus he awarded survivor's benefits.

On appeal, Employer contends that the administrative law judge erred in finding the Miner's death was due to legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁹ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817 (6th Cir. 1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). In cases where the statutory presumptions cannot be invoked, a miner's death will be considered due to pneumoconiosis if it caused death or was a substantially contributing cause that hastened death. 20 C.F.R. §718.205(b).

whether COPD played a role in the miner's death or otherwise express disagreement with Dr. Varghese's diagnosis." *Id.* at 15.

⁸ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented" 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

⁹ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6, 7.

Pursuant to the Board's instructions, the administrative law judge weighed the opinions of Drs. Varghese, Westerfield, and Caffrey. Decision and Order on Remand at 3-8. He credited Dr. Varghese's opinion that the Miner's death was due to legal pneumoconiosis in the form of COPD. *Id.* He found the opinions of Drs. Westerfield and Caffrey unpersuasive with respect to the cause of the Miner's death and assigned them diminished weight. *Id.* We reject Employer's argument that the administrative law judge erred in weighing these opinions. Employer's Brief at 6-13.

Dr. Westerfield

Dr. Westerfield opined that the Miner had COPD and "recurrent pneumonias" at the time of his death, but he could not "say with certainty what level of pulmonary impairment" the Miner had. Employer's Exhibit 11 at 7. Although he opined that the Miner's COPD was due to "extensive" cigarette smoking, he concluded the Miner had legal pneumoconiosis because his COPD was significantly related to coal mine dust exposure. *Id.* at 9.

With respect to death causation, Dr. Westerfield opined that the Miner died as a result of pulmonary congestion due to congestive heart failure. Employer's Exhibit 11 at 11. He explained that congestive heart failure "compromises the ability of the lungs" to work because "alveolar sacs [fill] with fluid and [are unable] to exchange gas," resulting in "chronic failure." Employer's Exhibit 13 at 17. He concluded that the "combination of recurrent pulmonary infections and heart disease" caused the Miner's death.¹⁰ Employer's Exhibit 11 at 9.

Dr. Westerfield explained that coal mine dust exposure was not a "significant cause" of the Miner's respiratory injury because there was "very little evidence of coal dust damage in [the Miner's] lung autopsy specimens," and limited microscopic pneumoconiosis represents only "inactive scarring." *Id.* at 11-12. He highlighted that the Miner stopped working in coal mines in 1991 but continued to "smoke cigarettes heavily" for another fourteen years. *Id.* at 9. Moreover, he opined that coal mine dust exposure did not cause or contribute to the Miner's death because the presence of coal mine dust in the lungs "was incidental" and did not contribute to the Miner's congestive heart failure or pneumonia. *Id.* at 11-12. He explained "[s]imple coal workers' pneumoconiosis, particularly when only identified microscopically, does not cause injury that interferes with respiration and does not cause the development of cardiac disease or infection." *Id.* During

¹⁰ Dr. Westerfield testified "heart failure contributed to [the Miner's] additional respiratory injury." Employer's Exhibit 13 at 17. He also stated that people like the Miner "who have the double whammy of heart and lung disease get extra [pulmonary] infection from their heart not working right[.]" *Id.* at 15.

his deposition, Dr. Westerfield testified the Miner's cigarette smoking contributed to his development of pulmonary infections and to his overall respiratory condition. Employer's Exhibit 13 at 12-13.

The Board instructed the administrative law judge that in weighing the medical opinions, he should address "whether the evidence establishes that the Miner's COPD was a direct cause of the [M]iner's death, not whether coal mine dust exposure played any role in the miner's death." *Sizemore*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 8 n.16. As discussed above, Dr. Westerfield excluded coal mine dust as a contributing factor in the Miner's death based on the limited amount of dust found on autopsy. However, because Claimant established the Miner's smoking-related COPD was significantly related to coal mine dust exposure and thus constituted legal pneumoconiosis, the relevant inquiry was whether the Miner's COPD caused his death or was a substantially contributing cause that hastened his death. The administrative law judge found Dr. Westerfield opined that the Miner "had a cardiac death," but "certainly had significant pulmonary impairment at the end." Decision and Order on Remand at 8. He permissibly found Dr. Westerfield's opinion unpersuasive because he "did not address the question of whether [the Miner's] COPD, which [is] legal pneumoconiosis, played a role in his death." Decision and Order on Remand at 8; see *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522 (6th Cir. 2002); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). As the administrative law judge's credibility finding is supported by substantial evidence, it is affirmed. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (Substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.).

Dr. Caffrey

Dr. Caffrey opined that the Miner "may have had simple coal workers' pneumoconiosis," but concluded it was not a "major medical problem" and did not cause or contribute to the Miner's death. Director's Exhibit 19 at 5-6. He further opined that the Miner's COPD was due to cigarette smoking. *Id.* He noted Dr. Varghese did not list coal workers' pneumoconiosis as a cause of the Miner's death, but did list COPD, congestive heart failure, coronary artery disease, and pneumonia. *Id.* Dr. Caffrey opined that the Miner's death was due pneumonia, which was unrelated to coal mine dust exposure. *Id.* During his deposition, Dr. Caffrey testified the Miner's "emphysema with some COPD" was not "a major problem." Director's Exhibit 66 at 86. He identified vascular disease as the "major problem" affecting the coronary arteries that led to congestive heart failure. *Id.*

He stated “[i]n the end [the Miner] developed methicillin resistant staph aureus pneumonia which,” combined with his congestive heart failure, “led to his death.” *Id.* at 177.

The administrative law judge noted Dr. Caffrey “acknowledged that coal [mine] dust can cause COPD in a susceptible individual if there is a significant amount of coal dust,” but found the doctor “did not address this issue after he reviewed the autopsy slides, or offer any opinion on whether [the Miner’s]” COPD constituted legal pneumoconiosis. Decision and Order on Remand at 7. Thus the administrative law judge rationally discredited Dr. Caffrey’s opinion because he “did not address the question of whether [the Miner’s] significant history of coal mine dust exposure played a role in the development of his COPD.” *Id.*; see *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). The administrative law judge also found Dr. Caffrey focused on whether clinical pneumoconiosis caused or contributed to the Miner’s death, and thus did not adequately “address the question of whether [the Miner’s] emphysema or COPD played any part in his death, along with his congestive heart failure and pneumonia.” Decision and Order on Remand at 7; *Stephens*, 298 F.3d at 522; *Napier*, 301 F.3d at 713-714; *Rowe*, 710 F.2d at 255.

Dr. Varghese

Dr. Varghese completed the Miner’s death certificate and stated his death was due to COPD, congestive heart failure, coronary artery disease, and pneumonia. Director’s Exhibit 10. He subsequently issued a February 15, 2018 correspondence stating that the Miner’s main diagnosis was COPD, and the Miner’s pneumonia was “secondary to [COPD] and probably black lung.” Director’s Exhibit 18A. He reiterated that the Miner died due to exacerbation of COPD. *Id.* The administrative law judge found Dr. Varghese’s opinion credible and entitled to significant weight. Decision and Order on Remand at 3-5.

Employer argues the administrative law judge applied the wrong death causation standard in evaluating Dr. Varghese’s opinion. Employer’s Brief at 6-9. It contends *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003) requires Claimant to establish legal pneumoconiosis hastened the Miner’s death through a specifically defined process that reduced his life by an estimable time. Employer’s Brief at 6-9. It further contends the administrative law judge erred by not evaluating whether Dr. Varghese’s opinion met this standard. *Id.*

The Board previously rejected this argument. *Sizemore*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 5-7. It noted the standard discussed in *Williams* involved an evaluation of whether pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death under 20 C.F.R. §718.205(b)(2), (6). *Sizemore*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 5-7. Because Judge King found “Dr. Varghese’s

opinion was sufficient to establish legal pneumoconiosis was a direct cause of [the Miner's] death" under 20 C.F.R. §718.205(b)(1), Judge King was "correct in stating that the standard set forth in *Williams* . . . was not applicable." *Sizemore*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 6. On remand, the administrative law judge did not disturb Judge King's conclusion that Dr. Varghese's opinion is sufficient to establish legal pneumoconiosis was a direct cause of the Miner's death. 20 C.F.R. §718.205(b)(1).

The Board's previous resolution on this issue constitutes the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). As Employer has not demonstrated a valid exception to the law of the case doctrine, we decline to disturb the Board's disposition of this issue. *See Brinkley*, 14 BLR at 1-150-151.

Employer next argues the administrative law judge impermissibly credited Dr. Varghese's opinion based solely on the doctor's status as the Miner's treating physician. Employer's Brief at 9. This argument has no merit.

Before weighing Dr. Varghese's opinion, the administrative law judge summarized treatment records from Mary Breckenridge Hospital (MBH), where the Miner obtained care from May 1991 to April 2007 for "a number of conditions," including "COPD, congestive cardiac failure, and chronic atrial fibrillation."¹¹ Decision and Order on Remand at 3-4, *citing* Director's Exhibit 16. Specifically, on February 18, 2004, Dr. Varghese treated the Miner at MBH for COPD "exacerbation," coronary artery disease, and arterial fibrillation after he experienced difficulty breathing and "severe wheezing." Decision and Order at 3-4, *citing* Director's Exhibit 16 at 48-51. He again treated the Miner for "exacerbation" of COPD in December 2006 and "multiple times in February and March 2007." Decision and Order on Remand at 3-4, *citing* Director's Exhibit 16 at 58-83. On February 9, 2007, the Miner again returned to MBH for treatment of COPD "exacerbation" and "respiratory infection with compensated congestive cardiac failure." Director's Exhibit 16 at 60-61. Subsequently, the Miner was re-admitted to MBH on February 25, 2007, for shortness of breath and hypoxia and again on March 7, 2007, for left lower lung pneumonia, COPD, coronary artery disease, and arterial fibrillation. *Id.* 70-80.

On March 23, 2007, Dr. Varghese indicated he was transferring the Miner to the intensive care unit in Hazard, Kentucky, because of "respiratory failure and deteriorating condition." Director's Exhibit 16 at 84-85. He indicated the Miner required home oxygen

¹¹ The administrative law judge found the Mary Breckenridge Hospital records "include long-standing and consistent x-ray findings" of COPD, interstitial fibrosis, and scarring, and "reflect [the Miner] was prescribed supplemental oxygen as early as 2004." Decision and Order at 3-4, *citing* Director's Exhibit 16.

use “around the clock.” *Id.* at 88. On April 24, 2007, he stated the Miner experienced a “number of medical problems including septic shock, bilateral . . . pneumonia, acute respiratory failure with hypoxia, congestive heart failure, stable anemia, malfunctioning pacemaker, [coagulopathy], malnutrition, and sacral decubiti.” *Id.* at 88-89. The Miner’s family requested he be returned to MBH for palliative care. *Id.* The Miner died on April 25, 2017. *Id.*

In weighing Dr. Varghese’s opinion, the administrative law judge specifically stated he was not crediting it “based solely on [the doctor’s] status as [the Miner’s] treating physician.” Decision and Order on Remand at 4. Rather he permissibly found Dr. Varghese’s “final assessment of end stage lung disease and [COPD], as well as his listing of the causes of death” are persuasive and “supported by his treatment notes.”¹² *Id.*; see *Stephens*, 298 F.3d at 522; *Napier*, 301 F.3d at 713-714; *Rowe*, 710 F.2d at 255.

Having credited Dr. Varghese’s opinion based on its “power to persuade,” the administrative law judge further permissibly found it entitled to significant weight because the doctor treated the Miner “regularly for a number of years before his death,” and “was in a good position to observe and evaluate [the Miner’s] medical condition over his last years” and “during his terminal admission.”¹³ Decision and Order on Remand at 5; see *Williams*, 338 F.3d at 513; *Stephens*, 298 F.3d at 522 (administrative law judge permissibly assigned controlling weight to treating physician because he examined the Miner on numerous occasions and was best suited to make an assessment of the Miner’s condition over a period of time); 20 C.F.R. §718.104(d)(1)-(5).

¹² The administrative law judge found there was no basis to conclude Dr. Varghese “offered his opinion in an attempt to be of assistance to the miner’s family.” Decision and Order on Remand at 4-6. This finding is affirmed as unchallenged. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 517 (6th Cir. 2003); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

¹³ Dr. Varghese noted he reviewed Dr. Dennis’s autopsy findings, which included a diagnosis of complicated pneumoconiosis, and opined that they further support the conclusion that the Miner’s death was due to COPD and “black lung.” Director’s Exhibit 18A. The administrative law judge acknowledged Employer’s argument that Dr. Varghese’s opinion should be rejected because “Judge King found that Dr. Dennis’s diagnosis of complicated pneumoconiosis was not credible.” Decision and Order at 6 n.3. He permissibly declined to discredit Dr. Varghese’s opinion on this basis, however, because he was not persuaded the doctor “relied” on Dr. Dennis’s autopsy. *Id.*; *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511 522 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding Claimant established the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge