

BRB No. 03-0420 BLA

MARY LESHINSKY)
(Widow of ROBERT LESHINSKY))
)
 Claimant-Respondent)
)
 v.)
)
 CONSOLIDATION COAL COMPANY) DATE ISSUED: 02/27/2004
)
 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.

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

Ashley M. Harman (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-Awarding Benefits (99-BLA-0016) of Administrative Law Judge Michael P. Lesniak 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).¹ This survivor's claim² is before the

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726

Board for a third time. When it was first before the administrative law judge, he awarded benefits, finding that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was hastened by pneumoconiosis. Pursuant to an appeal by employer, the Board vacated the administrative law judge's award of benefits, holding that he improperly credited the opinion of Dr. Wecht's over the contrary opinions of Drs. Kleinerman, Oesterling, Naeye, and Morgan when he relied on Dr. Wecht's credentials, without considering the credentials of the other physicians, and when he found Dr. Wecht's opinion to be more consistent with the miner's coal dust exposure history, his brief smoking history, and his history of severe heart disease, cor pulmonale and coal workers' pneumoconiosis than were the opinions of the other doctors. The Board also held that the administrative law judge did not provide an adequate explanation for his finding that Dr. Wecht's status as autopsy prosector entitled his opinion to greater weight than the opinions of physicians who merely reviewed autopsy slides. *Leshinsky v. Consolidation Coal Co.*, BRB No. 99-1173 BLA (Oct. 31, 2000)(unpub.). On remand, the administrative law judge again accorded greater weight to Dr. Wecht's opinion because he found: Dr. Wecht's credentials to be superior to those of the other physicians; Dr. Wecht's conclusions to be more consistent with the miner's coal mine employment and smoking history; and Dr. Wecht's opinion, as autopsy prosector, entitled to additional weight in light of questions raised concerning the autopsy tissue slides submitted for review.

Employer appealed again and the Board again vacated the administrative law judge's award of benefits and remanded the case for further consideration, *Leshinsky v. Consolidation Coal Co.*, BRB No. 01-0772 BLA (2-1 decision with Hall, J. dissenting) (May 29, 2002)(unpub.), holding that the administrative law judge failed to provide: an explanation as to why Dr. Wecht's credentials were superior to those of the other physicians; and an explanation as to why Dr. Wecht's opinion was more credible on the basis of claimant's smoking history and length of coal mine employment history, than the

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant, Mary Leshinsky, is the widow of the miner, Robert Leshinsky, who died on July 13, 1997. Claimant filed her survivor's claim on July 22, 1997. Director's Exhibit 1.

The miner's claim filed on April 19, 1990, Director's Exhibit 28, was denied by Administrative Law Judge Gerald M. Tierney in a Decision and Order dated August 16, 1993. That denial was affirmed by the Board in *Leshinsky v. Consolidation Coal Co.*, BRB No. 93-2370 BLA (Mar. 29, 1995)(unpublished). No further action was taken on the miner's claim.

opinions of the other physicians. By crediting Dr. Wecht's opinion based on these factors, the Board held, as employer contended, that the administrative law judge created an improper presumption that the miner's death and lung disease was due to coal mine employment. Further, the Board held that the administrative law judge impermissibly accorded greater weight to the opinion of Dr. Wecht solely because he was the autopsy prosector. On remand, in the Decision and Order now on appeal to the Board, the administrative law judge again awarded benefits, finding that the miner's death was due to pneumoconiosis by again crediting the opinion of Dr. Wecht over the contrary opinions of Drs. Kleinerman, Oesterling, Naeye and Morgan.

On appeal, employer asserts once again that the administrative law judge erred in according greater weight to the opinion of Dr. Wecht and, therefore, erred in finding that the evidence established that the miner's death was due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. In reply, employer reiterates its contentions. The Director, Office of Workers' Compensation Programs (the Director), is not participating 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).

On appeal, employer first contends that the administrative law judge erred in according less weight to the opinions of Drs. Kleinerman, Naeye, Oesterling and Morgan, who found that the miner's death was not caused or hastened by pneumoconiosis, but was instead due to cardiac disease, as they were neither well-reasoned nor well-documented. Regarding the opinion of Dr. Kleinerman, employer argues that the administrative law judge erred in finding it equivocal and, therefore, according it less weight inasmuch as Dr. Kleinerman specifically stated that the miner's simple coal workers' pneumoconiosis played no role in his death. Employer contends that in rejecting Dr. Kleinerman's opinion as to the cause of death, the administrative law judge was, in effect, impermissibly substituting his opinion for that of a medical expert. Employer further contends that the administrative law judge's analysis of Dr. Kleinerman's medical opinion improperly required the physician to rule out pneumoconiosis as a contributing cause to the miner's death, thereby shifting the burden of proving death due to pneumoconiosis from claimant. Additionally, employer asserts that the administrative law judge improperly substituted his own opinion for that of Dr. Kleinerman's when he rejected the physicians' diagnosis of smoking-related emphysema.

In according less weight to the opinion of Dr. Kleinerman, the administrative law judge found it equivocal inasmuch as Dr. Kleinerman's statement that coal workers' pneumoconiosis had no "significant" effect in causing, contributing to, or hastening the miner's death, suggested that the physician had not ruled out the possibility that the presence of pneumoconiosis may have had some effect, even if slight, on the miner's physiology. Decision and Order on Remand at 8. In addition, the administrative law judge accorded less weight to Dr. Kleinerman's diagnosis of centracinar emphysema caused by prolonged and heavy smoking because the administrative law judge found that the record did not support a history of heavy and prolonged smoking, *i.e.*, the administrative law judge found that the miner had an eleven year history of smoking which ceased forty years prior to his death. Decision and Order on Remand at 7-8. This was rational. See *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157, 1162 (1984).

Employer next argues that the administrative law judge likewise erred in finding Dr. Oesterling's opinion equivocal as to the cause of death and rejecting it for that reason. The administrative law judge, however, found Dr. Oesterling's opinion that coal mine dust exposure did not contribute to the miner's death equivocal because Dr. Oesterling also stated that all of claimant's lung disease including the presence of fibrosis, fibrotic changes, and a nodule of pneumoconiosis with fibrous tissue, was a contributing factor in the miner's death. Accordingly, the administrative law judge's finding that Dr. Oesterling's opinion was equivocal on the cause of death was rational. *Stanley*, 6 BLR at 1-1162. Further, the administrative law judge rejected Dr. Oesterling's opinion that the miner's underlying lung disease was due to his smoking history inasmuch as the administrative law judge found that the miner had a relatively insignificant smoking history. This was also rational. See *Bobick*, 13 BLR at 1-54; see also *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 113.

Employer also argues that the administrative law judge erred in substituting his determination for that of a medical expert when he concluded that Dr. Naeye's finding of severe emphysema due to cigarette smoking was not supported by the record which demonstrated an eleven year smoking history that ended forty years prior to the miner's death and inasmuch as Dr. Naeye did not explain how the miner's smoking history was sufficient to cause severe emphysema even though it occurred early in his life. In according little weight to the opinion of Dr. Naeye, the administrative law judge found it to be equivocal on several points: Dr. Naeye, on the one hand, stated that the miner might have some degree of cor pulmonale, but then stated that any changes in the right side of the miner's heart were the result of chronic heart failure; Dr. Naeye attributed the miner's severe emphysema to his cigarette smoking which the administrative law judge

found to be inconsistent with the miner's history of only eleven years of cigarette smoking which ended forty years prior to his death; and Dr. Naeye stated that the miner's pulmonary emphysema, though not a major factor, could have played a small role in the miner's lung disease and ultimate demise. The administrative law judge's accordance of little weight to Dr. Naeye's opinion was, therefore, rational. *See Bobick*, 13 BLR at 1-54; *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 113.

Employer further argues that the administrative law judge impermissibly rejected the opinion of Dr. Morgan because Dr. Morgan had repeatedly denied the presence of medical or legal pneumoconiosis. In concluding that Dr. Morgan's opinion was entitled to little weight, however, the administrative law judge found it neither well-reasoned nor well-documented because Dr. Morgan had repeatedly denied the presence of pneumoconiosis but, when faced with undeniable evidence of its presence, acknowledged its presence. Employer's Exhibit 6. The administrative law judge found this especially suspect since Dr. Wecht, the autopsy prosector, rated the presence of coal workers' pneumoconiosis on a scale of one to ten as being at five or six (moderate). *See Decision and Order on Remand* at 10. Moreover, the administrative law judge noted that Dr. Morgan characterized the presence of emphysema as relatively limited while Dr. Naeye described it as severe. The administrative law judge's accordance of little weight to Dr. Morgan's opinion for these reasons was, therefore, rational. *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 113; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Finally, employer argues that the administrative law judge erred in mechanically crediting the opinion of Dr. Wecht solely because he was the autopsy prosector, over the opinions of the other pathologists, without sufficiently explaining why Dr. Wecht's conclusions were more credible than the opinions of the reviewing pathologists. Employer further argues that this is especially true in light of the fact that Drs. Kleinerman, Oesterling, and Naeye each criticized Dr. Wecht's autopsy as providing inadequate specimens upon which to make certain diagnoses and for failing to provide tissue specimens to correlate with his gross description.

In crediting Dr. Wecht's opinion over the opinions of the reviewing pathologists, the administrative law judge concluded that one of the reasons that Dr. Wecht's opinion was entitled to greater weight in determining the cause of the miner's death because his gross examination of the miner provided him with an advantage over the physicians, who only reviewed slides, *i.e.*, Dr. Kleinerman, Oesterling, and Naeye, inasmuch as Dr. Wecht saw more evidence of coal workers' pneumoconiosis in his gross examination than could be captured or represented on the tissue slides. *Decision and Order on Remand* at 11. Regarding the opinions of the reviewing pathologists, the administrative law judge noted that the pathologists admitted that they place great weight on the information that they are able to gather from their personal review of autopsy slides. *Decision and Order on*

Remand at 11.³ Thus, the administrative law judge concluded that because the amount of coal workers' pneumoconiosis that is actually present is very important in determining the cause of death and Dr. Wecht saw more evidence of coal workers' pneumoconiosis on the gross examination than could be captured or represented on slides, Dr. Wecht's opinion was entitled to greater weight because he was the person who actually performed the autopsy and the only one who knew for certain the degree of coal workers' pneumoconiosis that was present. Decision and Order on Remand at 11-12. We conclude that this was a rational reason for according greater weight to the opinion of Dr. Wecht, the autopsy prosector. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). The administrative law judge additionally accorded greater weight to the opinion of Dr. Wecht because even though the other pathologists were highly qualified he found Dr. Wecht to be even more qualified and because he found Dr. Wecht's opinion to be better reasoned than the other opinions of record. This was rational. *See Clark*, 12 BLR at 1-155; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988); *Brown*, 7 BLR at 1-733.

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal as long as the administrative law judge's inferences are supported by the record, *Anderson*, 12 BLR at 1-113. Employer's contentions in this case are tantamount to a request that the Board reweigh the evidence, which it cannot do. *See Anderson*, 12 BLR at 1-113. We, therefore, affirm the administrative law judge's weighing of the medical opinion evidence and his finding that the miner's death was hastened by pneumoconiosis.

³ Dr. Wecht opined that while the miner's death was due to significant heart disease, and that coal workers' pneumoconiosis played a significant role in aggravating the heart disease. Director's Exhibits 9, 10, 23.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge