



BRB Nos. 15-0200 BLA
and 15-0200 BLA-A

PAULA FINLEY)
(Executrix of the Estate of MARIE L.)
WILKINSON, Deceased Widow of LOUIS)
WILKINSON))

Claimant-Petitioner)
Cross-Respondent)

v.)

PITTSBURG & MIDWAY COAL)

and)

DATE ISSUED: 04/27/2016

METLIFE INSURANCE OF)
CONNECTICUT P/K/A TRAVELERS)
INSURANCE)

Employer/Carrier-)
Respondents)
Cross-Petitioners)

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 Peter B. Silvain, Jr.,
Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Scott A. White (White & Risse, LLP), Arnold, Missouri, for
employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand (2008-BLA-5149) of Administrative Law Judge Peter B. Silvain, Jr., denying benefits on a survivor's claim¹ filed pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In a Decision and Order dated October 8, 2010, Administrative Law Judge Donald W. Mosser credited the miner with at least 29 years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.² Although Judge Mosser found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (2), he found that the evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Judge Mosser also found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). Further, Judge Mosser found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).³ Accordingly, Judge Mosser awarded benefits. Moreover, Judge Mosser subsequently awarded claimant's counsel a total fee of \$6,671.50, for 33.60 hours of services at an hourly rate of \$150.00 and expenses of \$1,631.50.

¹ The miner died on October 25, 1999. Director's Exhibit 15. His widow filed a survivor's claim on February 5, 2007. Director's Exhibit 2. While the survivor's claim was pending before Administrative Law Judge Peter B. Silvain, Jr., the miner's widow died on July 6, 2014. Claimant, who is the daughter of the deceased widow, is pursuing the survivor's claim on behalf of the widow's estate.

² Administrative Law Judge Donald W. Mosser found that claimant was not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2).

³ Judge Mosser noted that "[Dr. Stiles] testified that the miner's anthracosis caused his lungs to deliver less oxygen to the blood" and that "[t]his, in turn, could cause an irregular heartbeat, dysrhythmia, and ultimately death." Decision and Order at 20. Judge Mosser further found that, because the death certificate listed cardiac dysrhythmia as the immediate cause of the miner's death, Dr. Stiles's opinion that clinical pneumoconiosis hastened the miner's death was supported by the medical evidence. Judge Mosser concluded that "[Dr. Stiles's] opinions further establish that a specifically defined process reduced the miner's life, thus meeting the standard for death causation." *Id.*

In response to employer's appeal, the Board affirmed Judge Mosser's length of coal mine employment finding. *Wilkinson v. Pittsburg & Midway Coal Mining*, BRB No. 11-0230 BLA, slip op. at 2 n.2 (Jan. 31, 2012) (unpub.). However, the Board vacated Judge Mosser's findings at 20 C.F.R. §718.202(a)(2) and (4), and remanded the case for further consideration of the evidence. *Wilkinson*, BRB No. 11-0230 BLA, slip op. at 6. The Board also vacated Judge Mosser's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c),⁴ and remanded the case for further consideration of the evidence thereunder, if reached.⁵ *Wilkinson*, BRB No. 11-0230 BLA, slip op. at 7, 9-10. Lastly, the Board declined to address employer's arguments on appeal regarding Judge Mosser's award of attorney's fees because there had not been a successful prosecution of the claim, as the Board vacated the award of benefits. *Wilkinson*, BRB No. 11-0230 BLA, slip op. at 10.

On remand, Judge Silvain (the administrative law judge) found that the medical opinion evidence did not establish the existence of clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). However, the administrative law judge found that the autopsy evidence established the existence of legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2) and 718.203(c). The administrative law judge also found that the evidence did not establish that the miner's death was due to

⁴ The Board determined that Judge Mosser's finding that the death certificate bolstered Dr. Stiles's opinion was not rational in view of Judge Mosser's finding that the death certificate was entitled to little probative weight. The Board also held that "although [Judge Mosser] cited the proper standard before weighing the evidence relevant to whether pneumoconiosis hastened the miner's death, he did not apply this standard to Dr. Stiles's opinion." *Wilkinson v. Pittsburg & Midway Coal Mining*, BRB No. 11-0230 BLA, slip op. at 9 (Jan. 31, 2012) (unpub.). Specifically, the Board noted that "[Judge Mosser] determined that Dr. Stiles's opinion satisfied this standard without addressing his statements that: The coal dust in the miner's lungs "[p]robably" shortened the miner's life; that a definitive determination "would be up to his primary care physician to better help quantify because he took care of the individual; and that "[y]ou could have low oxygen causing a dysrhythmia because it could affect certain nerve bundles or certain fibers in the heart that would lead to an irregular heartbeat and in his demise." *Id.*, citing Claimant's Exhibit 2 at 23, 26 (emphasis added).

⁵ The Board instructed Judge Mosser to explain how Dr. Stiles's opinion established that a specifically defined process reduced the length of the miner's life in accordance with the standard adopted by the United States Court of Appeals for the Sixth Circuit in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003), if he again credited the doctor's opinion. *Wilkinson*, BRB No. 11-0230 BLA, slip op. at 9.

pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the autopsy evidence did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2). Claimant also challenges the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal, challenging the administrative law judge's finding that the autopsy evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(2). The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.⁶

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.⁷ 33 U.S.C. §921(b)(3), as incorporated 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, 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). For survivor's claims filed on or after January 1, 1982, where the Section 411(c)(4) presumption is not applicable, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20

⁶ Claimant has filed a Motion requesting the Board to close the time for employer to submit a reply brief. Employer responds, arguing that claimant's Motion should be denied because it has filed its reply brief and Motion to File Instantly in which it sets forth grounds for establishing good cause. The Board accepts employer's reply brief, which reiterates its prior contentions. 20 C.F.R. §§802.213, 802.217.

⁷ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the law of the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge considered the reports of Drs. Oesterling, Naeye, Renn, Tuteur and Stiles, as well as a death certificate signed by Dr. McGhee. The administrative law judge gave little weight to the death certificate, which listed the immediate cause of the miner's death as cardiac dysrhythmia, because the record does not contain Dr. McGhee's qualifications.⁸ The administrative law judge also found that the opinions of Drs. Oesterling, Naeye, Renn and Tuteur, that the miner's death was not caused by, contributed to, or hastened by pneumoconiosis,⁹ "do not assist the [c]laimant

⁸ Judge Silvain (the administrative law judge) agreed with Judge Mosser's findings that "there is no evidence identifying Dr. McGhee's qualifications, even though he had personal knowledge regarding the [m]iner's health as his treating physician," and that "[Dr. McGhee] noted in the discharge summary that he deferred to the autopsy findings before issuing the death certificate." Decision and Order on Remand at 12, *citing* Decision and Order at 19-20.

⁹ In an August 6, 2006 report, Dr. Oesterling found that "[the miner's] lungs demonstrate very minimal change, the most significant is the obliterative bronchiolitis." Director's Exhibit 21. Dr. Oesterling opined that "this limited change cannot be classified as coalworkers' [sic] pneumoconiosis, merely a mild anthracotic pigmentation of his lung tissue." *Id.* In a subsequent report dated February 23, 2010, Dr. Oesterling found that "Dr. Stiles'[s] initial autopsy provided inadequate sections of [the miner's] lung to truly evaluate the extent of his interstitial lung diseases." Employer's Exhibit 15. Dr. Oesterling opined, "[c]learly the limited change noted here is inadequate to explain in any way [the miner's] demise since it in no way hastened, contributed to or caused his death." *Id.*

In a November 23, 2007 report, Dr. Naeye found that the miner did not have coal workers' pneumoconiosis, and that "[the miner] had a cardiac arrest and died." Employer's Exhibit 1.

In reports dated May 4, 2008 and February 26, 2010, and a deposition taken on December 29, 2009, Dr. Renn opined that the miner's demise was not caused by, contributing to, or hastened by, his exposure to coal mine dust. Employer's Exhibits 4, 13 (Dr. Renn's Depo. at 23), 16.

In reports dated May 23, 2008 and February 15, 2010, and a deposition taken on December 22, 2009, Dr. Tuteur opined that the miner's death was directly related to a

in satisfying her initial burden [regarding death causation] and need not be preliminarily addressed.” Decision and Order on Remand at 13. Further, while the administrative law judge stated that “Dr. Stiles ... is the only physician of record who opined that the [m]iner’s death was due to pneumoconiosis,”¹⁰ *Id.*, he found that Dr. Stiles’s opinion is insufficient to establish that pneumoconiosis hastened the miner’s death. The administrative law judge therefore found that claimant failed to establish that the miner’s death was due to pneumoconiosis.

Claimant argues that he was denied due process of law by the administrative law judge’s decision to give little weight to the death certificate because there was nothing in the record identifying Dr. McGhee’s qualifications. Contrary to claimant’s assertion, the administrative law judge did consider the death certificate, but permissibly accorded it little weight because the record provided no indication that Dr. McGhee possessed any relevant qualifications to assess the cause of the miner’s death.¹¹ *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988). The administrative law judge was not, as claimant suggests, required to “look on the internet and find his qualifications.” Claimant’s Brief at 24. Thus, we reject claimant’s argument that he was denied due process of law.

Claimant also argues that the administrative law judge erred in finding that Dr. Stiles’s opinion is insufficient to establish that pneumoconiosis hastened the miner’s death. We disagree. The United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis must have hastened a miner’s death through “a specially defined process that reduced the miner’s life by an estimable time.” *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). In his Decision and Order on Remand, the administrative law judge stated that “Dr. Stiles admitted that,

hematoma in the neck. Employer’s Exhibits 7, 12 (Dr. Tuteur’s Depo. at 49), 14. Dr. Tuteur opined that the miner’s death was not related to, aggravated by, or caused by the inhalation of coal mine dust or coal workers’ pneumoconiosis. Employer’s Exhibits 7, 12 (Dr. Tuteur’s Depo. at 57), 14.

¹⁰ During a deposition taken on October 27, 2009, Dr. Stiles opined that pneumoconiosis contributed to the miner’s death. Claimant’s Exhibit 2 (Dr. Stiles’s Depo. at 24, 26, 73, 84-85, 87).

¹¹ As Dr. McGhee did not list clinical pneumoconiosis or legal pneumoconiosis, *i.e.*, a chronic lung disease related to coal mine dust exposure, *see* 20 C.F.R. §718.201; Director’s Exhibit 15, in any manner on the death certificate, the death certificate, even if credited, could not support claimant’s burden of establishing that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

although he believed that the [m]iner's pneumoconiosis hastened his death, he could not give an estimate as to 'how much or how soon or how many years it shaved off his life that contributed to his demise ...' further stating that that is up to 'other people to determine how much.'"¹² Decision and Order on Remand at 14. The administrative law judge permissibly determined that Dr. Stiles's opinion did not demonstrate that pneumoconiosis hastened the miner's death through a specifically defined process and for an estimable time.¹³ *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Thus, we reject claimant's assertion that the administrative law judge erred in finding that Dr. Stiles's opinion is insufficient to establish that pneumoconiosis hastened the miner's death. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We therefore affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), as supported by substantial evidence.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement in a survivor's claim,¹⁴ we affirm the

¹² The administrative law judge stated that "[d]espite Dr. Stiles'[s] belief that anthracosis could cause the [m]iner's lungs to deliver less oxygen in his blood which in turn could cause an irregular heartbeat, dysrhythmia, and ultimately death, his statements are based only on speculation and not grounded in the evidence of record." Decision and Order on Remand at 14. The administrative law judge further explained that "[t]he addition of the words 'probably' and 'could' to Dr. Stiles'[s] death causation explanation and his reluctance to provide a quantifiable amount of time by which the [m]iner's life was purportedly shortened by the disease prevent his opinion from meeting the Sixth Circuit standard." *Id.*

¹³ It is the province of the administrative law judge to assess the evidence of record and determine if a medical opinion is sufficiently documented and reasoned to satisfy a party's burden of proof. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

¹⁴ In view of our affirmance of the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), we need not address the contention raised in employer's cross-appeal that the administrative law judge erred in finding that the autopsy evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(2). *See Larioni v. Director*,

administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

OWCP, 6 BLR 1-1276 (1984). Moreover, in view of the aforementioned, we need not address claimant's contention that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2). *Id.*