

BRB No. 02-0323 BLA

MARGARET MAGYAR)
(Widow of STEPHEN MAGYAR))

Claimant-Respondent)

v.)

EASTERN ASSOCIATED COAL)
CORPORATION)

and)

OLD REPUBLIC INSURANCE)
COMPANY)

Employer/Carrier-)
Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE
ISSUED: _____

DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of
Richard A. Morgan, Administrative Law Judge, United States
Department of Labor.

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

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig),
Washington, D.C., for employer.

Mary Forrest-Doyle (Eugene Scalia, Acting Solicitor of Labor; Donald S.
Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate
Solicitor; 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.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (99-BLA-844) of Administrative Law Judge Richard A. Morgan rendered 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). The miner engaged in coal mine employment nearly 41 years before retiring in 1974 at age 60. He was hospitalized with pneumonia in December 1997 and died there in March 1998 at age 83. This case is before the Board for the second time. In his first decision, the administrative law judge found the existence of pneumoconiosis established by autopsy and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(2) and (a)(4) (2002). The administrative law judge also found that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). Although the administrative law judge found claimant failed to establish the miner's death was directly caused by his pneumoconiosis, he determined that it was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2) (2000) and *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Consequently, the administrative law judge awarded benefits.

On employer's appeal the Board affirmed in part, vacated in part, and remanded. *Magyar v. Eastern Assoc. Coal Corp.*, BRB No. 00-0874 BLA (July 16, 2001). The Board affirmed, as unchallenged, the administrative law judge's findings regarding length of coal mine employment, and the existence of pneumoconiosis arising out of coal mine employment. However, the Board found inconsistencies in the administrative law judge's treatment of the medical evidence. The Board noted that in addressing death due to pneumoconiosis the administrative law judge rejected the prosectors' determination that the miner's death was due to complicated coal workers' pneumoconiosis because the better-qualified physicians found no complicated coal workers' pneumoconiosis. The administrative law judge also found that Dr. Koh did not relate the miner's death to clinical pneumoconiosis, and found that Dr. Stone did not provide a cause of death. However, the administrative law judge then counted those doctors (*i.e.* the prosectors, and Drs. Koh and Stone) as three of "six physicians [who] attributed

¹ The 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

the miner's death in part to CWP." *Id.* at 6. The Board ruled the administrative law judge's inconsistent treatment of those doctors' opinions rendered his finding of death due to pneumoconiosis unreasoned. Therefore, the Board vacated that finding and remanded the case for further consideration of the medical opinion evidence. *Id.* The Board instructed the administrative law judge on remand to determine whether the medical opinions are reasoned and documented. *Id.* at 7.

On remand, the administrative law judge again reviewed the medical evidence, and expanded upon his previous findings regarding the weight to be accorded to the physicians' opinions. The administrative law judge again credited the autopsy report, reasoning that the diagnosis of death due to complicated pneumoconiosis could be read as finding death due to simple pneumoconiosis. The administrative law judge also found cardiologist Stone "attributed the respiratory failure, from which the miner died, to CWP/chronic lung disease." *Id.*

In addition, the administrative law judge reconsidered his previous finding that the evidence of coal dust related chronic obstructive pulmonary disease (COPD) was in equipoise. The administrative law judge found, "[t]he employer's physicians did not contest that the miner had centrilobular emphysema, but rather its etiology and severity..." and the Board had affirmed the administrative law judge's previous finding of clinical coal workers' pneumoconiosis. *Id.* Therefore, the administrative law judge reasoned, "[i]t has been established this miner's COPD consisted of two components, simple CWP and centrilobular emphysema." *Id.* The administrative law judge noted that of all the physicians, only Dr. Schaaf did not find COPD.

Finally, the administrative law judge reiterated and expanded upon his previous findings regarding the weight to be accorded to the physicians' opinions. Among other things, the administrative law judge gave little weight to the opinions of Drs. Naeye, Branscomb, and Bush, and credited the opinions of Drs. Perper and Schaaf. Consequently, he found that the miner's death was due to pneumoconiosis and awarded benefits.

On appeal, employer argues the administrative law judge again erred in assigning weight to and evaluating the medical evidence, and asserts that employer was denied due process. Claimant responds that employer's challenge amounts to an attempt to invade the province of the administrative law judge to determine which witnesses are more believable, and the administrative law judge's decision is rational and supported by substantial evidence. The Director, Office of Workers' Compensation Programs, responds that employer waived its due process argument because it did not assert it before the administrative law

judge, and employer was not denied due process in any event. The Director declined to respond to the other issues raised on appeal.

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).

To establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, the miner's pneumoconiosis arose out of coal mine employment, and the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-8 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or the presumption relating to complicated pneumoconiosis set forth at Section 718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Ceder Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Employer argues the administrative law judge committed numerous errors in evaluating the evidence, which require a remand. Although we find the administrative law judge erred in certain respects, those errors do not affect the administrative law judge's determination to give decisive weight to the opinion of Dr. Perper, and to conclude, based upon that opinion, that the miner's death was due to pneumoconiosis.

First, we agree with employer that the administrative law judge erroneously credited the opinion of Dr. Stone. Although Dr. Perper cited Dr. Stone's report in his report, Dr. Stone's report itself is not in the record. Therefore, the administrative law judge erred in relying upon Dr. Stone's opinion. See 20 C.F.R. §725.477 (administrative law judge's decision shall be based on the record evidence); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1138 (7th Cir. 1988) (unfair and irrational for administrative law judge to rely on evidence outside the record since neither the court nor the Board can review it).

We also agree with certain of employer's arguments regarding the

administrative law judge's analysis of the medical opinion evidence. Thus, the administrative law judge has failed to explain why the fact that Dr. Naeye looked at four fewer lung tissue samples (and Dr. Bush looked at one fewer sample) than Dr. Perper renders the opinions of Drs. Bush and Naeye less credible.

Additionally, the administrative law judge gave diminished weight to the opinion of Dr. Branscomb because Dr. Branscomb had not been provided with a positive x-ray reading. Neither the x-ray reading to which the administrative law judge referred nor the qualifications of the reader are in the record. Rather, the reading is referred to in Dr. Perper's report. Moreover, the doctor's opinion (as reported by Dr. Perper) is entirely equivocal. The administrative law judge failed to explain why Dr. Branscomb's lack of awareness of this reading should warrant giving Dr. Branscomb's opinion diminished weight.

We do not find, however, that these errors by the administrative law judge warrant vacation and remand. It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, see *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it, see *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). An administrative law judge may give more weight to physicians' opinions that he finds based on a more thorough review of the evidence of record and better reasoned. See *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge when his findings are supported by substantial evidence, see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In this case, the administrative law judge reviewed and reconsidered all of the relevant evidence and, according decisive weight to the opinion of Dr. Perper, found that simple coal workers' pneumoconiosis constituted part of the miner's COPD. Consequently, because he found that the cause of death was COPD and respiratory failure, he concluded that coal workers' pneumoconiosis substantially contributed to the miner's death. The administrative law judge's decision to credit Dr. Perper is rational, and thus the finding that pneumoconiosis substantially contributed to the

² We reject employer's argument that to the extent the opinions of Drs. Naeye and Bush were given diminished weight because they did not look at as many lung tissue samples as Dr. Perper, employer was denied due process. Having failed to raise its due process challenge to the slide evidence before the administrative law judge, employer has waived it. See *Cabral v. Eastern Associated Coal Co.*, 18 BLR 1-25, 1-33 (1993); *Pendleton v. United States Steel Corp.*, 6 BLR 1-815, 1-819 n.3 (1984).

miner's death is supported by substantial evidence. Therefore, this finding is affirmed.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge