

BRB No. 11-0779 BLA

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| DRAKIE KENNEDY |) | |
| (Widow of JOHN KENNEDY) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| PITTSTON COMPANY c/o |) | DATE ISSUED: 08/30/2012 |
| WELLS FARGO DISABILITY |) | |
| MANAGEMENT |) | |
| |) | |
| 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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Award of Benefits (2007-BLA-06065) of Administrative Law Judge Daniel F. Solomon, rendered on a survivor's

claim¹ filed on December 27, 2006, 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). This case is before the Board for a second time. The parties have stipulated that the miner worked at least twenty-six years in coal mine employment. The Board previously affirmed, as unchallenged by the parties, the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis,² based on the autopsy evidence at 20 C.F.R. §718.202(a)(2). *See Kennedy v. Pittston Co.*, BRB No. 10-0238 BLA, slip op. at 2 n.2 (Dec. 22, 2010) (unpub.). The Board, however, vacated the award of benefits because the administrative law judge did not adequately explain the bases for the weight accorded the conflicting medical opinions relevant to the existence of legal pneumoconiosis³ at 20 C.F.R. §718.202(a)(4), and whether clinical or legal pneumoconiosis hastened the miner's death. *Id.* at 5-6, 9-10. Specifically, the Board held that the administrative law judge did not adequately explain his conclusion that the pathology evidence supported Dr. Perper's opinion, or that Dr. Perper's opinion was more consistent with the regulations than the other medical opinions of record. *Id.* at 5. On remand, the Board instructed the administrative law judge to consider the extent to which Dr. Perper's diagnosis of complicated pneumoconiosis, which is contrary to the administrative law judge's findings in this case,⁴ detracted from the credibility of Dr.

¹ Claimant is the widow of the miner, John Kennedy, who died on September 6, 2006. Director's Exhibit 10.

² "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

³ "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "[T]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.*

⁴ The administrative law judge determined that claimant failed to prove that the large opacities observed by Dr. Perper on the autopsy slides would appear as larger than one centimeter in size on an x-ray, and thus found that claimant failed to establish that the miner suffered from complicated pneumoconiosis at 20 C.F.R. §718.304. 2009 Decision and Order at 5.

Perper's opinion, that the miner's death was hastened by clinical and legal pneumoconiosis. *Id.* In addition, the Board instructed the administrative law judge to consider claimant's entitlement pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and to reopen the record, as necessary, for the development of additional evidence in light of the change in law.⁵ *Id.* at 10-11.

In his Decision and Order on Remand Award of Benefits, dated August 2, 2011, the administrative law judge noted that claimant proffered no new evidence on remand, while employer submitted a report from Dr. Castle, along with the qualifications for Drs. Castle and Rosenberg. Decision and Order on Remand at 2. In considering the claim pursuant to amended Section 411(c)(4), the administrative law judge accepted claimant's concession in "her brief that total disability cannot be established." *Id.* at 3. Because the evidence did not support a finding that the miner had a totally disabling respiratory or pulmonary impairment during his lifetime, the administrative law judge concluded that claimant failed to invoke the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4). *Id.* However, based on Dr. Perper's opinion, the administrative law judge found that claimant established that the miner suffered from legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), and that the miner's death was hastened by legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* at 5-7. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that the administrative law judge's decision to credit Dr. Perper's opinion is irrational, and that the administrative law judge has not explained his findings in accordance with the Board's remand instructions and the Administrative Procedure Act (APA).⁶ Employer maintains that the administrative law judge engaged in

⁵ Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that the miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). Section 422(l) of the Act, 30 U.S.C. §932(l), as amended, permits a qualified survivor of a miner who filed a successful claim for benefits to be automatically entitled to survivor's benefits, without the burden of reestablishing entitlement. Claimant, however, is not automatically entitled to survivor's benefits pursuant to amended Section 422(l), as there is no evidence that the miner was previously awarded benefits.

⁶ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or

a selective analysis of the evidence and failed to consider properly the contrary opinions of Drs. Castle and Rosenberg, that the miner's death was unrelated to his coal dust exposure. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board.

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'Keefe 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 on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). The miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. See 20 C.F.R. §718.205(c)(1)-(3). 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); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

⁷ Because the miner's coal mine employment was in Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 17.

I. Legal Pneumoconiosis – 20 C.F.R. §718.202(a)(4)

On remand, the administrative law judge noted that all of the physicians who rendered an opinion relevant to the existence of legal pneumoconiosis are in agreement that the miner suffered from chronic obstructive pulmonary disease (COPD)/emphysema.⁸ Decision and Order on Remand at 3. As noted by the administrative law judge, Dr. Perper attributed the miner's COPD/emphysema to a combination of smoking and exposure to coal dust containing silica, while Dr. Rosenberg opined that the miner's emphysema was "characteristic" of smoking. *Id.* at 3-4. The administrative law judge summarized Dr. Perper's rationale as follows:

Dr. Perper stated that while it is legitimate to recognize in general the role of smoking in producing centrilobular emphysema, it is equally legitimate to recognize the significant role of exposure to coal mine dust and coal workers' pneumoconiosis, and there is no logical reason to exclude it. He stated that pneumoconiosis and its related emphysema complications have been shown to progress even after cessation of exposure to coal dust (because of the entrapped and retained intra-pulmonary fibrogenic crystalline silica). . . . The causal connection between exposure to coal and silica in regard to emphysema and [COPD] is also widely and virtually universally accepted. Dr. Perper referenced the 2001 Regulations and journal articles.

Id. at 5. The administrative law judge credited Dr. Perper's opinion because he found that Dr. Perper's rationale was better reasoned and "more closely follows the logic" of the Department of Labor that "smokers who mine have an additive risk for developing obstruction." *Id.*, citing 65 Fed. Reg. 79,940 (Dec. 20, 2000).

Employer argues that Dr. Perper's conclusions are inadequately explained, overly general and speculative. Employer asserts that Dr. Perper's opinion fails to satisfy claimant's burden of proof, as Dr. Perper improperly assumed that the miner's emphysema was due to coal dust exposure, based on general references to medical literature. Contrary to employer's argument, however, we conclude that the

⁸ Dr. Castle did not offer an opinion as to whether the miner had chronic obstructive pulmonary disease/emphysema. Employer's Exhibits 2, 5, 7. He stated that "it is not possible to accurately assess whether or not [the miner] had any defined respiratory impairment and what that impairment might have been related to." Employer's Exhibit 2.

administrative law judge acted within his discretion in finding Dr. Perper's opinion to be reasoned and documented, and entitled to controlling weight. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order on Remand at 5-6. We specifically reject employer's contention that claimant received an improper presumption that the miner's COPD was due to coal dust exposure, since the administrative law judge correctly observed that Dr. Perper cited to specific evidence in this case to support his diagnosis, including the miner's symptoms of cough and shortness of breath and objective testing. Decision and Order on Remand at 5. The administrative law judge rationally explained that Dr. Perper's opinion was more credible because he "was better able to outline [how] the treatment records and medical literature substantiates his position," whereas Dr. Rosenberg offered no explanation for excluding the miner's twenty-six years of coal mining as a contributory factor for the miner's emphysema. *Id.* at 5-6; see *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

An administrative law judge has broad discretion in assessing the credibility of the medical experts, and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. See *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Because the administrative law judge properly explained on remand why he considered Dr. Perper's opinion to be credible, we affirm the administrative law judge's reliance on Dr. Perper's opinion to support a finding that the miner suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). See *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

II. Death Causation - 20 C.F.R. §718.205(c)

On remand, the administrative law judge also credited Dr. Perper's opinion that coal dust exposure hastened the miner's death from a heart attack and underlying heart disease. Decision and Order on Remand at 7. We reject employer's assertion that the administrative law judge failed to reconsider Dr. Perper's opinion, in light of the fact that he diagnosed complicated pneumoconiosis. In accordance with the Board's instructions, the administrative law judge found that Dr. Perper's opinion, that COPD due, in part, to coal dust exposure hastened the miner's death, was not dependent on Dr. Perper's additional finding that the miner had pathological evidence for complicated pneumoconiosis. *Id.* In reaching that finding, the administrative law judge observed that Dr. Perper discussed in detail how the miner was hospitalized on numerous occasions preceding his death for treatment of respiratory symptoms and exacerbations of his COPD and that Dr. Perper discussed how "[i]t has been documented in the medical

literature that chronic hypoxia associated with chronic lung disease triggers or aggravates lethal malignant arrhythmia in patients with chronic heart disease.” *Id.*, quoting Claimant’s Exhibit 1. The administrative law judge was persuaded by claimant’s arguments on remand that Dr. Perper has explained how COPD “is a known catalyst for a heart attack.” *Id.* at 7, quoting Claimant’s Closing Arguments in Support of an Award of Benefits at 23. The administrative law judge accepted claimant’s position that Dr. Perper’s opinion is reasoned and documented because Dr. Perper relied on “the entirety of [the miner’s] clinical presentation, including legal and simple pneumoconiosis” to reach his conclusions, and specifically explained how these conditions “replaced health[y] lung tissue and disrupted [the miner’s] respiratory system” and, thereby, hastened the miner’s death from heart disease. *Id.* The administrative law judge also specifically found that Dr. Perper’s rationale, that COPD hastened the miner’s death, was consistent with the opinion of the miner’s cardiologist, who stated that the miner died as a result of his chronic lung disease and heart disease. Decision and Order on Remand at 7. Therefore, because the administrative law judge has rationally explained his credibility determinations with regard to Dr. Perper, they are affirmed. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

We also reject employer’s assertion that the administrative law judge “failed to consider and weigh the medical opinions of Drs. Castle and Rosenberg regarding the cause of death.” Employer’s Brief in Support of Petition for Review at 21. Because neither Dr. Rosenberg nor Dr. Castle diagnosed legal pneumoconiosis, their opinions are entitled to diminished weight on the issue of whether the miner’s death was hastened by legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Furthermore, contrary to employer’s contention, the administrative law judge found that neither Dr. Rosenberg nor Dr. Castle sufficiently addressed why the miner’s lengthy coal employment mine history was not a hastening factor in the miner’s death, even if heart disease was the direct cause of death. Decision and Order on Remand at 7.

Because the administrative law judge has followed the Board’s remand instructions and explained his findings in accordance with the APA, we reject employer’s assertions of error and affirm the administrative law judge’s finding, based on Dr. Perper’s opinion, that claimant established that the miner’s death was hastened by legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁹ *See Sparks*, 213 F.3d at 190, 22

⁹ Employer again argues, as it did in the prior appeal, that the administrative law judge should apply the standard set forth by the United States Court of Appeals for the Sixth Circuit in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002), for determining whether pneumoconiosis hastened the miner’s death. Employer’s Brief in Support of Petition for Review at 22-23. The Board has rejected this argument, because this case arises within the jurisdiction of the Fourth Circuit, and we

BLR at 2-259; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, affirm the administrative law judge's finding that claimant established her entitlement to survivor's benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

have no reason to alter our prior holding. *See Kennedy v. Pittston Co.*, BRB No. 10-0238 BLA, slip op. at 9 (Dec. 11, 2010) (unpub.); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).