

BRB No. 09-0236 BLA

LEONA O. CHURCH)	
(Widow of DONALD B. CHURCH))	
)	
Claimant-Respondent)	
)	
v.)	
)	
VIRGINIA POCAHONTAS COMPANY)	DATE ISSUED: 12/29/2009
)	
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.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Award of Benefits (06-BLA-5015) of Administrative Law Judge Daniel F. Solomon 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). In the last appeal, the Board affirmed the administrative law judge's finding that claimant¹ had established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R

¹ Claimant is the widow of the miner, who died on September 6, 2004. Claimant filed her survivor's claim for benefits on September 27, 2004. Director's Exhibit 2.

§718.202(a), 718.203(b), but vacated his finding of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), because he failed to provide an adequate rationale for his credibility determinations, as required under the Administrative Procedure Act (APA), 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). The Board remanded the case with instructions for the administrative law judge to apply the evidentiary limitations at 20 C.F.R. §725.414, and to determine an appropriate course of action if he found that any physician relied upon inadmissible evidence. The Board directed the administrative law judge, *inter alia*, to resolve the conflict in the medical opinion evidence regarding the extent to which smoking contributed to the miner's respiratory condition and death, and to explain why Dr. Bluemink's ability to perform the autopsy gave him an advantage in addressing the issue of whether pneumoconiosis caused or hastened the miner's death. The administrative law judge was also instructed to address Dr. Perper's medical opinion, that the miner's death was caused by pneumoconiosis, and to assign appropriate weight to all of the medical opinions of record in light of the physicians' respective medical credentials, the explanation of their opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *L.C. [Church] v. Virginia Pocahontas Co.*, BRB No. 07-0371 BLA (Mar. 28, 2008)(unpub.). On remand, the administrative law judge again found that the weight of the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's weighing of the evidence relevant to the cause of the miner's death at Section 718.205(c), arguing that the administrative law judge performed a selective analysis and failed to accord equal scrutiny to the medical opinions of record. Claimant has not responded. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this 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.² 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).

² The record indicates that the miner's coal mine employment occurred in West Virginia; accordingly, 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, 1-202 (1989)(*en banc*); Director's Exhibit 2.

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence 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). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or if death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Bill Branch Coal Corp. 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, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order on Remand is supported by substantial evidence, consistent with applicable law, and therefore must be affirmed. In evaluating the conflicting medical opinions at Section 718.205(c), the administrative law judge determined that all of the physicians diagnosed pneumoconiosis, but disagreed as to its extent and severity, with Drs. Bluemink and Perper opining that the miner's mild to moderately severe pneumoconiosis was a contributing cause of death, and Drs. Tomashefski, Oesterling and Rosenberg concluding that death was unrelated to the miner's minimal pneumoconiosis. The administrative law judge further determined that all of the physicians agreed that the miner's chronic obstructive pulmonary disease (COPD) played some role in his death, but disagreed as to whether the COPD/emphysema was related to coal dust exposure. In resolving the conflict among the medical opinions, the administrative law judge noted that Dr. Rosenberg was a Board-certified pulmonary specialist, but rationally found that the pathology evidence was more probative as to the extent of the miner's pneumoconiosis and the cause of his death. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). While Drs. Bluemink, Perper, Tomashefski and Oesterling were all Board-certified pathologists, the administrative law judge permissibly concluded that Dr. Bluemink was in the best position to determine the extent of the miner's pneumoconiosis, as Dr. Bluemink performed the autopsy and had the opportunity, through gross examination, to observe the miner's heart and respiratory system, whereas the other pathologists merely performed a slide review without seeing the entire chest cavity. *Id.*; Decision and Order on Remand at 3. The administrative law judge was not persuaded by Dr. Bluemink's finding of coal workers' pneumoconiosis (CWP) "complicated by progressive massive fibrosis" as a diagnosis of complicated pneumoconiosis. However, the administrative law judge rationally credited Dr. Bluemink's findings of extensive fibrosis and diffuse lung injury due to coal dust with small amounts of admixed silica, as substantiated in

large part by the findings of Dr. Perper,³ because Dr. Bluemink “made definitive determinations as to the size and composition of the matter he reviewed.”⁴ Decision and Order on Remand at 4; Director’s Exhibit 11. Dr. Bluemink also opined that the miner’s death was caused by massive amounts of coal dust over a long period of time due to sustained occupational exposure. Director’s Exhibit 8. Thus, because the administrative law judge acted within his discretion in finding that Dr. Bluemink was in the best position to determine the extent of the miner’s pneumoconiosis, he permissibly gave more weight to Dr. Bluemink’s opinion than to Dr. Tomashefski’s contrary opinion that the miner’s pneumoconiosis was “too mild” to have hastened his death from severe bronchopneumonia and emphysema due solely to smoking.⁵ Decision and Order on

³ Dr. Perper found a mild to moderately severe type of interstitial pulmonary fibrosis pattern of coal workers’ pneumoconiosis, noting the presence of marked interstitial fibro-anthracosis with honeycombing and associated severe centrilobular emphysema. Claimant’s Exhibit 2.

⁴ Dr. Bluemink noted that the miner’s lungs were heavily marked with black pigment, with black macules measuring 15 mm in diameter and occasional black nodules measuring 10-15 mm in diameter in the left lower lobe; dense pigment infiltration around the blood vessels in the right upper lobe measuring 15 mm in diameter; numerous matted black lymph nodes in the hyaline of the lung; extraordinary amounts of black pigment deposition within the walls of blood vessels in sections of lung parenchyma; and honeycombing, emphysema and extensive fibrosis. Director’s Exhibits 8, 11.

⁵ The administrative law judge additionally found that Dr. Tomashefski’s opinion was inextricably linked to his reliance on inadmissible evidence, *i.e.*, medical opinions contained in the living miner’s claim, and that the objectionable content could not be redacted because it was “unclear how Dr. Tomashefski’s consideration of the inadmissible evidence affected his conclusion [that the miner’s pneumoconiosis was too mild to have caused respiratory symptoms or to have been a contributory factor in his death].” Decision and Order on Remand at 5-6; Employer’s Exhibit 10; *see Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004)(*en banc*). While employer argues that the administrative law judge failed “to meaningfully address [employer’s] Request to Clarify Record Prior to Filing of Briefs” by determining what portion of Dr. Tomashefski’s report was admissible, Employer’s Brief at 20-21, the administrative law judge has broad discretion in procedural matters, and did not abuse his discretion by denying employer’s request. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). As employer failed to comply with the administrative law judge’s request to submit a brief on the issue, and did not seek to either reopen the record for the admission of a revised report based on admissible evidence, or to show good

Remand at 6. Similarly, the administrative law judge permissibly accorded less weight to Dr. Oesterling's opinion, that the miner's limited macular pneumoconiosis was not a contributing cause of his death from a combination of heart disease, pneumonia and emphysema unrelated to coal dust exposure, as Dr. Oesterling disputed Dr. Bluemink's finding of massive amounts of coal dust present on autopsy by speculating, without substantiation in the record, that Dr. Bluemink must have relied on highly magnified photographs that tended to exaggerate the extent of black pigmentation found. Further, as Dr. Oesterling noted silicates and silica crystals, but did not discuss their significance, and as he attributed lesions of "dark matter" and/or fibrosis to hemosiderin (bleeding) without supporting documentation in the record, the administrative law judge rationally found that his opinion was not persuasive. Decision and Order on Remand at 7-8; Employer's Exhibits 8, 12. By contrast, the administrative law judge found that Dr. Perper's slide review and report substantiated Dr. Bluemink's credible findings on autopsy regarding the extent and severity of the miner's pneumoconiosis, and that Dr. Perper persuasively explained that the miner's COPD/emphysema was caused by a combination of smoking and coal dust exposure. Decision and Order on Remand at 8-9; Claimant's Exhibit 2. As Dr. Perper attached medical literature to support his view that centrilobular emphysema is a direct result of exposure to mixed coal dust containing silica, beyond any effect that may be attributable to smoking, while Drs. Tomashefski, Oesterling and Rosenberg failed to acknowledge the additive effects of smoking and coal mine dust exposure, as recognized in the preamble to the amended regulations, the administrative law judge acted within his discretion in according determinative weight at Section 718.205(c) to Dr. Perper's opinion, that pneumoconiosis was a contributing cause of the miner's death. Decision and Order on Remand at 9-10.

The administrative law judge's credibility determinations may not be disturbed if they are rational and supported by substantial evidence. See *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Our review confirms that the administrative law judge adequately evaluated the medical opinions of record, and reasonably resolved the evidentiary conflicts in view of the persuasiveness and rationality of the opinions.⁶

cause for the admission of excess evidence pursuant to 20 C.F.R. §725.465, we reject employer's assertion of error.

⁶ We reject employer's additional argument, that because the administrative law judge originally found that the death certificate was not probative on the issue of death causation, he erred in assigning it "some weight" on remand. In his first decision, the administrative law judge found that the death certificate, listing cardiopulmonary arrest as the cause of death, with COPD, Black Lung disease and coronary artery disease as secondary causes, was not probative because there was no evidence that it was issued by a physician with relevant qualifications who had prior knowledge of the miner's

See Underwood v. Elkay Mining, Inc., 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). As substantial evidence supports the administrative law judge's findings, we affirm his determination that the more credible evidence of record is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *See Shuff*, 967 F.2d 977, 16 BLR 2-90; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

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

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

condition. Decision and Order at 17; Director's Exhibit 7. The effect of the Board's decision, vacating the administrative law judge's findings at 20 C.F.R. §718.205(c) and remanding this case for a re-evaluation of the medical opinions on the issue of the cause of the miner's death, was to return the parties to the *status quo ante*. *See Williams v. Peabody Coal Co.*, BRB No. 00-0236 BLA (May 17, 2001)(unpub.). Accordingly, the administrative law judge acted within his discretion, on remand, in reassessing the death certificate and finding that it merited "some weight . . . in that cardiopulmonary arrest has been established by the preponderance of the evidence." Decision and Order on Remand at 8.