

BRB No. 00-0610 BLA

MARY MACHAK)	
(WIDOW OF ALBERT MACHAK))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
THE FLORENCE MINING COMPANY)	
)	
)	
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Hillary S. Daninhirsh and George H. Thompson (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

HALL, J., Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand - Awarding Benefits (97-BLA-1918) of Administrative Law Judge Michael P. Lesniak on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).¹ The case is before the Board for

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board

the second time. Previously, the Board noted that employer conceded the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2000), 718.203 (2000), but the Board vacated the administrative law judge's finding that the evidence established death due to pneumoconiosis at 20 C.F.R. §718.205(c)(2000). On remand, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to C.F.R. §718.205 (2000). Accordingly, the administrative law judge awarded benefits.

subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

On appeal, employer challenges the administrative law judge's determination that the evidence establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2)(2000). Employer asserts that the evidence establishes that the miner died due to pancreatic cancer unrelated to his coal dust exposure. Claimant², in response, asserts that the administrative law judge's findings are supported by substantial evidence, and she accordingly urges affirmance. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.

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

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's 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 had complicated pneumoconiosis. 20 C.F.R. §§718.1; 718.202; 718.203; 718.205(c); 718.304; *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *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). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2)(2000). *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Lukosevicz, supra*; see 20 C.F.R. §718.205(c)(2), (c)(5).

²Claimant is Mary Machak, surviving spouse of the miner, Albert Machak, who died on July 1, 1996.

Employer challenges the administrative law judge's determination that the evidence establishes that pneumoconiosis was a substantially contributing factor leading to the miner's death at Section 718.205(c)(2)(2000).³ Employer asserts that the evidence establishes that the miner died due to pancreatic cancer unrelated to his coal dust exposure. Employer asserts that the administrative law judge improperly discounted, as poorly explained, the opinions of Drs. Sinnenburg, Fino and Perper and then improperly credited the opinions of Drs. Rizkalla, Schaaf and Mittal, which employer asserts are not adequately reasoned and documented.⁴

After consideration of all of employer's arguments with respect to the administrative law judge's findings at Section 718.205(c)(2)(2000), we hold that the administrative law judge's findings are supported by substantial evidence and contain no reversible error. We affirm the administrative law judge's determination to credit the opinions of Dr. Rizkalla, Schaaf and Mittal, as they constitute substantial evidence to support a finding of death due to pneumoconiosis pursuant to Section 718.205(c)(2)(2000). *See* 20 C.F.R. §718.205(c)(2), (c)(5). Further, as employer fails to challenge the administrative law judge's decision to credit the opinions of Drs. Rizkalla, Schaaf and Mittal over Dr. Oesterling's contrary opinion, we affirm this finding as unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *See also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Thus, we affirm the administrative law judge's finding that the evidence establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2)(2000); *Lango, supra*;

³The administrative law judge analyzed the evidence pursuant to Section 718.205(c)(2)(2000). While the case was pending, Section 718.205(c) was amended to include Section 718.205(c)(5), which specifically states that pneumoconiosis is a substantially contributing factor to the miner's death if it hastens the miner's death. 20 C.F. R. §718.205(c)(5).

⁴ Employer also contends that the administrative law judge erred by discounting the opinion of Dr. Perper. In its prior Decision and Order, the Board affirmed the administrative law judge's determination to give less weight to the opinion of Dr. Perper, as the administrative law judge noted on remand. *See Machak v. Florence Mining Co.*, BRB No. 98-1500 BLA (Aug. 13, 1999)(unpub.), slip op. at 4. Inasmuch as no exception to the law of the case doctrine applies, this finding now constitutes the law of the case, and we reject employer's challenge to the administrative law judge's treatment of Dr. Perper's opinion on this basis. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1- 988 (1984).

Lukosevicz, supra; see 20 C.F.R. §718.205(c)(2), (c)(5). Accordingly, we affirm the administrative law judge's award of benefits in the instant claim. *See Trumbo, supra; Neeley, supra.*

Claimant's counsel has filed a complete, itemized attorney fee petition for services performed before the Board in BRB Nos. 98-1317 BLA and 88-1500 BLA pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a fee of \$2,062.50, representing 13.75 hours of work at an hourly rate of \$150. Employer has not filed an objection to the fee petition.

The Board has held that \$150 per hour is a reasonable hourly rate for services performed before the Board. *See generally Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995). Moreover, a review of claimant's counsel's listing of services performed indicates that counsel's requests are reasonable, and commensurate with the complexity of the case. *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). We approve, therefore, claimant's counsel's request for \$2062.50 for 13.75 hours of legal services at an hourly rate of \$150. *Id.* This fee shall be paid directly to claimant's attorney by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed, and claimant's counsel's fee petition for \$2,062.50 for work before the Board in BRB Nos. 98-1317 BLA and 98-1500 BLA is approved.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, J., dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's Decision and Order on Remand - Awarding Benefits, because I believe he erred

in weighing the medical opinion evidence of record. The administrative law judge discredited the opinions of those doctors who opined that the miner's death was not hastened by pneumoconiosis; without discussing the rationales offered by these doctors, the administrative law judge asserted that these opinions were not explained. In contrast, he credited as adequately explained, the opinions of those doctors who found the miner's death hastened by pneumoconiosis, but failed to analyze those opinions. I would vacate the administrative law judge's decision awarding benefits and remand the case for the administrative law judge to discuss, analyze and weigh the rationales of all the relevant medical opinions. *See Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 20 (3d Cir. 1997).

Essentially the doctors were in agreement on basic facts: that at the time of his death, the miner had pneumoconiosis and pancreatic cancer, and that the cancer caused a saddle thromboembolism which was the immediate cause of death.⁵ The doctors disagreed on whether pneumoconiosis hastened the miner's death.⁶

The administrative law judge rejected the opinions of Drs. Fino, Sinnenburg and Perper for failing to explain how pneumoconiosis, which was undeniably present, would not have contributed to the miner's death. Decision and Order at 7. In fact, in his deposition Dr. Fino had explained at great length that the pancreatic cancer alone caused a saddle embolism of the pulmonary arteries and that the embolism alone killed the miner:

A pulmonary embolism is a blood clot in the pulmonary arteries. A saddle embolism, such as this man had, is a huge blood clot that blocks the two pulmonary arteries that come from the heart, one going to the right and one going to the left lung. So that means this man suddenly had a complete blockage of any blood going through the pulmonary arteries. It is like you put a cork in both of them, so the right heart tried to pump blood into the lungs to pick up oxygen, but there was total obstruction of the pulmonary arteries. That means from the time that [the] embolism occurred, there was no way that this man could get any oxygen into his blood. That is a

⁵Although the administrative law judge stated that Dr. Rizkalla noted a relationship between claimant's pneumoconiosis or coal dust exposure and pancreatic cancer, the doctor testified that there was no such connection. Decision and Order on Remand at 4; Claimant's Exhibit 2 at 13, 34.

⁶Employer correctly argues that the administrative law judge failed to discuss that only Dr. Rizkalla stated that the embolism could have been caused by pneumoconiosis as well as pancreatic cancer.

castastrophic event. It caused his death. Saddle pulmonary emboli are 100 percent uniformly fatal. There is nothing you can do about it, because if you have a clot that [*sic*] big enough to block both the right and the left pulmonary artery, it is going to cause death.

Employer's Exhibit 6 at 12-13. Dr. Fino went on to explain that because a saddle pulmonary embolism cuts off all blood supply from the heart to the lungs it causes death instantly, regardless of the health or sickness of the lungs. Employer's Exhibit 6 at 12, 16. Hence, he concluded that the presence of pneumoconiosis did not hasten the miner's death. *Id.*

The administrative law judge rejected Dr. Sinnenburg's opinion for failing to explain how the serious illnesses from which the miner suffered would not have contributed to his death. Decision and Order on Remand at 7. Yet the record reflects that the doctor did explain his opinion. Dr. Sinnenburg stated that the miner had various medical conditions, including pneumoconiosis, which were stable. He also had pancreatic cancer which was widespread and rapidly progressing. The cancer caused a saddle embolism which is a "uniformly and rapidly fatal event." Employer's Exhibit 4 at 2 (unpaginated). For that reason, Dr. Sinnenburg concluded that the presence of pneumoconiosis did not contribute to the miner's death.

The administrative law judge also rejected Dr. Perper's opinion for failing to explain how the miner's death from a massive pulmonary thromboembolism could be unrelated to his severe lung condition due to pneumoconiosis.⁷ Decision and Order at 7.

Dr. Perper, like Drs. Fino and Sinnenburg, opined that a saddle-type massive, thromboembolism caused the miner's sudden and immediate death and that the embolism was due to pancreatic cancer, unrelated to pneumoconiosis. Director's Exhibit 24 at 20-21.

In sum, the administrative law judge erred in discrediting the opinions of Drs. Fino, Sinnenburg and Perper for failing to provide a rationale for their opinions, that pneumoconiosis did not contribute to the miner's death. The administrative law judge also erred in crediting as adequately explained, the opinions of Drs. Schaaf, Mittal and

⁷Although the Board previously affirmed the administrative law judge's discrediting of Dr. Perper's opinion on this ground, employer has preserved its objection on appeal. I believe the majority errs in applying the law of the case doctrine to this issue because the record reflects that Dr. Perper provided a rationale for his opinion, and his opinion is an integral part of employer's case. Hence, one of the exceptions to the law of the case doctrine applies: the prior decision was clearly erroneous and would create manifest injustice. *In re City of Philadelphia*, 158 F.3d 711, 720 (3d Cir. 1998).

Rizkalla, that pneumoconiosis contributed to the miner's death, without analyzing the rationales of those opinions in the context of all of the medical evidence of record.

Because these errors provide the basis for the administrative law judge's decision, I would vacate the decision and remand the case for the administrative law judge to discuss, analyze and weigh all of the medical opinions at issue.

REGINA C. McGRANERY
Administrative Appeals Judge