

BRB Nos. 11-0739 BLA
and 11-0767 BLA

MYRA L. BOWEN (Deceased))	
(Widow of HUBERT BOWEN))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 08/30/2012
)	
PEABODY COAL COMPANY)	
)	
Employer-Petitioner)	
)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer¹ appeals the Decision and Order on Remand Award of Benefits (2005-BLA-05370 and 2005-BLA-05371) of Administrative Law Judge Daniel F. Solomon, with respect to a miner's subsequent claim and a survivor's claim² filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).³ This case is before the Board for the second time.⁴ In its prior Decision and Order, the Board vacated the awards of benefits in both the miner's claim and the survivor's claim and remanded the case to the administrative law judge for reconsideration of the issues of the existence of legal pneumoconiosis, total disability due to pneumoconiosis and death due to pneumoconiosis.⁵ *M.B. [Bowen] v. Peabody Coal Co.*, BRB No. 08-0783 BLA, slip op. at 9-10, 13-14 (Aug. 28, 2009) (unpub.). The Board denied employer's subsequent motion for reconsideration. *M.B. [Bowen] v. Peabody Coal Co.*, BRB No. 08-0783 BLA (Feb. 26, 2010) (unpub. Order).

On remand, the administrative law judge found that, in the miner's claim, claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4) and

¹ The administrative law judge named Island Creek Coal Company as the employer in the caption. However, in the body of his decision, Peabody Coal Company is correctly named as the responsible operator, and the parties' briefs on appeal acknowledge Peabody Coal Company as the responsible operator. Decision and Order on Remand at 1; Employer's Brief at 1; Claimant's Response Brief at 1-2.

² Claimant is the spouse of Hubert Bowen, who died on May 22, 2003. Subsequent to the filing of employer's present appeal, claimant's counsel submitted claimant's death certificate to the Board, which indicates that she died on February 12, 2012.

³ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply because the miner's claim and the survivor's claim were filed prior to January 1, 2005. Director's Exhibits 1, 3, 35.

⁴ The full procedural history of this case is set forth in the Board's prior decision. *M.B. [Bowen] v. Peabody Coal Co.*, BRB No. 08-0783 BLA, slip op. at 2 n.1 (Aug. 28, 2009) (unpub.).

⁵ The Board affirmed the administrative law judge's findings that the miner had thirty-seven years of coal mine employment, that the miner's 2002 subsequent claim was timely filed, that claimant established total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Bowen*, slip op. at 3 n.2.

total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). With respect to the survivor's claim, the administrative law judge restated that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in the miner's claim and the survivor's claim.

Employer argues on appeal that the administrative law judge did not follow the Board's remand instructions or comply with the requirements of the Administrative Procedure Act⁶ in rendering his findings under 20 C.F.R. §§718.202(a)(4), 718.204(c) and 718.205(c). Employer requests that, if the Board vacates the administrative law judge's findings and remands the case, the case be reassigned to a different administrative law judge, alleging that the administrative law judge's "unsupported personal views preclude a fair hearing." Employer's Brief at 1. Claimant has responded and urges affirmance of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board. Employer filed a reply to claimant's brief, reiterating its initial contentions.

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Existence of Pneumoconiosis

Employer contends that the administrative law judge's findings at 20 C.F.R. §718.202(a)(4) in both the miner's claim and the survivor's claim do not accord with the Board's remand instructions, or the APA, as he did not provide a valid rationale for

⁶ The Administrative Procedure Act, 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 every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record."

⁷ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 1.

finding that the diagnoses of legal pneumoconiosis by Drs. Givens and Simpao were reasoned and documented.⁸ Employer allegations of error are without merit.

As the administrative law judge indicated, the records of Dr. Givens's treatment of the miner between 1974 and 2003 include a history of chronic obstructive pulmonary disease (COPD) with asthma, pulmonary fibrosis, emphysema, pneumoconiosis, coronary artery disease and lung cancer. Decision and Order on Remand at 5-6; Director's Exhibit 43; Claimant's Exhibit 1(b); Employer's Exhibit 5. The administrative law judge further stated accurately that, in Dr. Givens's deposition testimony, the physician noted that the miner's primary problem was pulmonary disease, that his blood gas studies revealed both obstructive and restrictive disease, which worsened throughout the years, that the miner had legal pneumoconiosis in the form of COPD, and that "there's no question that exposure to dust in the coal mine environment is a contributing factor." Decision and Order on Remand at 3; Claimant's Exhibit 1(a) at 5-8, 16-17.

Pursuant to the holding of the United States Court of Appeals for the Sixth Circuit in *Napier*, the reviewing authority is required to defer to the administrative law judge's assessment of the credibility of a physician's opinion. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553, citing *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002) (lacking the authority to make credibility determinations, the court defers to the administrative law judge's findings). In this case, the administrative law judge's finding that Dr. Givens's diagnosis of legal pneumoconiosis was well-documented and well-reasoned, is rational and supported by substantial evidence, as the physician identified the evidence supporting his diagnosis, explained his conclusions, and stated unequivocally that coal dust exposure was a contributing cause of the miner's COPD. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order on Remand at 9. In addition, the administrative law judge rationally determined that Dr. Givens's opinion is substantiated by Dr. Simpao's medical reports⁹ and Dr. Repsher's concession that the miner "probably" had

⁸ 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).

⁹ Dr. Simpao examined the miner at the request of the Department of Labor on August 21, 1989 and July 25, 2002. Director's Exhibits 1, 11. In 1989, Dr. Simpao opined that the miner was totally disabled by coal workers' pneumoconiosis, emphysema and chronic bronchitis and that all three conditions were caused by coal dust exposure. Director's Exhibit 1. In 2002, Dr. Simpao diagnosed "CWP 1/0" caused by "multiple years of coal dust exposure," and indicated that the miner had a "severe impairment" and was "totally disabled." Director's Exhibit 11. In response to a questionnaire appended to Form CM-988, Dr. Simpao reported that he based his diagnosis of pneumoconiosis "on

some obstruction, albeit “individually unmeasurable,” caused by coal dust exposure. Director’s Exhibit 20; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; Decision and Order on Remand at 9-11.

We reject, therefore, employer’s contention that the administrative law judge’s statement that the Act must be liberally construed “to include the largest numbers of miners as benefit recipients,” establishes that the administrative law judge’s decision to credit Dr. Givens’s diagnosis of legal pneumoconiosis did not have a rational basis. Decision and Order on Remand at 10 n.4, *quoting Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993). There is also no merit in employer’s contention that, because Dr. Givens did not diagnosis pneumoconiosis until the miner filed his claim for benefits, his opinion is entitled to little or no weight. Contrary to employer’s assertion, Dr. Givens diagnosed COPD and pneumoconiosis in hospital discharge summaries dated September 19, 1995, March 12, 1998 and July 16, 2001. Director’s Exhibit 43 at 13, 14, 40, 41; Claimant’s Exhibit 1(b). In addition, the administrative law judge was not required to discredit Dr. Givens’s opinion because he did not attribute the miner’s COPD to coal dust exposure in the treatment records. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; Decision and Order on Remand at 10.

With respect to the administrative law judge’s consideration on remand of the contrary opinions of Drs. Repsher, Renn and Tuteur, employer renews its argument that the administrative law judge could not rely on his interpretation of the preamble and studies cited therein to discredit these opinions. The Board previously rejected employer’s assertion and affirmed the administrative law judge’s discrediting of the opinions in which Drs. Repsher, Renn and Tuteur stated that the miner’s COPD was unrelated to coal dust exposure. *Bowen*, BRB No. 08-0783 BLA, slip op. at 10. Because employer has not set forth a basis for altering the Board’s prior disposition, it now constitutes the law of the case and we decline to disturb it. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Accordingly, we affirm the administrative law judge’s finding, based on the opinion of Dr. Givens, that the existence of legal pneumoconiosis was established in the miner’s claim and in the survivor’s claim, pursuant to 20 C.F.R. §718.202(a)(4).¹⁰ *See Martin v.*

the chest x-ray, EKG, arterial blood gas [test] along with symptomatology and physical findings.” *Id.*

¹⁰ Employer also alleges that remand is required because the administrative law judge mistakenly stated that the miner had “16 years of coal mine employment, and at least a 15 year smoking history.” Employer’s Brief at 18 n.10, *quoting* Decision and Order on Remand at 11. We disagree. Dr. Givens stated that the miner had a smoking history of thirty years and explained that, although he could not recall exactly how many

Ligon Preparation Co., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325.

II. Total Disability Due to Pneumoconiosis

Pursuant to 20 C.F.R. §718.204(c), employer argues that the administrative law judge erred because he did not apply the Sixth Circuit’s standard for establishing disability causation and did not render a finding as to whether the opinions of Drs. Givens and Simpao were reasoned and documented. These allegations of error are without merit. The administrative law judge’s statement that “although pneumoconiosis need only be a ‘contributing cause’ to the miner’s total disability, a claimant must demonstrate that the disease was more than a de minimus or ‘infinitesimal’ factor in the miner’s total disability,” represented the correct standard for assessing whether claimant established total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Decision and Order on Remand at 11, *quoting Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997). In addition, because we have affirmed the administrative law judge’s credibility determinations on the issue of legal pneumoconiosis, and the administrative law judge relied upon them to conclude that claimant established that the miner’s total disability was due to pneumoconiosis, we also affirm his finding at 20 C.F.R. §718.204(c) and further affirm the award of benefits in the miner’s claim. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483, 23 BLR 2-44, 70 (6th Cir. 2003); *Smith*, 127 F.3d at 507, 21 BLR at 2-185-86.

III. Death Due to Pneumoconiosis

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge reconsidered the evidence relevant to the cause of the miner’s death, consisting of the death certificate and the opinions of Drs. Givens, Repsher, Renn and Tuteur. Decision and Order on Remand at 13-15. The death certificate identified the cause of death as myocardial infarction. Director’s Exhibit 39. Dr. Givens testified that the miner’s death was due to cancer and that COPD, caused by coal dust exposure, hastened the miner’s death. Claimant’s

cigarettes the miner smoked per day, he assumed that the miner smoked one pack per day until he quit in 1995. Claimant’s Exhibit 1(a) at 9, 24-25, 40. In addition, the administrative law judge acknowledged that a forty-five year smoking history was reported on a pulmonary function study that was reviewed by Dr. Givens and that Dr. Simpao reported a thirty-nine year smoking history in his 2002 report. Decision and Order on Remand at 6, 7. Because Dr. Givens’s understanding that the miner had a “long-standing” smoking history is consistent with the record, the administrative law judge’s statement does not constitute error requiring remand. Claimant’s Exhibit 1(a) at 9; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Exhibit 1(a) at 8-9, 15, 47-48, 55, 57. Dr. Givens also testified that without his pulmonary problems, the miner “would’ve lasted longer and would’ve been able to tolerate the chemotherapy, radiation” and that the miner “could not tolerate any significant type of treatment because he was a pulmonary invalid.” *Id.* at 15. In contrast, Dr. Repsher indicated in his written report and deposition testimony that the miner’s death was “most likely” due to his severe coronary artery disease, which caused an acute myocardial infarction or a fatal ventricular arrhythmia. Director’s Exhibit 24; Employer’s Exhibit 20. Dr. Renn similarly indicated in his written report that the miner’s death was caused by “an adverse cardiac event.” Director’s Exhibit 33. When deposed, however, Dr. Renn testified that he could not express a definite opinion as to the cause of the miner’s death and disputed Dr. Givens’s statement that the miner did not receive the necessary treatment for his lung cancer due to his pulmonary disease. Employer’s Exhibit 19 at 44, 66. Dr. Tuteur also concluded that the exact cause of the miner’s death could not be determined. Employer’s Exhibit 15. Dr. Tuteur indicated, “neither the inhalation of coal mine dust, nor the development of coal workers’ pneumoconiosis substantially contributed to the cause of [the miner’s death] or hastened his death.” *Id.* In his deposition testimony, Dr. Tuteur also disagreed with Dr. Givens’s assessment that the miner’s pulmonary disease weakened his heart, but further noted:

I agree with [Dr. Givens’s] statement that because of [the miner’s] advanced heart disease and his advanced chronic obstructive lung disease, the clinical course of his metastatic adenocarcinoma, unrelated to those two conditions, was shorter than it would have been had he been a healthy 40-year old person, but that has nothing to do with the inhalation of coal dust.

Id. at 98-99. The administrative law judge reviewed this evidence and concluded, “I accept that . . . pneumoconiosis was a factor in [the] pulmonary deficit also attributable to cancer, leading to the ‘quicker’ demise. I accept that it is not the most important cause but I accept Dr. Givens’s opinion and find it is a ‘substantially contributing cause’ that hastened the miner’s death.” Decision and Order on Remand at 16, *quoting* 20 C.F.R. §718.205(c).

Employer argues that the administrative law judge did not follow the Board’s instructions in rendering his findings at 20 C.F.R. §718.205(c), because he made no finding regarding the primary cause of the miner’s death and did not properly apply the hastening death standard adopted by the Sixth Circuit. Employer’s contentions have merit.

In finding that Dr. Givens’s opinion was sufficient to establish that legal pneumoconiosis hastened the miner’s death, the administrative law judge did not first determine, as instructed by the Board, what the medical evidence of record established as the primary cause of the miner’s death. *See Bowen*, BRB No. 08-0787 BLA, slip op. at 14. Because the administrative law judge did not make a finding as to whether the

primary cause of death was heart disease or cancer, or some combination of the two, it is not clear whether his conclusion that legal pneumoconiosis hastened the miner's death is supported by substantial evidence. Nor is it clear that Dr. Givens's opinion was corroborated by Dr. Tuteur's opinion. In addition, although the administrative law judge accepted claimant's assertion that Dr. Givens "stated over and over again that the weakened lungs caused the heart to fail quicker," none of the cited exhibits support claimant's proposition.¹¹ Decision and Order on Remand at 14, *citing* Director's Exhibit 43; Claimant's Exhibit 1(a) at 8, 16-17, 19, 39, 40, 48. Therefore, we must vacate the administrative law judge's finding that claimant established that pneumoconiosis hastened the miner's death under 20 C.F.R. §718.205(c)(5) and remand the case to the administrative law judge for reconsideration of this issue. *See Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

On remand, the administrative law judge must first determine the cause of the miner's death. The administrative law judge must then reconsider whether Dr. Givens's opinion satisfies claimant's burden of proof under 20 C.F.R. §718.205(c)(5). In addressing Dr. Givens's opinion, the administrative law judge must identify the portions of the record in which he described the specific process by which legal pneumoconiosis contributed to the miner's heart disease, or prevented the miner from undergoing more aggressive treatment for his lung cancer, and resolve the conflict in the evidence regarding whether pulmonary disease actually restricted the treatment of the miner's lung cancer.

The administrative law judge must also apply the Sixth Circuit's holding that pneumoconiosis only "hastens" a death if it does so "through a specifically defined process that reduced the miner's life by an estimable time." *Williams*, 338 F.3d at 518, 22 BLR at 2-655. The Sixth Circuit has acknowledged that "[t]here is some room for argument . . . about what it means to hasten death 'by an estimable time.'" *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 304, 24 BLR 2-257, 2-267 (6th Cir. 2010), *quoting Williams*, 338 F.3d at 518, 22 BLR at 2-655 (emphasis added). However, the court further stated that, although "context and common sense will govern the resolution" of this question, "[a] medical opinion that pneumoconiosis expedited death through a 'specifically defined process' . . . generally should be able to explain how and to what

¹¹ In the cited portions of Dr. Givens's medical reports and deposition testimony, he indicated that the miner died from carcinoma, that his quality of life for ten to fifteen years prior to his death was poor and that his pulmonary disease increased the workload on his heart and caused his early "incapacitation." Director's Exhibit 43; Claimant's Exhibit 1(a) at 8, 16-17, 19, 39, 40, 48.

extent – customarily through a range of time – that process hastened a specific patient’s death.”¹² *Conley*, 595 F.3d at 304, 24 BLR at 2-267.

Finally, we address employer’s request that the case be reassigned to a different administrative law judge on remand. Adverse, or even erroneous, rulings in a proceeding are not, by themselves, sufficient to show bias on the part of the administrative law judge. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Our review of the administrative law judge’s decisions in this matter does not reveal evidence of partiality, bias, or prejudice against employer. We, therefore, deny employer’s request that this case be assigned to a different administrative law judge on remand.

Accordingly, the administrative law judge’s Decision and Order on Remand Award of Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹² Although the administrative law judge discussed *Conley* and *Williams* on remand, he has not properly performed the required analysis of whether Dr. Givens’s death causation opinion is sufficient to satisfy the Sixth Circuit standard. *See* Decision and Order on Remand at 15-16.