

BRB No. 12-0379 BLA

LORETTA I. MEADE )  
(Widow of JAMES MEADE) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
TALMAN, INCORPORATED ) DATE ISSUED: 04/30/2013  
 )  
and )  
 )  
AMERICAN RESOURCES 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 of Adele Higgins Odegard,  
Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg,  
Kentucky, for claimant.

Ward Ballerstedt (Ferrerri & Fogle, PLLC), Louisville, Kentucky, for  
employer/carrier.

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen James,  
Associate Solicitor; Michael J. Rutledge, Counsel for Administrative  
Litigation and Legal Advice), Washington, D.C., for the Director, Office of  
Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2010-BLA-5592) of Administrative Law Judge Adele Higgins Odegard awarding benefits on a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited the miner with 22.32 years of coal mine employment<sup>1</sup> and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that, although the evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, it established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b). The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that the miner's work for it satisfied the regulatory definition of a miner and, thus, that it is the responsible operator in this case. Employer also challenges the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Claimant<sup>2</sup> responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, contending that the administrative law judge correctly found that employer is the responsible operator because the miner's work for it qualified as coal mine work under the Act.<sup>3</sup>

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<sup>1</sup> The administrative law judge further found that, of the 22.32 years of coal mine employment the miner worked, the miner had 13.4 years of underground coal mine employment.

<sup>2</sup> Claimant is the widow of the miner. The miner filed a claim on September 8, 1978, which was finally denied by a claims examiner on May 1, 1980. He died on November 25, 2008. Director's Exhibits 18, 30. Claimant filed a survivor's claim on June 23, 2009. Director's Exhibit 2.

<sup>3</sup> Because the administrative law judge's findings regarding the length of the miner's coal mine employment, and her findings that the evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, but that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b), are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 applicable law.<sup>4</sup> 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).

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Initially, we will address employer's contention that the administrative law judge erred in finding that it is the properly designated responsible operator in this case. Specifically, employer asserts that the miner's work for it did not satisfy the regulatory definition of coal mine employment. We disagree.

The administrative law judge found that employer was the properly designated responsible operator because it was the miner's last employment for at least one year, and the miner met the definition of a miner when he worked for it. In so finding, the administrative law judge noted that the Social Security earnings record indicated that the miner last worked for employer from 1989 to 1995 as a truck driver. The administrative law judge also found that, because employer is a trucking company that provided hauling services to at least one coal mine operator, it met the definition of an operator under the regulations, citing 20 C.F.R. §725.491(a). Further, after determining that it was unclear from the record whether the site from which the miner picked up coal was either a mine or a processing plant that was removed from a mine, the administrative law judge noted that, under the regulations, a transportation worker is a miner when his work is at a mine or a coal preparation facility, citing 20 C.F.R. §725.202(b).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *Director, OWCP v. Consolidation Coal Co.*, [Petracca], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility. The function requirement mandates that the duties performed be integral to the extraction or preparation of coal. In this case, the administrative law judge

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<sup>4</sup> The record indicates that the miner was last employed in the coal mining industry in Kentucky. Director's Exhibits 3, 13. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

reasonably found that “the [m]iner’s work for the [e]mployer, whether at a strip mine or tippie, was at a covered situs, and thus [met] the ‘situs’ requirement enunciated by the Sixth Circuit.” Decision and Order at 7; *see Petracca*, 884 F.2d at 930, 13 BLR at 2-41-42; *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). In addition, the administrative law judge reasonably found that the function requirement was met because “the [m]iner’s actions in picking up processed coal at a tippie or mine site and delivering the coal to another location, was (sic) integral to the coal preparation process.” Decision and Order at 8; *Petracca*, 884 F.2d at 930, 13 BLR at 2-41-42; *Southard*, 732 F.2d at 71, 6 BLR at 2-31-32. Employer points to no evidence that the miner’s work for it involved coal that was already in the stream of commerce. Thus, under the facts of this case, we affirm the administrative law judge’s determination that the miner’s work for employer satisfied the situs and function requirements, as supported by substantial evidence. Consequently, the administrative law judge reasonably found that claimant established that the miner met the regulatory definition of a miner when he worked for employer. 20 C.F.R. §725.202.

Further, the administrative law judge permissibly found that employer failed to rebut the presumption that the miner met the regulatory definition of a miner,<sup>5</sup> as she determined that “[the] testimony [of Robert Tucker, the miner’s supervisor,] does not exclude the possibility that the [m]iner was regularly exposed to coal mine dust in his employment for [it].”<sup>6</sup> Decision and Order at 9. We, therefore, reject employer’s assertion that the administrative law judge erred in finding that it is the properly designated responsible operator in this case.

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<sup>5</sup> Section 725.202(b)(1) provides a rebuttal presumption that an individual who worked in coal mine construction or transportation was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for the purposes of determining whether such individual is or was a miner, establishing the applicability of any presumptions under Section 411(c) of the Act and 20 C.F.R. Part 718, and determining the identity of the responsible operator. 20 C.F.R. §725.202(b)(1)(i), (ii), (iii). Further, Section 725.202(b)(2) provides that the presumption may be rebutted by evidence demonstrating that the individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility, or by evidence demonstrating that the individual did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

<sup>6</sup> The administrative law judge noted that the testimony of Robert Tucker, the miner’s supervisor, did not take into consideration all of the miner’s responsibilities, such as his maintenance responsibilities on the truck. Decision and Order at 9.

Turning to the merits, we address employer's contention that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). The administrative law judge considered the autopsy report and supplemental report of Dr. Dennis, the consulting reports of Drs. Caffrey and Broudy, and the death certificate signed by Dr. Stephens. In his autopsy report, based on both gross and microscopic descriptions, Dr. Dennis diagnosed pulmonary congestion and edema, severe pulmonary embolus and simple coal workers' pneumoconiosis, and opined that "[the miner] died as a result of the pulmonary embolus which was moderate to severe and bilaterally expressed." Director's Exhibit 20. In a supplemental report, Dr. Dennis opined:

[The miner] died a pulmonary death and the contributing factor to his pulmonary death was a pulmonary embolus. In addition, the underlying contribution by coal worker's (sic) pneumoconiosis has to be stated. The coal worker's (sic) pneumoconiosis did indeed significantly contribute to his death by restricting his air flow and ability to exchange carbon dioxide for oxygen and the impairment secondary to coal worker's (sic) pneumoconiosis and the diffuse involvement by the same indicates the length of exposure to the irritating factor of silica, subsequent fibrosis and macular development involving the entire lung. The lungs with entire volume involvement by coal worker's (sic) pneumoconiosis are indeed pathologic and contribute to death scenarios and contribute to hypoxia and subsequent pulmonary embolus formation.

Director's Exhibit 21. By contrast, in his report, Dr. Caffrey opined that the miner's simple coal workers' pneumoconiosis did not cause, contribute to, or hasten his death.<sup>7</sup> Employer's Exhibit 1. Similarly, in his report, Dr. Broudy opined that there was no evidence that coal workers' pneumoconiosis caused or contributed to the miner's death. Director's Exhibit 31. In the death certificate, Dr. Stephens listed cardiorespiratory arrest as the immediate cause of the miner's death. Director's Exhibits 18, 30.

The administrative law judge gave greater weight to Dr. Dennis's opinion that the miner had pulmonary emboli than to Dr. Caffrey's contrary opinion, because Dr. Dennis is a Board-certified pathologist who had an opportunity, as the prosector, to observe the miner's entire lung during the autopsy. In addition, the administrative law judge gave greater weight to Dr. Dennis's opinion that the immediate cause of the miner's death was

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<sup>7</sup> Dr. Caffrey stated that "simple coal workers' pneumoconiosis rarely leads to death in my experience." Employer's Exhibit 1. Dr. Caffrey also opined that "[the miner's simple coal workers' pneumoconiosis] did not cause him hypoxia or pulmonary emboli as Dr. Dennis indicated in his [supplemental report]." *Id.*

pulmonary emboli because it is well-reasoned and supported by the medical evidence of record. Further, the administrative law judge gave greater weight to Dr. Dennis's opinion that pneumoconiosis contributed to the miner's death because it is supported by the medical evidence in the record. The administrative law judge gave less weight to Dr. Caffrey's opinion that pneumoconiosis did not contribute to the miner's death because Dr. Caffrey discounted the existence of pulmonary emboli and "[the doctor's] speculation about cardiac disease and congestive heart failure are not supported by other evidence." Decision and Order at 23. The administrative law judge also gave less weight to Dr. Broudy's opinion that pneumoconiosis did not contribute to the miner's death because the doctor's view that the miner's pneumoconiosis was likely microscopic is not supported by the autopsy evidence. Moreover, the administrative law judge gave no weight to the death certificate. Hence, based on Dr. Dennis's opinion, the administrative law judge found that claimant established that the miner's pneumoconiosis was a substantially contributing cause of his death.

Employer asserts that the administrative law judge erred in giving greater weight to Dr. Dennis's opinion that the miner had pulmonary emboli than to Dr. Caffrey's contrary opinion merely because Dr. Dennis conducted the autopsy. Employer's assertion has merit. An administrative law judge may not credit the opinion of the autopsy prosector over the opinion of one who reviews slides solely because the autopsy prosector was the only physician to conduct a gross examination of the body. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 191-92, 22 BLR 2-251, 2-262 (4th Cir. 2000); *see also Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992) (holding that the administrative law judge did not explain how the autopsy prosector's ability to conduct a gross examination gave him an advantage over reviewing pathologists). In this case, the administrative law judge gave greater weight to Dr. Dennis's opinion that the miner had pulmonary emboli than to Dr. Caffrey's opinion that pulmonary emboli could not be identified because Dr. Dennis, as the autopsy prosector, had the opportunity to directly observe the miner's entire lung during the autopsy. However, the administrative law judge did not explain why she found that Dr. Dennis's gross examination of the lung tissue gave him an advantage over Dr. Caffrey, a reviewing pathologist, in providing a more credible assessment regarding the existence of pulmonary emboli. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, we hold that the administrative law judge erred in giving greater weight to Dr. Dennis's opinion regarding the existence of pulmonary emboli than to Dr. Caffrey's contrary opinion because Dr. Dennis saw the gross tissue of the entire lung during the autopsy.

Employer also argues that the administrative law judge erred in giving greater weight to Dr. Dennis's opinion because, employer alleges, it does not constitute substantial evidence that pneumoconiosis contributed to the miner's death, as it is not well-reasoned. Employer's assertion has merit. 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), requires that an administrative law judge set forth the rationale underlying her findings of fact and conclusions of law. *See Wojtowicz*, 12 BLR at 1-165. In this case, the administrative law judge found that Dr. Dennis's opinion that the immediate cause of the miner's death was pulmonary emboli was well-reasoned and supported by the medical evidence of record. The administrative law judge also found that Dr. Dennis's opinion that pneumoconiosis contributed to the miner's death was supported by the medical evidence in the record. In considering Dr. Dennis's opinion, the administrative law judge stated:

Though his opinion on this issue (quoted in full above) is *somewhat muddled in its language*, I find that Dr. Dennis concluded that the [m]iner's restricted air flow and impaired carbon dioxide exchange (which were attributed to his pneumoconiosis) caused hypoxia and contributed to the creation of pulmonary emboli. Thus, Dr. Dennis not only concluded that the immediate cause of the [m]iner's death was due to pulmonary emboli, but he also opined that the [m]iner's pneumoconiosis contributed to the formation of pulmonary emboli by causing hypoxia.

Decision and Order at 21 (emphasis added).

Further, the administrative law judge stated that "Dr. Broudy echoed Dr. Dennis'[s] conclusion regarding pulmonary emboli as the immediate cause of the [m]iner's death, and his report indicates he in fact reviewed Dr. Dennis'[s] report." *Id.* at 22. The administrative law judge also noted that Dr. Broudy did not indicate that the treatment records were inconsistent with Dr. Dennis's opinion regarding the existence of pulmonary emboli. However, after noting that that Dr. Broudy did not comment on Dr. Dennis's opinion regarding the relationship between pneumoconiosis and the miner's death, the administrative law judge determined that Dr. Broudy's opinion that the miner's pneumoconiosis was likely microscopic was inconsistent with Dr. Dennis's autopsy report.<sup>8</sup> Thus, because the administrative law judge did not adequately explain why she found that Dr. Dennis's opinion was well-reasoned and supported by the medical evidence of record, *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165, we hold that the administrative law judge erred in giving significant weight to Dr. Dennis's opinion on these grounds.

Employer additionally asserts that the administrative law judge erred in discounting Dr. Caffrey's opinion because, employer alleges, she found that the doctor's diagnosis of congestive heart failure is not supported by the medical evidence in the

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<sup>8</sup> In addressing the cause of the miner's death, Dr. Broudy stated, "[a]t most [the miner] would have microscopic coal workers (sic) pneumoconiosis which would not have been expected to cause or contribute to his death." Director's Exhibit 31.

record. The administrative law judge noted that congestive heart failure was not listed as a diagnosis in the discharge summary of the miner's final hospitalization. The administrative law judge also noted that it did not appear that Dr. Caffrey had access to any of the miner's hospitalization records. Hence, the administrative law judge found that Dr. Caffrey's conclusion that the miner had congestive heart failure was not supported by the medical evidence in the record. However, as noted by the administrative law judge, the treatment records contain Dr. Ebeo's consulting report, which noted a history of congestive heart failure. Director's Exhibit 30. Dr. Ebeo also noted that acute respiratory failure *may* be secondary to pulmonary embolism versus sepsis syndrome versus myasthenia gravis and/or congestive heart failure from myocardial infarction. *Id.* Further, in his consulting report, Dr. Caffrey indicated that he reviewed Dr. Dennis's autopsy report and supplemental report, as well as autopsy slides of the miner's lung tissue. Based on the autopsy slides, Dr. Dennis diagnosed bilateral acute passive congestive and pulmonary edema, mild to moderate centrilobular emphysema, and simple coal workers' pneumoconiosis. In addressing whether pneumoconiosis contributed to the miner's death, Dr. Caffrey found that "the lungs shows (sic) that there was moderate congestion and edema, and I would suspect that [the miner] had cardiac disease and had congestive heart failure."<sup>9</sup> Employer's Exhibit 1. Thus, we hold that the administrative law judge erred in discounting Dr. Caffrey opinion because the doctor's diagnosis of congestive heart failure is not supported by the medical evidence in the record.

In view of the foregoing, we vacate the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and remand the case for further consideration of all the relevant medical evidence in accordance with the APA.

When weighing the conflicting medical opinions on remand, the administrative law judge must address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

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<sup>9</sup> Because Dr. Caffrey indicated that the diagnoses of moderate congestion and edema were based on the microscopic description of lung tissue, it appears that the doctor's reference to the gross description was a typographical error. Employer's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge