

BRB No. 06-0841 BLA

RUTH L. BOWERSOX)
(Widow of KENNETH BOWERSOX))
)
Claimant-Respondent)
)
v.)
)
MARK MINING II, INCORPORATED)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 08/22/2007
)
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 on Remand—Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski, (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand—Awarding Benefits (02-BLA-0389) of Administrative Law Judge Michael P. Lesniak (the administrative law

judge) on a survivor's claim for benefits 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 procedural history of this case is as follows. This case was first before Administrative Law Judge Robert J. Lesnick, who credited the miner with a coal mine employment history of twenty-eight years, noted that employer stipulated to the existence of pneumoconiosis arising out of coal mine employment, and found the evidence sufficient to establish that the miner's pneumoconiosis substantially contributed to and hastened his death pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Lesnick awarded benefits on this survivor's claim.

Pursuant to an appeal by employer, the Board affirmed the award of benefits, noting that Judge Lesnick had permissibly found that the opinions of Drs. Perper and Rizkalla, that coal workers' pneumoconiosis contributed to the miner's death, were better reasoned than the contrary opinion of Dr. Tuteur because the opinions of Drs. Perper and Rizkalla contained better analysis and were better supported by the record. *Bowersox v. Mark Mining II, Inc.*, BRB No. 04-0103 BLA (Nov. 18, 2004)(unpub.). *Id.* The Board declined to address employer's request to apply the holding of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001) or the holding of the United States Court of Appeals for the Fourth Circuit in *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384 , 21 BLR 2-639 (4th Cir. 1999) because this case arose within the jurisdiction of the United States Court of Appeals for the Third Circuit, which had not adopted the holdings of those cases. *Bowersox*, slip op. at 4 n.3. Lastly, the Board rejected employer's assertion that Judge Lesnick demonstrated bias in his consideration of the case. *Bowersox*, slip op at 4-5.

Employer requested reconsideration of the Board's decision. The Board granted employer's Motion for Reconsideration and vacated its Decision and Order affirming the award of benefits. *Bowersox v. Mark Mining II, Inc.*, BRB No. 04-0103 BLA (Decision and Order on Motion for Reconsideration)(2-1 decision with Hall, J. dissenting)(Mar. 14, 2005)(unpub.). In granting employer's Motion for Reconsideration, the Board again declined to apply the holdings of *Jarrell* and *McCandless*, as the instant case arose in the

¹ Claimant is the widow of the miner, who died on November 1, 2000. The death certificate lists the immediate cause of death as renal failure. Director's Exhibit 4. Paralysis agitatoris, aspiration pneumonia, Alzheimer's disease and chronic obstructive pulmonary disease are all listed as "other significant conditions contributing to death, but not related to the underlying cause." *Id.* During his lifetime, the miner filed a claim for benefits on January 19, 1984, which was denied by the Department of Labor as the miner failed to establish any of the elements of entitlement. Director's Exhibit 19. The miner's claim was not pursued.

Third Circuit. Decision and Order on Motion for Reconsideration, slip op. at 2. The Board, however, held that review of Judge Lesnick's Decision and Order indicated that "he [did] not specifically [address] whether the opinions of Drs. Perper and Rizkalla [were] sufficiently reasoned to constitute substantial reliable and probative evidence that the miner's pneumoconiosis hastened his death." *Id.* Thus, the Board vacated its prior Decision and Order affirming Judge Lesnick's award of benefits, but "only insofar as [it] affirmed the administrative law judge's finding that the opinions of Drs. Perper and Rizkalla [were] reasoned." *Id.* The Board, therefore, remanded the case for the administrative law judge to reconsider the opinions of Drs. Perper and Rizkalla.

On remand, the administrative law judge found that the opinion of Dr. Rizkalla was entitled to less weight than that originally given to it by Judge Lesnick, as Dr. Rizkalla relied on an inaccurate length of coal mine employment.² The administrative law judge, however, found that the opinion of Dr. Perper was extremely well-reasoned and entitled to the greatest weight, as Dr. Perper more than thoroughly explained how the underlying documentation and data, both favorable and unfavorable, [supported] his diagnosis. Decision and Order at 10-11. The administrative law judge concluded, therefore, that because Dr. Perper's opinion was extremely well-reasoned, knowledgeable and persuasive, and the Board had upheld Judge Lesnick's findings that the contrary medical opinions were entitled to less weight, claimant established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Benefits were, accordingly, awarded.

On appeal, employer asserts that the administrative law judge erred in finding that Dr. Perper's opinion constituted a well-reasoned, probative medical opinion that pneumoconiosis contributed to the miner's death and thus erred in finding that pneumoconiosis contributed to the miner's death. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), states that he will not file a substantive response brief. The Director does contend, however, that employer's reliance on the 1985 Report of the Surgeon General, United States Department of Health and Human Services, *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace* (1985), to argue that

² The administrative law judge noted that Dr. Rizkalla relied on a forty-year occupational history and a twenty-year cigarette smoking history, while the administrative law judge found that the miner had a twenty-eight year coal mine employment history. Decision and Order at 9, 11. The administrative law judge noted that he accorded less weight to the opinion of Dr. Rizkalla because he did not know whether knowledge of a reduced occupational history would have changed the doctor's opinion as to the cause of the miner's demise. Decision and Order at 11.

simple pneumoconiosis does not progress in the absence of further dust exposure, is misplaced as that report is outdated and fails to address a more recent article on which the Department of Labor relied to find that pneumoconiosis is both a progressive and latent disease. *See* 65 Fed. Reg. 79971 (Dec. 20, 2000). The Director further asserts that employer's argument that the Department, in its most recent rulemaking, concluded that *legal* pneumoconiosis is not progressive and latent, must be rejected as the Department specifically stated that pneumoconiosis was progressive and latent and, in so doing, did not differentiate between *clinical* or *legal* pneumoconiosis. 65 Fed. Reg. 79971 (Dec. 20, 2001). Employer reiterates its position in its reply brief.

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. 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 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After considering the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's finding at Section 718.205, that the evidence establishes that pneumoconiosis contributed to the miner's death, is rational, supported by substantial evidence, and in accordance with law. The administrative law judge's Decision and Order on Remand awarding benefits is, therefore, affirmed.

The Board's prior remand instructions were very narrow. The Board specifically required the administrative law to determine whether the opinions of Drs. Perper and Rizkalla constituted reasoned medical opinions. Whether a medical report is sufficiently reasoned is for the administrative law judge, as fact-finder, to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). To make

that determination, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. *Id.* Given the narrow nature of the Board's remand instructions and the administrative law judge's thorough review of the Dr. Perper's opinion, we reject employer's assertions on appeal and hold that the administrative law judge has complied with the Board's remand instructions.

Specifically, we reject employer's argument that the administrative law judge credited Dr. Perper's opinion without determining whether it was based on "good medicine," Employer's Brief at 14, when he stated that he was persuaded by Dr. Perper that the miner's pneumoconiosis predisposed him to terminal bronchopneumonia. Employer argues that the physician's references to some scientific studies as support for his conclusions did not by themselves render the physician's opinion credible, as these references have not been validated by credible scientific literature, are not directly relevant to the issues present in this case, and have not been presented by scientific experts who are subject to cross-examination. Employer argues that Dr. Perper did not rely upon any epidemiological studies to draw any connection between the death of the miner and pneumoconiosis. In addition, employer argues that, in crediting Dr. Perper's opinion as reasoned, the administrative law judge erred in finding that the physician's conclusion that he was unable to separate the effects of both the miner's smoking history and coal dust exposure history, on the miner's emphysema, constituted an affirmative diagnosis of causation. Employer argues that "reliance on an inability to 'rule out' a risk factor does not 'rule in' that factor as a source of an individual's [chronic obstructive pulmonary disease]." Employer's Brief at 20.

Contrary to employer's assertion, in addressing Dr. Perper's medical conclusions, the administrative law judge found that Dr. Perper fully explained the basis for his opinion that the cause of the miner's fatal bronchopneumonia was the propensity of the miner to develop infectious disease because of a chronic lung disease of coal workers' pneumoconiosis.³ The administrative law judge found that the physician "explained in

³ Dr. Perper specifically stated that:

individuals who have chronic obstructive lung disease...like in this particular gentleman...cough and...have an increased secretion of mucus which they expectorate and the mucus cannot be eliminated sufficiently and properly by the action of the lining of the airways and[,] as a result of that[,] there is often mucus obstruction or partial mucus obstruction...In addition to that[,] silica has been shown experimentally to decrease the general immunity resistance of the body to

logical and comprehensive detail the processes he found the lung tissue and how they relate[d] to the miner's overall clinical picture and his ultimate demise." Decision and Order on Remand at 10. In addition, the administrative law found that the physician thoroughly explained his basis for concluding that both coal mine dust exposure and smoking contributed to the miner's emphysema and that while the physician could not separate the effects of the two, the progression in the miner's disease, after the miner stopped smoking, would not have occurred with smoking alone, *i.e.*, coal mine dust exposure played some role. Hearing Transcript at 76. The administrative law judge thus rationally credited Dr. Perper's conclusions in this regard, *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003) (doctor's opinion that states that pneumoconiosis was one of two causes of claimant's totally disabling respiratory condition is sufficient to establish causation).

Further, employer argues again that the Fourth Circuit's holding in *Jarrell*, is controlling in this case. When this case was previously before the Board, however, the Board held that *Jarrell* was not applicable, as the instant case arises within the Third Circuit, which has not adopted the holding of *Jarrell*. The Board's previous disposition of this issue constitutes the law of the case, and we decline to revisit it because there is no persuasive evidence that the law of the case doctrine is inapplicable, or that an exception to the doctrine has been demonstrated. *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *rev'd on other grounds, Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992).

The Board's remand instructions were narrowly drawn and the administrative law judge has complied with the instructions. His determination that Dr. Perper's opinion is reasoned and supports a finding that pneumoconiosis was a substantially contributing cause of the miner's death is both rational and supported by substantial evidence. We therefore reject employer's assertions and hold that the administrative law judge has complied with the Board's remand instructions and, in so doing, has rationally found that Dr. Perper's opinion constitutes a well-reasoned medical opinion. *See Clark*, 12 BLR at 1-153; *Peskie*, 8 BLR at 1-129; *Lucostic*, 8 BLR at 1-47 (1985).

infection, and as I said in this particular case, in addition to the parenchymal pneumoconiosis there were several lymph nodes silicotic involvement by the exposure to the coal dust with large numbers of silica crystals, which demonstrate additionally the magnitude of the exposure

Claimant's Exhibit 2 (Deposition of Dr. Perper) at 27-28.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge