

BRB No. 98-0386 BLA

ERMA LASH	)	
(Widow of JOHN J. LASH)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
BARNES & TUCKER COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Tulowitzki, & Bilonick), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1705) of Administrative Law Judge Daniel L. Leland denying benefits on a 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 accepted the parties' stipulation to twenty-nine years of coal mine employment and, noting that employer did not contest the existence of pneumoconiosis, found that the autopsy

evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b). The administrative law judge further found that the record failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge failed to explain his conclusion that certain physicians were more highly qualified than others. Claimant further asserts that the administrative law judge erred in weighing the medical opinions pursuant to Section 718.205(c)(1), (2) and failed to recognize that certain physicians expressed opinions that are hostile to the Act. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.<sup>1</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under Section 718.205(c), claimant must prove that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a). For survivor's claims filed after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

The miner's death certificate listed metastatic lung cancer as the immediate

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<sup>1</sup> We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), and 718.205(c)(3). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

cause of death and “C.O.P.D.: Coalworkers['] Pneumoconiosis” as a significant condition. Director's Exhibit 6. Dr. Rizkalla, who testified that he is Board-certified in Anatomical and Clinical Pathology, performed the autopsy and diagnosed metastatic small cell carcinoma, simple coal workers' pneumoconiosis, interstitial fibrosis, and mild coronary artery disease. Director's Exhibit 7. Dr. Rizkalla opined that the miner “died from small cell carcinoma” and that his underlying pneumoconiosis was a substantial contributing factor leading to his death. Director's Exhibit 7 at 2. Dr. Rizkalla testified that pneumoconiosis hastened the miner's death by increasing the burden on his heart and lungs. Claimant's Exhibit 3 at 12. The record does not contain Dr. Rizkalla's *curriculum vitae*. Dr. Rizkalla testified that he has not researched or published regarding pneumoconiosis. Claimant's Exhibit 3 at 7.

Dr. Perper, who is Board-certified in Anatomical, Clinical, and Forensic Pathology, reviewed the autopsy report and slides and the miner's hospital records and diagnosed lung cancer and simple coal workers' pneumoconiosis with chronic obstructive lung disease. Claimant's Exhibit 1. Dr. Perper opined that the primary cause of death was lung cancer, which he believed was “a complication of coal workers' pneumoconiosis and exposure to coal and silica.” Claimant's Exhibit 1 at 12. Dr. Perper cited medical literature that he claimed established a causal relationship between occupational exposure to silica-containing coal dust and the development of lung cancer. Claimant's Exhibit 1 at 13-21. Dr. Perper further opined that the coal workers' pneumoconiosis with related emphysema and lung cancer hastened the miner's death by causing a reduction in his blood oxygen levels. Claimant's Exhibit 1 at 23, Claimant's Exhibit 4 at 22. Dr. Perper's *curriculum vitae* documents his research and publication in the field of forensic pathology.<sup>2</sup> Claimant's Exhibit 1.

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<sup>2</sup> Claimant does not challenge the administrative law judge's decision to discount as unexplained the death causation opinion of Board-certified pathologist Dr. Wecht. Claimant's Exhibit 2; Decision and Order at 9.

Drs. Naeye, Kleinerman, and Cagle, all of whom are Board-certified in Anatomical and Clinical Pathology, reviewed the miner's medical records, death certificate, autopsy report and slides, and concluded that his simple pneumoconiosis was too mild to have hastened his death due to smoking-related lung cancer. Director's Exhibits 8, 17; Employer's Exhibits 4, 8, 13, 18, 19. All three physicians stated that current medical research shows no causal link between coal dust or silica exposure and lung cancer.<sup>3</sup> The record indicates that Drs. Naeye and Kleinerman have researched and published extensively regarding pneumoconiosis, and that Dr. Cagle has researched and published extensively regarding various aspects of lung cancer and lung pathology. Director's Exhibit 8; Employer's Exhibit 4, 13.

Pursuant to Section 718.205(c)(1) and (2), the administrative law judge acknowledged that Dr. Rizkalla was the autopsy prosector, but found that there was no evidence in the record that his opportunity to see the miner's lungs in gross gave him an advantage over the reviewing pathologists. Decision and Order at 8. The administrative law judge further found that there was “no evidence that [Dr. Rizkalla] has any particular expertise regarding occupational lung diseases.” Decision and Order at 9. Accordingly, the administrative law judge declined to credit Dr. Rizkalla's opinion based upon his status as the autopsy prosector. Turning to Dr. Perper's opinion, the administrative law judge noted that Dr. Perper was “the only pathologist in the record to make . . . a connection” between coal dust exposure and the development of lung cancer. Decision and Order at 9. The administrative law judge further found that “Dr. Naeye and Dr. Kleinerman, who are experts in the pathology of occupational lung diseases, and Dr. Cagle, who is an expert on lung pathology, are far more knowledgeable regarding occupational lung diseases than Dr. Perper, and find no such nexus.” *Id.* In addition, the administrative law judge considered but was not persuaded by a research article submitted by claimant to support her contention that exposure to silica-containing coal dust caused the miner's lung cancer. Claimant's Exhibit 5; Decision and Order at 9. The administrative law judge ultimately concluded that, “[a]s the more expert pathologists have concluded that the

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<sup>3</sup> Three additional Board-certified pathologists, Drs. Bush, Mendelow, and Griffin, and two Board-certified pulmonary specialists, Drs. Fino and Pickerell, reached the same conclusion. However, the administrative law judge chose to rely primarily upon the opinions of Drs. Naeye, Kleinerman, and Cagle. Decision and Order at 8-9.

decedent died due to lung cancer and that his coal workers' pneumoconiosis had no role in his death, I find that the decedent did not die due to pneumoconiosis.” Decision and Order at 10.

Claimant contends that the administrative law judge failed to explain his finding that Drs. Naeye, Kleinerman, and Cagle are more highly qualified than Drs. Rizkalla and Perper. Claimant's Brief at 3, citing 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); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Contrary to claimant's contention, the administrative law judge explained that he found them to be “more knowledgeable regarding occupational lung disease than Dr. Perper. . . .” Decision and Order at 9. The administrative law judge further found no evidence to indicate that Dr. Rizkalla has special expertise in this area. *Id.* As noted above, the record documents the expertise of Drs. Naeye, Kleinerman, and Cagle<sup>4</sup> in occupational lung disease and lung pathology, while indicating that Dr. Perper's focus is forensic pathology. Although the administrative law judge did not list these specific differences in summarizing the evidence, based upon our review of the record it is sufficiently clear to us why the administrative law judge made the credibility determination that he did. See *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997). Substantial evidence supports his finding. Therefore, we reject claimant's contention that the administrative law judge's analysis of the physicians' expertise is inadequately explained under the APA.

Claimant next asserts that the administrative law judge failed to indicate the weight he accorded to Dr. Rizkalla's opinion that coal workers' pneumoconiosis hastened the miner's death. Claimant's Brief at 3. The administrative law judge considered Dr. Rizkalla's opinion that pneumoconiosis hastened the miner's death due to lung cancer by burdening his heart and lungs. Claimant's Exhibit 3 at 12; Decision and Order at 6. However, the administrative law judge properly declined to accord his opinion greater weight because the administrative law judge found no evidence that his gross examination provided him with an advantage over the reviewing pathologists, see *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992), or that he possessed expertise in occupational lung diseases. Decision and Order at 8-9. The administrative law judge then credited the opinions of Drs. Naeye, Kleinerman, and Cagle that pneumoconiosis played no role in the miner's death, based upon their expertise in occupational lung disease and lung pathology.

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<sup>4</sup> Dr. Cagle stated that “I hold myself out as an expert in lung pathology, including” the areas of coal workers' pneumoconiosis and silicosis. Employer's Exhibit 18 at 22.

Decision and Order at 9. Although the administrative law judge specifically credited their opinions over that of Dr. Perper without again mentioning Dr. Rizkalla, the obvious implication of the administrative law judge's analysis is that he also credited their opinions over that of Dr. Rizkalla. Therefore, we reject claimant's contention.

Claimant next contends that the administrative law judge failed to address Dr. Perper's opinion that coal workers' pneumoconiosis hastened the miner's death by causing a drop in his blood oxygen levels. Claimant's Brief at 5. Contrary to claimant's contention, the administrative law judge discussed this portion of Dr. Perper's opinion. Decision and Order at 7. We have reviewed Dr. Perper's opinion as a whole, and we believe that substantial evidence supports the administrative law judge's finding that Dr. Perper's opinion "that the decedent's coal workers' pneumoconiosis was a substantial contributing cause of his death is based on the premise that there is a causal relationship between exposure to silica[-]containing coal dust and the development of lung cancer." Decision and Order at 9. The bulk of Dr. Perper's medical reasoning is devoted to establishing a direct connection between silica-containing coal dust and the miner's lung cancer death, Claimant's Exhibit 1 at 11-24, and the small portion of his opinion stating that pneumoconiosis hastened death by causing hypoxia states that it did so in the context of "complicating lung cancer," an apparent reference to Dr. Perper's view that the miner's lung cancer arose in part from his coal dust exposure and pneumoconiosis. Claimant's Exhibit 4 at 22. The administrative law judge permissibly credited, based upon qualifications, the opinions of physicians who concluded that the medical literature does not establish such a causal connection, and who opined that the miner's pneumoconiosis was too mild to have hastened his death. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Based upon these opinions, the administrative law judge concluded that pneumoconiosis played "no role" in the miner's death. Decision and Order at 10; see *Lukosevicz, supra*. Therefore, we reject claimant's contention.

Claimant alleges further that the administrative law judge failed to address her contention that Dr. Naeye relied upon an assumption that is hostile to the Act.<sup>5</sup> Claimant's Brief at 6. Specifically, claimant alleges that Dr. Naeye based his opinion on the view that simple pneumoconiosis never hastens death. We have reviewed the single sentence quoted by claimant in Dr. Naeye's second consultation report,

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<sup>5</sup> Claimant also alleges that Dr. Fino relied on a premise hostile to the Act. Claimant did not raise Dr. Fino's alleged hostility below, see *Perry v. Director, OWCP*, 9 BLR at 1-1, 1-3 (1986), and the administrative law judge expressly declined to rely upon Dr. Fino's opinion. Decision and Order at 8. Therefore, we discuss only Dr. Naeye's opinion.

and the report as a whole. Director's Exhibit 17. We believe that, viewed in context, Dr. Naeye's statement merely expresses his belief that simple pneumoconiosis will not progress once coal dust exposure ceases, and that the medical research literature does not establish a link between simple pneumoconiosis and decreased life expectancy generally.<sup>6</sup> Claimant refers us to no case law holding that such an opinion is hostile to the Act. In his three written reports and at his deposition, Dr. Naeye explained in detail his opinion that the miner's lung cancer was unrelated to coal dust exposure and that his simple pneumoconiosis was too mild to have hastened his death due to smoking-related lung cancer. Director's Exhibits 8, 17; Employer's Exhibit 8, 17. We see no indication that he based his opinion on premises contrary to the Act. Therefore, we reject claimant's contention.<sup>7</sup>

Finally, claimant argues that the administrative law judge erred by failing to address an error that Dr. Cagle made when he reviewed and critiqued an American Thoracic Society research article. Claimant's Brief at 8. This article surveys the research literature and concludes that there is a causal relationship between silicosis and lung cancer. Claimant's Exhibit 5. Of the twenty-three studies the article references, one involved coal miners. In reviewing this article, Dr. Cagle raised several criticisms of the studies referenced, including his view that none of the underlying studies addressed coal miners.<sup>8</sup> Employer's Exhibit 19. The administrative law judge in discussing the article recognized that one of its references in fact dealt with coal miners, Decision and Order at 9, but claimant asserts that the administrative law judge should have gone on to address how Dr.

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<sup>6</sup> Dr. Naeye stated that "Simple CWP does not advance or shorten a worker's life after that worker retires from mining. (citations omitted). For that reason the questions you ask must be answered in the context of his pulmonary status at retirement in 1983." Director's Exhibit 17 at 1. Dr. Naeye then explained that the evidence he reviewed concerning the miner's pulmonary status at that time indicated that his pneumoconiosis was too mild to have hastened his death. *Id.*

<sup>7</sup> Even assuming, *arguendo*, that the sentence quoted by claimant expresses a belief contrary to the Act, there is no evidence that it formed the primary basis for Dr. Naeye's conclusion that the miner died due to lung cancer and that his pneumoconiosis was too mild to hasten his death. See *Stephens v. Bethlehem Mines Corp.*, 8 BLR 1-350, 1-352 (1985). Thus, the administrative law judge's failure to address this dispute is at best a harmless error. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

<sup>8</sup> Dr. Cagle also stated that the studies do not always account for smoking, use suspect methods, and lack a pathologic basis for diagnosis. Employer's Exhibit 19.

Cagle's error "reflected upon [his] credibility." Claimant's Brief at 8. While the administrative law judge might have chosen to do so, we reject the contention that he was required to do so, especially in light of the fact that the administrative law judge was not persuaded by the article.

The administrative law judge noted correctly that the article stated that there is insufficient data available regarding the cancer risk of workers exposed to silica but who do not have silicosis. Decision and Order at 9; Claimant's Exhibit 5 at 3. The administrative law judge further noted that the evidence conflicted in this case regarding whether the miner had silicosis or simply had signs of previous exposure to silica.<sup>9</sup> The administrative law judge concluded that, even assuming that the miner had silicosis, "it does not necessarily follow that the . . . silicosis . . . caused his lung cancer." Decision and Order at 9. Because the administrative law judge's analysis was reasonable and he was not persuaded by the article, see *Clark, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984), we see no reason to remand this case for him to reweigh Dr. Cagle's opinion because of Dr. Cagle's misstatement.<sup>10</sup> Therefore, we reject claimant's contention, and we affirm the administrative law judge's finding pursuant to Section 718.205(c)(1), (2).

Because claimant has failed to establish death due to pneumoconiosis, a necessary element of entitlement in a survivor's claim under Part 718, see *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry, supra*, the denial of benefits is affirmed.

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<sup>9</sup> Two physicians diagnosed silicosis, while five, including Dr. Perper, concluded that the miner did not have silicosis.

<sup>10</sup> Claimant contends that the administrative law judge erred by not resolving the issue of whether the miner had silicosis. Claimant's Brief at 9. However, claimant apparently agreed to employer's stipulation of the existence of simple pneumoconiosis and did not make the existence of silicosis an issue for resolution. Hearing Transcript at 4. Moreover, the administrative law judge assumed that the miner had silicosis.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge