

BRB No. 10-0226 BLA

KAREN S. LONG)	
(Widow of MURVEN P. LONG))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 12/30/2010
CONSOLIDATION COAL COMPANY)	
)	
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 – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (2004-BLA-06396) of Administrative Law Judge Michael P. Lesniak, rendered on a survivor’s claim filed on March 15, 2002, 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).¹ This case is before the Board for a second time. The Board previously affirmed, as unchallenged by the parties on appeal, the administrative law judge’s decision to accept the parties’ stipulations to forty-one years of coal mine employment and the existence of simple pneumoconiosis arising out coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. *K.L. [Long] v. Consolidation Coal Co.*, BRB No. 08-0214 BLA, slip op. at 4 n.2 (Nov. 13, 2008) (unpub.). However, the Board vacated the administrative law judge’s finding that pneumoconiosis was a substantially contributing cause of the miner’s death pursuant to 20 C.F.R. §718.205(c)(2), (5), and remanded the case to the administrative law judge for reconsideration. *Id.* at 5-6. On remand, the administrative law judge found that Dr. Schmidt’s opinion, that pneumoconiosis hastened the miner’s death, was entitled to greater weight than the contrary opinions of Drs. Renn, Oesterling and Bush under 20 C.F.R. §718.205(c)(2), (5). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge did not comply with the Board’s remand instructions in crediting Dr. Schmidt’s opinion over the opinions of Drs. Renn, Oesterling and Bush. Claimant has not responded. The Director, Office of Workers’ Compensation Programs, has filed a letter, indicating that he will not file a brief in response to employer’s appeal.²

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,

¹ Claimant is the widow of the miner, Murven P. Long, who died on November 29, 2001. Director’s Exhibits 2, 9.

² On October 14, 2010, the Board gave the parties the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. The Director, Office of Workers’ Compensation Programs (the Director), and employer have responded and concur that, based on the filing date of the claim, the amendments to the Black Lung Benefits Act do not apply. Claimant has not responded. We agree with the Director and employer that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director’s Exhibit 2.

and in accordance with applicable law.³ 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 pursuant to 20 C.F.R. Part 718, claimant must demonstrate 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). To establish entitlement to survivor’s benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate 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). In this survivor’s claim, death is considered due to pneumoconiosis if pneumoconiosis caused the miner’s death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, or if claimant establishes invocation of the irrebuttable presumption of death due to pneumoconiosis. 20 C.F.R. §§718.205(c)(2), (4), 718.304. Pneumoconiosis is a substantially contributing cause of the miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1992); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000).

On remand, the administrative law judge considered the medical opinions of Drs. Schmidt, Renn, Oesterling and Bush under 20 C.F.R. §718.205(c). Regarding Dr. Schmidt’s opinion, the administrative law judge noted Dr. Schmidt’s statement, that “[d]ialysis-dependent patients with other lung diseases, such as coal worker’s lung disease (pneumoconiosis), have additional trouble with lung function given that such lung disease is additive to the fluid accumulation that occurs in the lungs with kidney failure.” Decision and Order on Remand at 3, *quoting* Director’s Exhibit 45. The administrative law judge further determined that Dr. Schmidt opined that decreased lung function contributed to the development of pneumonia, congestive heart failure (CHF) and, ultimately, the miner’s death. Decision and Order on Remand at 4. The administrative law judge acknowledged Dr. Schmidt’s testimony that, although she does not have superior knowledge of lung diseases, she does have a superior knowledge of the effects that other diseases have on dialysis patients.⁴ *Id.* The administrative law judge found

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner’s coal mine employment was in West Virginia. *See Shupe v. Director, Office of Workers’ Compensation Programs*, 12 BLR 1-200, 1-202 (1989 (*en banc*)); Director’s Exhibit 4.

⁴ In accordance with the Board’s remand instructions, the administrative law judge reconsidered Dr. Schmidt’s status as a treating physician under 20 C.F.R. §718.104(d)

that Dr. Schmidt specifically addressed “this coal miner and took into account her personal knowledge of his diseases,” including coal workers’ pneumoconiosis. *Id.* The administrative law judge further determined that Dr. Schmidt’s opinion is supported by the autopsy reports, treatment records and the award of benefits by the West Virginia Occupational Pneumoconiosis Board for an impairment caused by pneumoconiosis. *Id.*

Regarding the opinions of Drs. Renn and Oesterling, the administrative law judge found they did not adequately address Dr. Schmidt’s conclusion, that the miner’s pneumoconiosis “decreased the amount of lung function left available for normal breathing” and, therefore, contributed to his death. Decision and Order on Remand at 3. The administrative law judge further accorded little weight to Dr. Renn’s opinion, as Dr. Renn did not address whether pneumoconiosis hastened the miner’s death. *Id.* The administrative law judge noted that, although Dr. Renn relied on several studies that link CHF to decreased lung function, these studies did not rule out the possibility of coal workers’ pneumoconiosis also having “a negative impact on this particular miner’s lung function” and, therefore, hastening his death. *Id.*

With respect to Dr. Bush’s rebuttal autopsy report, the administrative law judge indicated that the Board had instructed him to admit it on remand. Decision and Order on Remand at 2. The administrative law judge determined that, consistent with the other autopsy reports, Dr. Bush diagnosed mild simple coal workers’ pneumoconiosis. *Id.*; Employer’s Exhibit 5. The administrative law judge concluded, “[a]fter taking into account Dr. Bush’s autopsy rebuttal report and reweighing all of the medical evidence, including Dr. Schmidt’s opinion, I find that [c]laimant established death due to pneumoconiosis.” Decision and Order on Remand at 4.

Employer argues that the administrative law judge did not comply with the Board’s remand instructions, or the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §432(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in finding that the opinion of Dr. Schmidt was entitled to more weight than the contrary opinions of Drs. Oesterling and Renn. Employer further maintains that the administrative law judge did not adequately address Dr. Bush’s autopsy report under 20 C.F.R. §718.205(c). In remanding this case, the Board stated:

. . . [T]he administrative law judge must more fully discuss his credibility determinations concerning the conflicting medical evidence, particularly the conflicting opinions of Drs. Schmidt and Renn, in light of Dr. Renn’s

and concluded that her opinion was not entitled to any additional weight on that basis. Decision and Order on Remand at 3.

specific criticisms of Dr. Schmidt's opinion and his comments refuting Dr. Schmidt's conclusions. In addition, the administrative law judge must discuss all of the relevant medical evidence, including the opinion of Dr. Bush . . . on the issue of the cause of the miner's death.

Long, slip op. at 6 (citations omitted). Based upon our review of the administrative law judge's findings on remand, we agree with employer that the administrative law judge's consideration of the medical opinions of Drs. Schmidt, Renn and Bush does not comport with our instructions or the APA.⁵

In crediting Dr. Schmidt's opinion, the administrative law judge again did not explicitly address Dr. Renn's critical analysis of Dr. Schmidt's determination that pneumoconiosis was a substantially contributing cause of the miner's death. The administrative law judge also did not resolve the conflict between Dr. Schmidt's opinion and the views of Drs. Renn and Oesterling, that the miner's simple pneumoconiosis was too mild to have contributed in any way to the miner's death.⁶ In this regard, the administrative law judge did not address the significance of Dr. Schmidt's testimony that: She "did not know" whether simple coal workers' pneumoconiosis causes impairment; she "presumed" that the degree of the miner's pneumoconiosis caused enough damage to compromise the miner's pulmonary reserve; and she could not say whether pneumoconiosis substantially contributed to the miner's death. Employer's Exhibit 9 at 14, 22, 24; Employer's Exhibit 12.

⁵ The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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).

⁶ Dr. Renn diagnosed simple pneumoconiosis, "that is known to, at most, result in a very mild obstructive ventilatory defect that is detectable only through epidemiological studies." Employer's Exhibit 7. Dr. Renn concluded that the miner died of end-stage renal failure, due to diabetic nephropathy, resulting in chronic congestion of various systems, including the lungs, which was aggravated by chronic congestive heart failure (CHF), acute bronchopneumonia and pulmonary infarctions. *Id.* Dr. Oesterling explained that pneumoconiosis did not hasten the miner's death because "the lesion . . . measure[d] approximately two by three millimeters . . . a very small area of structural change." Employer's Exhibit 10 at 23-24. Dr. Oesterling further indicated, "if you don't impact greater than close to [forty] percent with the disease process, it has no functional change . . . these very isolated small lesions are not enough to alter structure to the point that there's change in function." *Id.*

In addition, in discounting Dr. Renn's opinion because he relied, in part, upon articles linking CHF to respiratory impairment, the administrative law judge did not address Dr. Renn's extensive explanation of why he identified CHF, rather than pneumoconiosis, as the cause of the miner's breathing difficulties immediately prior to his death.⁷ Similarly, the administrative law judge did not fully consider Dr. Oesterling's critique of Dr. Schmidt's finding that dialysis-dependent patients with lung disease, such as pneumoconiosis, have additional respiratory problems, given that the lung disease is additive to the fluid accumulation that occurs in the lungs with kidney failure.⁸

Concerning Dr. Bush's rebuttal autopsy report, although the administrative law judge noted Dr. Bush's pathological findings, he did not address Dr. Bush's opinion that the miner's death was not related to pneumoconiosis. The basis for this omission is unclear. The administrative law judge stated that the Board instructed him "to consider whether to admit the additional medical evidence in Dr. Bush's . . . autopsy report[] that is in excess of the autopsy evidence" and indicated, in summarizing his finding under 20 C.F.R. §718.205(c)(2), that he took Dr. Bush's rebuttal autopsy report "into account."⁹

⁷ Dr. Renn indicated that the miner's "heavy, wet lungs," the rupture of the alveolar walls, the breakdown of red blood cells, and presence of hemosiderin are consistent with respiratory distress caused by CHF, not pneumoconiosis. Employer's Exhibit 11 at 22-23. Dr. Renn also noted that the miner had thromboemboli that caused pulmonary infarctions and bronchopneumonia, the latter of which is unrelated to simple pneumoconiosis. *Id.* at 24, 33.

⁸ Dr. Oesterling stated:

[I]f we had progressive massive fibrosis, severe destruction of the lungs from coal workers' disease, it would have been a factor. It would have accelerated it, it would not have caused [the miner's] death. It would have been an accelerating factor . . . [The miner] did not have that level of disease.

Employer's Exhibit 10 at 38-39.

⁹ The administrative law judge admitted Dr. Bush's report as employer's autopsy report in rebuttal of the report prepared by Dr. Flores, the autopsy prosector, who did not offer an opinion as to the cause of the miner's death. Decision and Order on Remand at 2; Director's Exhibit 10; Employer's Exhibit 5. Dr. Bush reviewed Dr. Flores's autopsy report, the tissue slides, the survivor's claim form, the death certificate, the medical reports of Drs. Schmidt and Oesterling and the miner's medical records. Employer's Exhibit 5.

Decision and Order on Remand at 2, 4. The administrative law judge also stated that, because a doctor who prepares an autopsy report “may not take into consideration other clinical evidence, such as medical opinion and treatment records,” he would “redact the portions of Dr. Bush’s report that exceed the evidentiary limitations.” *Id.* at 2. The administrative law judge did not explain, however, his apparent determination that Dr. Bush relied upon impermissible evidence in opining that “death was not caused, contributed to or hastened by any chronic dust disease related to coal mine employment.” Employer’s Exhibit 5.

Because the administrative law judge did not properly resolve the latter issue and did not adequately address the conflicting medical opinions of Drs. Schmidt, Renn and Oesterling, the administrative law judge has not complied with the Board’s remand instructions or the APA. We vacate, therefore, the administrative law judge’s determination that Dr. Schmidt’s opinion was sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner’s death pursuant to 20 C.F.R. §718.205(c)(2), (5). *See Mays*, 176 F.3d at 762 n.10, 21 BLR at 2-603 n.10; *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

On remand, the administrative law judge must make an explicit determination as to whether Dr. Bush’s opinion excluding pneumoconiosis as a contributing cause of the miner’s death was based upon evidence beyond the scope of a rebuttal autopsy report. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-109 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff’d on recon.*, 24 BLR 1-13 (2007) (McGranery & Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-66-67 (2004) (*en banc*). If the administrative law judge finds that Dr. Bush’s opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Id.* Rather, the administrative law judge may redact the objectionable content, ask the physician to submit a new report, or factor in the physician’s reliance upon the inadmissible evidence when deciding the weight to which the physician’s opinion is entitled. *Harris*, 23 BLR at 1-108-109.

When assessing the probative weight to which each medical opinion is entitled, the administrative law judge must consider the qualifications of the respective physicians, the documentation underlying their medical judgments, the explanation for their conclusions, and the sophistication and bases of their diagnoses. *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). The administrative law judge must also consider whether the physicians’ opinions are consistent with the Act and the implementing regulations. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Finally, the administrative law

judge must set forth his findings on remand in detail, including the underlying rationale, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge