

BRB No. 12-0157 BLA

KAREEN S. LONG)	
(Widow of MURVEN P. LONG))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 12/17/2012
)	
CONSOLIDATION COAL COMPANY)	
)	
Employer-Respondent)	
)	
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—Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John B. Brooks, Morgantown, West Virginia, for claimant.

Ashley M. Harman and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand—Denying Benefits (04-BLA-6396) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a survivor’s claim filed on March 15, 2002, and is before the Board for the third time. Director’s Exhibit 2.

In the most recent decision,¹ pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to reconsider the medical opinions regarding whether pneumoconiosis was a substantially contributing cause of the miner's death, pursuant to 20 C.F.R. §718.205(c). Specifically, the Board held that the administrative law judge failed to sufficiently explain his determination to credit the opinion of Dr. Schmidt, that pneumoconiosis contributed to the miner's death from renal failure, over the opinions of Drs. Renn and Oesterling, that the miner's pneumoconiosis was too mild to have contributed in any way to his death. *Long v. Consolidation Coal Co.*, BRB No. 10-0226 BLA, slip op. at 5-6 (Dec. 30, 2010)(unpub.). Further, the Board held that the administrative law judge did not adequately explain why he disregarded Dr. Bush's opinion that the miner's death was unrelated to pneumoconiosis. *Long*, BRB No. 10-0226 BLA, slip op. at 6-7. Accordingly, the Board instructed the administrative law judge, on remand, to reconsider the conflicting evidence, taking into account "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." *Long*, slip op. at 7 (citations omitted). The Board further instructed the administrative law judge to explain his findings. *Long*, slip op. at 8.

On remand, the administrative law judge reconsidered the evidence, and found that it did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

¹ The full procedural history of this case is set forth in the Board's previous decisions. *Long v. Consolidation Coal Co.*, BRB No. 10-0226 BLA (Dec. 30, 2010)(unpub.); *K.L. [Long] v. Consolidation Coal Co.*, BRB No. 08-0214 BLA (Nov. 13, 2008)(unpub). At this point in the proceedings, the Board has affirmed the administrative law judge's decision to accept the parties' stipulations that the miner had forty-one years of coal mine employment and suffered from simple pneumoconiosis that arose out of coal mine employment, pursuant to 20 C.F.R. §§718.202, 718.203(b). *Long*, BRB No. 08-0214 BLA, slip op. at 2 n.2. Additionally, the Board has noted that, because the miner's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Long*, BRB No. 08-0214 BLA, slip op. at 3 n.3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

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).

Because this survivor's claim was filed after January 1, 1982, but before January 1, 2005,² claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish any one of these elements precludes entitlement. See *Trumbo*, 17 BLR at 1-87; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

In this case, four physicians, Drs. Schmidt, Renn, Oesterling, and Bush addressed the cause of the miner's death. Dr. Schmidt, who is Board-certified in Internal Medicine and Nephrology, and who treated the miner for end-stage kidney failure, attributed his death to complications of renal failure and diabetes. Director's Exhibit 45; Employer's Exhibits 9, 12. Dr. Schmidt further opined that pneumoconiosis contributed to the miner's death, because "[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." Director's Exhibit 45. Dr. Schmidt stated that the miner's "lung condition was adversely affected by coal worker's chronic lung disease," leaving the miner with diminished lung reserve to withstand the fluid accumulation in his lungs that occurred between his dialysis treatments. *Id.* Dr. Schmidt, however, also testified 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.

² As the Board noted previously, because this claim was filed before January 1, 2005, recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case. *Long*, BRB No. 10-0226 BLA, slip op. at 2 n.2.

In contrast, Drs. Renn, Oesterling, and Bush opined that the miner's simple pneumoconiosis was too mild to have played any role in his death. Dr. Renn, who is Board-certified in Internal Medicine, Pulmonary Disease, and Forensic Medicine, attributed the miner's death to end-stage renal failure and congestive heart failure, and disagreed with Dr. Schmidt's conclusion that the miner's simple pneumoconiosis decreased his lung function and contributed to his death. Employer's Exhibits 7, 11. Dr. Renn opined that the miner's pneumoconiosis was too mild to have caused any impairment or to have contributed to any of the diseases that caused his death. Employer's Exhibit 11 at 24. Dr. Oesterling, who is Board-certified in Anatomical and Clinical Pathology, attributed the miner's death to heart failure, progressive ischemia, renal failure, and pulmonary infarctions. Employer's Exhibits 2, 10. Dr. Oesterling opined that the mild degree of coal workers' pneumoconiosis that was present was insufficient to produce any respiratory impairment or to have hastened the miner's death. Employer's Exhibit 2 at 2. Finally, Dr. Bush, who is Board-certified in Anatomical and Clinical Pathology, opined that the miner's pneumoconiosis was too limited in extent to have produced any impairment.³ Employer's Exhibit 5.

In considering the evidence on remand pursuant to 20 C.F.R. §718.205(c), the administrative law judge found that Dr. Schmidt's opinion was "undercut" by those of Drs. Renn and Oesterling, that the miner's pneumoconiosis was too mild to have contributed to his death. Specifically, the administrative law judge noted that, while Dr. Schmidt was well-qualified to address the consequences of kidney failure and the effect of other diseases on dialysis patients, she had "little professional experience" with pneumoconiosis. Decision and Order at 5. The administrative law judge noted further that Dr. Schmidt merely "presumed" that the miner's pneumoconiosis was severe enough to compromise his pulmonary reserve, whereas Drs. Renn and Oesterling "definitively stated" that the miner's pneumoconiosis was too mild to have affected his lung function or hastened his death.⁴ *Id.* The administrative law judge therefore accorded Dr.

³ The administrative law judge, on remand, determined that the remainder of Dr. Bush's opinion, addressing the cause of the miner's death and setting forth Dr. Bush's disagreement with Dr. Schmidt's opinion, was based, in part, on evidence outside the scope of an autopsy rebuttal report. Decision and Order at 7-8. He therefore redacted portions of Dr. Bush's report, and gave "less weight" to Dr. Bush's opinion on the cause of the miner's death. On appeal, employer does not challenge the administrative law judge's analysis, and states that it "does not rely on Dr. Bush's response to Dr. Schmidt's conclusions." Employer's Brief at 13 n.1.

⁴ The administrative law judge considered that Dr. Oesterling relied upon photomicrographs of the miner's lung tissue to reach his opinion that the miner's pneumoconiosis was too mild to have altered his pulmonary function. Decision and Order at 5.

Schmidt's opinion, that the miner's pneumoconiosis decreased his pulmonary reserve, "less weight because of her equivocation." *Id.* Further, the administrative law judge found that Dr. Schmidt did not adequately address the miner's significant cardiac problems as a source of his breathing problems near the time of his death. Decision and Order at 6. Therefore, the administrative law judge found that claimant did not meet her burden of proof to establish that pneumoconiosis was a substantially contributing cause of the miner's death.

Claimant argues that the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) is not supported by substantial evidence. Claimant's Brief at 6. Claimant contends that Dr. Schmidt's opinion establishes that the miner's death was due to pneumoconiosis, and asserts that employer's doctors, Drs. Renn, Oesterling, and Bush, never explained why they rejected the opinion of Dr. Schmidt. *Id.* at 9-11. Claimant also asserts that Drs. Renn, Oesterling, and Bush rendered the opinions they did because they were paid by employer. *Id.* at 8, 11.

Contrary to claimant's contention, substantial evidence supports the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis. The administrative law judge acted within his discretion in considering that Dr. Schmidt had little professional experience with pneumoconiosis, and permissibly found that her opinion was "undercut" by the contrary opinions of Drs. Oesterling and Renn that the miner's pneumoconiosis was too mild to have hastened his death. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Additionally, the administrative law judge permissibly found that the fact that Dr. Schmidt merely presumed that the miner's pneumoconiosis was severe enough to compromise his pulmonary reserve rendered Dr. Schmidt's opinion equivocal, compared to the "definitive," contrary opinions of Drs. Oesterling and Renn. *See U. S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 391, 21 BLR 2-639, 2-653 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Further, the administrative law judge permissibly discounted Dr. Schmidt's opinion because the physician failed to adequately account for the miner's cardiac condition at the time of his death.⁵ *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Substantial evidence supports the administrative law judge's

⁵ The administrative law judge found that Dr. Schmidt failed to adequately consider the miner's cardiac condition at the time of death because she stated that she was unaware that the miner's cardiac disease was causing him to be short of breath. Decision and Order on Remand-Denying Benefits at 6; Employer's Exhibit 9 at 26.

permissible credibility determinations, which are therefore affirmed.⁶ *See Anderson*, 12 BLR at 1-113.

Consequently, we affirm the administrative law judge's determination that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because claimant did not establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trumbo*, 17 BLR at 1-87.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁶ We reject claimant's additional argument that the opinions of employer's experts should have been discounted as biased, because the physicians were paid for their opinions. The identity of the party who hires a medical expert does not, by itself, demonstrate partiality or partisanship on the part of the physician. *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992); *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991)(en banc)(holding that it is error to discredit, as biased, a medical report prepared for litigation absent a specific basis for finding the report to be unreliable).