

BRB No. 07-0332 BLA

U. K.W.	)	
(Widow of E.W.)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED: 12/21/2007
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2005-BLA-05587) of Administrative Law Judge Daniel F. Solomon awarding benefits 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 administrative law judge credited the miner with twenty-four years of qualifying coal mine employment, and determined that the miner suffered from pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), and that pneumoconiosis substantially contributed to the miner's death from pneumonia pursuant to 20 C.F.R. §718.205. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that claimant established entitlement under Section 718.205(c) of the regulations and that his Decision and Order fails to comport with the requirements of the Administrative Procedure Act (the APA), 5 U.S.C. §§554(c)(2), 556(d), 557(c), as incorporated into the Act by 30 U.S.C. §932(a).<sup>1</sup> Employer specifically argues that the administrative law judge failed to consider relevant evidence and failed to rationally explain his findings. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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.<sup>2</sup> 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 survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Employer argues on appeal that the administrative law judge violated the APA in finding that claimant established entitlement under Section 718.205(c). Specifically, employer argues that the administrative law judge failed to consider evidence relevant to the severity of the miner's pneumoconiosis, such as a negative x-ray taken within a year of the miner's death, reports from Drs. Castle and Forehand attributing the miner's pulmonary problems to smoking, and Dr. Iosif's treatment records documenting end-stage pulmonary emphysema but not mentioning pneumoconiosis, in assessing the

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<sup>1</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding of pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202 and 718.203. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>2</sup> The law of the United States Court of Appeals for the Fourth Circuit is applicable as the miner was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

credibility and relative weight of the conflicting opinions of the pathologists, Drs. Turjman and Tomashefski.<sup>3</sup> Employer's argument has merit. While employer does not challenge the administrative law judge's finding that the autopsy evidence of record was more probative than the x-ray evidence in determining whether pneumoconiosis was present, employer correctly asserts that the administrative law judge neglected to consider the evidence of record that supports Dr. Tomashefski's finding of mild simple pneumoconiosis, Employer's Exhibit 1, and that undermines Dr. Turjman's diagnosis of "advanced-stage coalworkers' pneumoconiosis," Director's Exhibit 12. *See Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). As the administrative law judge failed to consider all relevant evidence, we vacate his findings at Section 718.205, and remand this case for the administrative law judge to reweigh the evidence on the issue of death causation. *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

Employer argues that the administrative law judge erred in failing to rationally explain his rejection of Dr. Tomashefski's opinion and his crediting of Dr. Turjman's

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<sup>3</sup> The relevant medical evidence of record consists of the following: a negative x-ray reading by Dr. Wiot, dated October 3, 2003; an autopsy report by Dr. Turjman dated July 19, 2004, concluding that the miner's lungs showed an advanced stage of coal workers' pneumoconiosis with associated diffuse panlobular emphysema, Director's Exhibit 12; medical reports dated November 23, 2005 and July 24, 2006 from Dr. Tomashefski, who reviewed the medical records, the autopsy report, and slides of the miner's lung, concluding that the miner's lungs showed mild simple coal workers' pneumoconiosis that did not contribute in any way to the miner's panacinar emphysema or death, Employer's Exhibit 1 and 9; a March 17, 2006 medical report by Dr. Sahyouni, who based his conclusions on Dr. Turjman's autopsy report and treatment records of Dr. Iosif, stating that the miner had "end-stage coal workers pneumoconiosis and concomitant emphysema which both led to the chronic respiratory failure which by the end had ended in the death of [the miner]," Claimant's Exhibit 1; the July 8, 2004 death certificate, signed by Dr. Sahyouni, listing the cause of death as chronic respiratory failure due to pneumoconiosis, Director's Exhibit 11; a May 5, 1995 medical examination report by Dr. Castle stating that the miner suffered from chronic obstructive pulmonary disease due to tobacco abuse and bronchial asthma, Employer's Exhibit 7; a September 14, 1994 medical examination report by Dr. Forehand concluding that the miner was totally impaired due to emphysema caused by cigarette smoking, Employer's Exhibit 8; the August 7, 1996 through June 5, 2003 treatment records of Dr. Iosif, treating the miner for advanced pulmonary emphysema and chronic obstructive pulmonary disease, Director's Exhibit 13; and the September 3, 2003 to March 24, 2004 treatment records of Dr. Sahyouni continuing to treat the miner in accordance with Dr. Iosif's treatment plan.

opinion. Specifically, employer states that “[t]he judge improperly imposed himself as a medical expert to discount the medical opinion of Dr. Tomashefski; [and] the judge gave no valid reason for crediting Dr. Turjman over Dr. Tomashefski.” Employer’s Brief at 12 and 16, internal citations omitted. We agree with employer’s assertions and we hold that remand is necessary for compliance with the requirements of the APA.

In resolving the conflict between the autopsy reports of Drs. Turjman and Tomashefski, the administrative law judge stated:

Both Dr. Turjman and Dr. Tomashefski diagnose pneumoconiosis. A review of Dr. Tomashefski’s description of the microscopic material is generally consistent with the description provided by Dr. Turjman... Both reports rule out cancer and cardiac disease. Both find a respiratory basis for the Miner’s demise, but Dr. Tomashefski attributes it to tobacco smoke and diagnoses it as bulbous [*sic*] emphysema, while Dr. Turjman finds that extensive pneumonia was a cause of death in his explanation although he diagnoses “advanced stage” pneumoconiosis.

I find that the descriptions given [by Drs. Turjman and Tomashefski] are more reasonably, to a reasonable degree of probability, evidence of legal pneumoconiosis that “hastened” the miner’s death. Although Dr. Tomashefski is better qualified than Dr. Turjman, I give less weight to Dr. Tomashefski’s opinion. I find that although he notes the presence of coal macules, silica, and the presence of lesions, Dr. Tomashefski forecloses the possibility of more than one cause of death. He did not recognize that matter such as silica and conglomerate matter may constitute “legal” pneumoconiosis. To the contrary, “hastening” implies that there may be many “causes” that must be ruled out when identified as possible legal pneumoconiosis.

Moreover, Dr. Tomashefski notes lesions of simple pneumoconiosis are mainly localized in the peripheral portions of the upper lung zones, but does not account for the mixture of silica and other matter that may be induced by coal mine employment and that may be evidence of “legal” pneumoconiosis that are [*sic*] seen throughout the lungs.

Decision and Order at 9. As there are no diagnoses of legal pneumoconiosis in the record, we hold that the administrative law judge’s finding of legal pneumoconiosis is not supported. Moreover, the administrative law judge’s conclusory statement that “[a]lthough Dr. Tomashefski is better qualified than Dr. Turjman, I give less weight to Dr. Tomashefski’s opinion,” Decision and Order at 9, fails to satisfy the APA requirement that every adjudicatory decision be accompanied by a statement of findings of fact and

conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §§554(c), 556(d), 557(c); see *Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793, 1-795 (1985). Although the administrative law judge assesses the credibility of Dr. Tomashefski's opinion, he fails to explain why he found Dr. Turjman's report to be valid and more persuasive. Moreover, although the administrative law judge rejects Dr. Tomashefski's opinion for failing to consider pneumoconiosis as a possible contributing factor in the miner's death, a review of Dr. Tomashefski's report indicates that he considered the possibility and ruled it out based on the lack of spatial association between the coal dust deposits and emphysematous changes that he viewed in the autopsy slides. Employer's Exhibit 1. Dr. Tomashefski concluded that the miner had simple coal workers' pneumoconiosis; but panacinar emphysema was the underlying cause of death; severe diffuse acute bronchopneumonia was the immediate cause of the miner's death; and neither coal dust exposure nor coal mine employment was a significant cause or contributory factor to his panacinar emphysema and chronic bronchitis. *Id.* Thus, contrary to the administrative law judge's characterization of the report, Dr. Tomashefski did not fail to consider pneumoconiosis as a possible contributing cause of the miner's death. As the administrative law judge failed to sufficiently explain his crediting of Dr. Turjman's report and mischaracterized Dr. Tomashefski's report, we must remand the case for further consideration. *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991). On remand, therefore, the administrative law judge is directed to reassess Dr. Tomashefski's opinion, in weighing the relevant medical evidence of record under Section 718.205, and issue a decision and order that comports with the requirements of the APA.

Employer lastly challenges the administrative law judge's finding that Dr. Sahyouni's medical report carried claimant's burden of proof under Section 718.205(c) by a preponderance of the evidence. Employer states, "the judge failed to apply proper standards [as] to what constitutes a valid opinion under the Act; [and] the judge gave no valid reason for giving the report any weight." Employer's Brief at 18, 19.

Again, we find merit in employer's arguments. The administrative law judge credited Dr. Sahyouni's report, because he was claimant's treating physician, without considering the report in conjunction with Dr. Tomashefski's contrary opinion and without first evaluating the validity of Dr. Sahyouni's opinion in light of the doctor's failure to address the miner's long-term smoking history or set forth any specific clinical findings, observations, facts or data that would support his conclusion. In crediting Dr. Sahyouni's report, the administrative law judge stated:

I note that Dr. Sahyouni was the attending physician at death and had succeeded to Dr. Iosif as the Miner's treating physician. 20 C.F.R. §718.104(d). The symptoms and treatment rendered to the Miner were appropriate for pneumoconiosis. Although I do not attribute controlling

weight to his opinion, I accept that his logic that pneumoconiosis was in part a substantial cause of death meets the hastening standard and is consistent with and is a viable explanation for cause of death. It is more rational that the Miner had a combination of respiratory impairments and that pneumoconiosis substantially contributed to the competently producing cause of death, pneumonia.

Decision and Order at 9. This finding fails to satisfy the requirement of Section 718.104(d)(5) that the reasoning and underlying documentation of the treating physician's opinion be considered in light of the record as a whole. 20 C.F.R. §718.104(d)(5); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Corp. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As the administrative law judge failed to discuss the validity of Dr. Sahyouni's opinion in light of the record, we hold that he has not provided a sufficient reason for giving the report any weight.<sup>4</sup> Consequently, on remand the administrative law judge must, in weighing the evidence relevant to death causation under Section 718.205, again consider whether the opinion of Dr. Sahyouni is entitled to the treating physician preference under Section 718.104(d).

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<sup>4</sup> Employer requests that the Board take judicial notice of the fact that Dr. Sahyouni has surrendered his medical license pending resolution of possible criminal charges. We reject employer's request as Dr. Sahyouni's license was valid at the time he issued his report.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge