

BRB No. 97-1580 BLA

DIXIE W. CAMPBELL)	
(Widow of BILLIE J. CAMPBELL))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
PEABODY COAL COMPANY)	
)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon & Kelley), Madisonville, Kentucky, for claimant.

Terri L. Bowman (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-0968) of Administrative Law Judge Mollie W. Neal awarding benefits on a 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). The administrative law judge found that the autopsy evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and concluded that pneumoconiosis was a substantially contributing cause or factor leading to the

miner's death pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, she awarded benefits.

On appeal, employer contends that the administrative law judge improperly relied upon a medical report that a previous administrative law judge admitted into the record over employer's objection. Employer further asserts that the administrative law judge mechanically credited the opinion of the autopsy prosector pursuant to Sections 718.202(a)(2) and 718.205(c)(2), and failed to provide a valid rationale for her weighing of the other medical opinions. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal. Employer has filed a reply brief.¹

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

¹ We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.205(c)(1), (3). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

At the first formal hearing in this case held on February 14, 1995, claimant proffered a 1986 autopsy review report by Dr. Pitzer which was prepared before claimant's survivor's claim was filed but which was not submitted to the Department of Labor during the district director's consideration of the claim. Claimant also proffered Dr. Pitzer's 1994 report which was based in part on the findings in his 1986 report. Employer objected to the admission of both reports on the ground that claimant withheld the 1986 report until her claim was forwarded to the Office of Administrative Law Judges, in violation of 20 C.F.R. §725.456(d).² Administrative Law Judge Bernard J. Gilday, Jr. found that claimant failed to offer any extraordinary circumstances to justify her failure to submit the 1986 report, as required by Section 725.456(d). Nevertheless, he admitted both reports over employer's objection and remanded the case to the district director for further consideration.

On remand, the district director placed the objected-to reports into Director's Exhibit 28, considered all of the medical reports that had been submitted after the case was referred to the Office of the Administrative Law Judges, and denied benefits. Pursuant to claimant's request for a hearing, the case was forwarded to Administrative Law Judge Mollie W. Neal.³ At the January 14, 1997 hearing Judge Neal offered Director's Exhibits 1-29 for admission into the record and asked counsel whether there were "any objections to these exhibits?" Hearing Transcript at 5. Employer's counsel affirmatively stated for the record that he had no objection to their admission. *Id.* During the hearing claimant's counsel referred to Dr. Pitzer's reports without objection by employer's counsel. Hearing Transcript at 22. Employer's counsel referred to Dr. Pitzer's reports four times in his closing argument without making any mention of the earlier contention over their admissibility.

² Section 725.456(d) provides:

Documentary evidence which is obtained by any party during the time a claim is pending before the deputy commissioner, and which is withheld by such party until the claim is forwarded to the Office of Administrative Law Judges shall, notwithstanding paragraph (b) of this section, not be admitted into the hearing record in the absence of extraordinary circumstances, unless such admission is requested by any other party to the claim (see §725.414(e)).

20 C.F.R. §725.456(d).

³ The record indicates that the case was reassigned to Judge Neal for administrative reasons. Order Reassigning Cases, Nov. 20, 1996. No objection to the reassignment appears in the record.

Hearing Transcript at 27. Judge Neal in her decision relied on both of Dr. Pitzer's reports to support the prosecutor's opinion and awarded benefits. Employer did not request reconsideration.

Employer contends that Judge Gilday erred by admitting the withheld 1986 report at the first hearing despite claimant's failure to present extraordinary circumstances for withholding it from the district director as required by Section 725.456(d). Employer's Brief at 12-13. Claimant responds that employer waived its objection by failing to renew it at the second hearing before Judge Neal. Claimant's Brief at 6-7. Employer replies that it did not renew its objection at the second hearing because Judge Gilday's ruling "was the law of the case, and . . . could not have been challenged until an appeal," and asserts that its initial objection preserved the issue for appeal. Employer's Reply at 2.

Because employer not only failed to renew its Section 725.456(d) objection at the second hearing but expressly stated at that time that it did not object to the admission of any of Director's Exhibits 1-29, we hold that employer waived its right to have the administrative law judge exclude these exhibits. See *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995). In arguing that it had no need to renew its objection at the second hearing employer incorrectly assumes that Judge Neal lacked the discretion to revisit Judge Gilday's evidentiary ruling. See 29 C.F.R. §18.29; 20 C.F.R. §725.351(b); *Gillig v. Advanced Cardiovascular Systems, Inc.*, 67 F.3d 586, 589-90 (6th Cir. 1995)(where a case is transferred for administrative reasons, law of the case doctrine imposes no bar to reconsideration of prior rulings by transferee judge); *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990)(under law of the case doctrine, a transferee court may recognize and enforce prior rulings by a coordinate court, but it retains the discretion to reconsider previously decided issues). Because employer waived its objection to the admission of Dr. Pitzer's reports by failing to renew the objection before Judge Neal, the issue is not before us on appeal. 29 C.F.R. §18.103(a)(1); see *Dankle, supra*; *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991)(Stage, J., dissenting). Therefore, we decline to address employer's contention and we turn to the merits of the case.

In the Decision and Order awarding benefits, the administrative law judge considered the autopsy prosecutor's report and several autopsy review opinions regarding the existence of pneumoconiosis and whether it contributed to the miner's death. Decision and Order at 4-7. Dr. Orrahood, the autopsy prosecutor, noted "black surfaces" upon gross examination of the miner's thoracic cavity and reported "carbon pigment" on gross examination of the lungs. Director's Exhibit 10 at 2. Dr. Orrahood stated that no fibrotic nodules were seen on gross examination. *Id.* On microscopic examination of the miner's lung tissue, Dr. Orrahood reported the presence of macronodules and fibrosis. Director's Exhibit 10 at 3. He diagnosed

“coal miners' pneumoconiosis” with associated emphysema. Director's Exhibit 10 at 1.

Drs. Naeye, Hansbarger, Cymbala, and Pitzer reviewed the autopsy report and lung tissue slides and diagnosed “coal workers' pneumoconiosis.” Director's Exhibits 14; 28 at 48, 107-11, 116-17. In contrast, Drs. Gallo, Broudy, Lane, and Caffrey reported anthracotic pigmentation only based on their review of the autopsy report and slides, and concluded that coal workers' pneumoconiosis was absent. Director's Exhibit 11-13; 28 at 89. In addition, Drs. Naeye, Cymbala, Hansbarger, Broudy, Lane, and Pitzer diagnosed emphysema based on their microscopic examinations. Dr. Naeye opined that the emphysema was not likely due to coal dust exposure. Director's Exhibit 14. Dr. Cymbala at one point stated that the emphysema was a complication of the coal workers' pneumoconiosis and at another point stated that it arose in part from the miner's exposure to coal dust. Director's Exhibit 28 at 72. The other physicians did not discuss the etiology of the miner's emphysema.

Regarding the cause of death, Dr. Orrahood did not list the “coal miners' pneumoconiosis” itself as a cause of death but indicated that the emphysema associated with it was one of the causes of death. Director's Exhibit 10 at 1. Drs. Cymbala and Pitzer described the coal workers' pneumoconiosis as moderate to severe and opined that it hastened the miner's demise, Director's Exhibit 28 at 113, 116, while Drs. Naeye and Hansbarger classified it as too mild to have hastened the miner's death in any way.⁴ Director's Exhibits 14, 28 at 108.

Pursuant to Section 718.202(a)(2), the administrative law judge began her analysis by according “great weight” to the autopsy prosector's report because he had the “unique opportunity to review the miner's entire respiratory system.” Decision and Order at 7. The administrative law judge then found that the diagnoses of coal workers' pneumoconiosis by Drs. Naeye, Hansbarger, Cymbala, and Pitzer supported the prosector's diagnosis. The administrative law judge additionally accorded “great weight” to the opinions of Drs. Naeye and Cymbala because they discussed the etiology of the miner's emphysema. In so doing, the administrative law judge did not resolve the conflict between the opinions of Drs. Orrahood and

⁴ The death certificate listed the immediate cause of death as carcinoma of the kidney and carcinomatosis. Director's Exhibit 8. No other causes or conditions contributing to death were listed.

Cymbala on one hand, and Dr. Naeye on the other, regarding whether the miner's emphysema was related to coal mine employment. The administrative law judge then discounted the reports of Drs. Gallo, Broudy, Lane, and Caffrey because they did not discuss whether the miner's emphysema was related to coal dust exposure. The administrative law judge concluded that the prosector's report was more persuasive because it was based on both a gross and microscopic examination and was supported by the reports of Drs. Naeye, Pitzer, Cymbala, and Hansbarger. Accordingly, the administrative law judge found the existence of pneumoconiosis established pursuant to Section 718.202(a)(2).

Pursuant to Section 718.205(c)(2), the administrative law judge again accorded “greater weight to the opinion of the autopsy prosector who had the unique experience of examining the miner's entire respiratory system.” Decision and Order at 9. The administrative law judge discounted the opinions of Drs. Naeye and Hansbarger because they did not discuss whether the miner's emphysema contributed to his death. *Id.* The administrative law judge found the prosector's opinion that emphysema due to coal workers' pneumoconiosis contributed to death to be supported by Dr. Cymbala's opinion, and concluded that the prosector's report outweighed the reports of Drs. Naeye and Hansbarger because of “his participation in the autopsy of the miner.” Decision and Order at 10. Accordingly, the administrative law judge concluded that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2). See *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Employer contends that the administrative law judge failed to explain sufficiently her reasons for crediting the autopsy prosector's opinion and failed to properly evaluate the other medical reports. Employer's Brief at 14-16, 20-22. This contention has merit. An administrative law judge may, in appropriate cases, credit the opinion of the autopsy prosector over the opinions of reviewing pathologists. See *Gruller v. BethEnergy Mines Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). However, an administrative law judge must provide an adequate rationale for concluding, under the facts of the case, that the autopsy prosector's opportunity to conduct a gross examination, rather than merely review slides, renders the autopsy prosector's opinion superior to the reviewing pathologists' opinions. *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992).

Here, Dr. Orrahood conducted a gross examination of the miner's lungs and a microscopic examination of the lung tissue slides. Only on microscopic examination did he report seeing nodules and fibrosis. Director's Exhibit 10 at 3. He diagnosed coal miners' pneumoconiosis with associated emphysema, and opined that the emphysema contributed to the miner's death. However, four other pathologists

conducted microscopic examinations of the same lung tissue and concluded that coal workers' pneumoconiosis was absent. Director's Exhibits 11-13; 28 at 89. Two other pathologists diagnosed coal workers' pneumoconiosis but indicated that it was far too mild to have hastened the miner's death. Director's Exhibits 14, 28 at 108. In addition, six reviewing pathologists diagnosed emphysema microscopically. Director's Exhibits 14, 28 at 48, 107-11, 116-17. One of them opined that the emphysema was not likely related to coal dust exposure, Director's Exhibit 14, and another stated that it was. Director's Exhibit 28 at 72, 113.

The administrative law judge did not set forth the reasoning underlying her conclusion that Dr. Orrahood's opportunity to see the miner's entire respiratory system gave him an advantage over the reviewing pathologists. See *Urgolites, supra*. Without such an explanation from the administrative law judge, it is not clear from a review of this record how Dr. Orrahood's gross examination was important to his diagnosis of coal miner's pneumoconiosis with associated emphysema or to his determination that the associated emphysema was a cause of death. Although the administrative law judge attempted to supply additional reasoning by focusing on the degree to which the reviewing pathologists discussed the miner's emphysema, its relation to coal dust exposure, and whether it hastened the miner's death, employer correctly notes that she failed to first resolve the conflicting medical evidence and make an explicit finding that the emphysema was pneumoconiosis as defined in 20 C.F.R. §718.201. Employer's Brief at 17, 22. Since the issues to be determined are whether the miner had pneumoconiosis arising out of coal mine employment, see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993), and whether pneumoconiosis hastened his death, see *Brown, supra*, the administrative law judge's incomplete analysis of the emphysema issue does not provide a basis for affirmance. Therefore, we must vacate the administrative law judge's findings pursuant to Sections 718.202(a)(2) and 718.205(c)(2) and remand this case for further consideration.

On remand, the administrative law judge should set forth the reasons for her conclusion that the autopsy prosector's gross examination provided him with an advantage over the reviewing pathologists under the facts of this case. See *Urgolites, supra*. The administrative law judge should consider the relative qualifications of the physicians and the quality of their opinions in determining the weight to be accorded. *Id.* The administrative law judge must also resolve the conflicting medical evidence and make a specific finding regarding whether the miner's emphysema was pneumoconiosis arising out of coal mine employment if she intends to weigh the opinions of the competing physicians based upon whether they discussed the etiology of the miner's emphysema or addressed whether it hastened his death. 20 C.F.R. §718.201; 718.203(b).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge