

BRB No. 99-0493 BLA

EDITH K. WILTROUT )  
(Widow of WALTER WILTROUT) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 SHANNOPIN MINING COMPANY )  
 )  
 and ) DATE ISSUED:  
 )  
 OLD REPUBLIC INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

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

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-BLA-0757) of Administrative Law Judge Daniel L. Leland 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). Claimant<sup>1</sup> filed her survivor's claim on June 30, 1997.<sup>2</sup>

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<sup>1</sup>Claimant is the surviving spouse of the miner, who died on June 4, 1997. Director's Exhibit 7. The miner's death certificate, signed by Dr. Snow, indicates that the immediate cause

After crediting the miner with thirty-four years and four months of coal mine employment, the administrative law judge considered the instant claim under the applicable regulations at 20 C.F.R. Part 718. The administrative law judge determined that although the x-rays of record were read unanimously as negative for pneumoconiosis, the autopsy evidence of record was sufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found claimant entitled to the rebuttable presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that there was insufficient evidence to rebut the presumption. The administrative law judge then found the evidence sufficient to establish that pneumoconiosis was a substantial contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge improperly determined that Dr. Oesterling's pathology opinion supported a finding of pneumoconiosis pursuant to Section 718.202(a)(2). Employer further contends that the administrative law judge improperly credited the medical reports of Drs. Wecht and Elnicki over the reports of Drs. Oesterling, Kleinerman and Tuteur in finding that claimant established that the miner's death was due to pneumoconiosis under Section 718.205(c)(2). Claimant responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates the contentions raised in its Petition for Review and brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not intend presently to participate 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. 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).

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of the miner's death was ventricular fibrillation due to arteriosclerotic heart disease. *Id.* Chronic obstructive lung disease is the only "other significant condition contributing to death" listed on the death certificate. *Id.*

<sup>2</sup>The miner had filed previously, on March 11, 1994, a living miner's claim, which the district director finally denied on June 15, 1994. Director's Exhibit 26. The miner thereafter took no further action in pursuit of benefits in the miner's claim. *Id.*

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis or where complicated pneumoconiosis is established. See 20 C.F.R. §§718.1, 718.203, 718.205(c)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, has held that for purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death "where pneumoconiosis actually hastens death." *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

On appeal, employer contends that the administrative law judge erred in finding that the autopsy evidence was sufficient to establish the existence of pneumoconiosis. The administrative law judge recognized that the United States Court of Appeals for the Third Circuit has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); Decision and Order at 5. Consequently, the administrative law judge acknowledged that he was required to weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(4) together in determining whether the miner suffered from pneumoconiosis. *Williams, supra*; Decision and Order at 5.

Employer argues that the administrative law judge erred in finding that Dr. Oesterling's pathology opinion indicated that the miner suffered from pneumoconiosis. Dr. Oesterling, a pathologist who reviewed the autopsy slides prepared by the autopsy prosector, Dr. Wecht, specifically opined in both his report and deposition testimony that the miner did not suffer from coal workers' pneumoconiosis. Director's Exhibit 19; Employer's Exhibit 3. The administrative law judge duly noted the doctor's opinion, but found that the doctor's opinion nonetheless established the existence of pneumoconiosis inasmuch as Dr. Oesterling testified that the miner's lungs showed anthracosis, a disease which is included under the definition of pneumoconiosis at 20 C.F.R. §718.201. Decision and Order at 4-6. Employer argues that the administrative law judge took Dr. Oesterling's deposition testimony that the miner's lung tissue showed "anthracosis" out of context because the administrative law judge did not note the doctor's additional testimony in which he clarified that his use of the term "anthracosis" denoted not the disease process, but only "anthracotic pigmentation," a finding of which employer contends is insufficient, by itself, to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). See 20 C.F.R. §718.202(a)(2); Decision and Order at 5-6; Employer's Exhibit 3 at 41-42. To the extent that the administrative law judge erred in finding that Dr. Oesterling's opinion established the presence of pneumoconiosis, however, we hold that such error was harmless inasmuch as the other two opinions of record submitted by pathologists, *i.e.*, the opinions of Drs. Wecht and Kleinerman, indicate that the miner suffered from coal workers' pneumoconiosis, and inasmuch as the administrative law judge properly credited these two

opinions on the ground that they were submitted by pathologists, one of whom was the autopsy prosector. See *United States Steel Corp. v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 5-6; Director's Exhibits 8, 20; Employer's Exhibit 1; Claimant's Exhibit 1. Because substantial evidence supports the administrative law judge's finding that the autopsy evidence of record is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(2), this finding is affirmed. Moreover, the administrative law judge properly credited this evidence over the unanimously negative x-ray evidence and Dr. Tuteur's opinion that the miner did not have pneumoconiosis in finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(1)-(4). See *Williams, supra*; see also *Terlip, supra*; Decision and Order at 5-6. Accordingly, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a).

Employer also contends that the administrative law judge based his finding that pneumoconiosis hastened the miner's death upon improper, mechanical preferences for the opinion of the autopsy prosector, Dr. Wecht, and the opinion of the miner's treating physician, Dr. Elnicki. Employer argues that these arbitrary preferences were improper because the administrative law judge consequently did not consider the thoroughness of the contrary medical opinions of Drs. Oesterling, Kleinerman and Tuteur, the sophistication of their conclusions, and the extent of the documentation and reasoning supporting their opinions. Employer contends that the administrative law judge thus violated the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), because he did not provide a sufficient rationale for resolving the conflict posed by the medical evidence. Employer's contentions have merit.

While an administrative law judge may reasonably accord greater weight to the opinion of an autopsy prosector on the issue of the existence of pneumoconiosis, see *Oravetz, supra*; *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Terlip, supra*, an administrative law judge may not mechanically give deference to a physician's findings solely because the physician was the autopsy prosector when there is credible, contrary evidence in the record. See *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). In the instant case, it is evident that the administrative law judge accorded greatest weight to Dr. Wecht's opinion simply because he was the autopsy prosector, without providing an adequate rationale for according less weight to the opinions of Drs. Oesterling and Kleinerman, who reviewed the autopsy slides, Director's Exhibit 19; Employer's Exhibits 2-3, and Dr. Tuteur, who reviewed all of the medical evidence of record. Decision and Order at 6; Director's Exhibits 47, 48, 52. The administrative law judge merely summarized the conclusions indicated in each of the conflicting reports prior to crediting the report of the autopsy prosector, and did not sufficiently discuss the thoroughness of the contrary medical opinions of Drs. Oesterling, Kleinerman and Tuteur, the sophistication of their conclusions, and the extent of the documentation and reasoning supporting their opinions. Decision and Order at 5-6.

Additionally, while greater weight may be accorded to a treating physician's opinion, an administrative law judge must not mechanically defer to the physician's status as treating physician, but must explain why that factor is significant. See *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). As employer contends, it appears that the administrative law judge credited Dr. Elnicki's opinion that pneumoconiosis contributed significantly to the miner's death over Dr. Tuteur's contrary opinion simply because Dr. Elnicki was claimant's treating physician.<sup>3</sup> Decision and Order at 6. While the administrative law judge also noted that Dr. Elnicki based his opinion on the findings of Dr. Wecht's autopsy report, the administrative law judge did not adequately discuss why the doctor's review of Dr. Wecht's report rendered his opinion better-reasoned than Dr. Tuteur's report, especially since Dr. Tuteur also reviewed the autopsy report, and, moreover, unlike Dr. Elnicki, reviewed all of the medical evidence in the record. Accordingly, we vacate the administrative law judge's finding under Section 718.205(c)(2), and remand this case for the administrative law judge to reconsider all of the relevant evidence thereunder in compliance with the requirements of the APA.

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<sup>3</sup>Dr. Elnicki was the miner's treating physician over the last three and one-half years of the miner's life. The progress and treatment notes covering periodic visits during that time neither indicate a diagnosis nor a history of pneumoconiosis or other lung disease. Director's Exhibit 10. In his report dated August 29, 1997, Dr. Elnicki stated that he had reviewed Dr. Wecht's autopsy report and his own office notes. Director's Exhibit 9. Dr. Elnicki stated that the miner had a history of coal workers' pneumoconiosis. *Id.* Dr. Elnicki also stated in the August 29, 1997 report that "[the miner's] lung disease was fairly advanced given the autopsy report of pulmonary osteoarthropathy, increased AP diameter of the chest and findings of cor pulmonale [sic]." *Id.* It is apparent that Dr. Elnicki based his opinion that pneumoconiosis contributed significantly to the miner's death on Dr. Wecht's autopsy findings because Dr. Elnicki further indicated in his 1997 report that his office's specific laboratory data on the miner were "mostly normal." *Id.*

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge