

BRB No. 07-0387 BLA

B.J.S.)	
(Widow of L.M.S.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
DOMINION COAL CORPORATION)	
c/o ACORDIA EMPLOYERS SERVICE)	DATE ISSUED: 02/28/2008
)	
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 of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Sparkle Bonds (The Virginia Black Lung Association), Richlands, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-6286) of Administrative Law Judge Larry W. Price awarding 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). This case involves a survivor's claim filed on June 14, 2004. After crediting the miner with 20.88 years of coal mine employment, the administrative law judge found that the autopsy and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). After finding that claimant was

entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant¹ responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief.²

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Employer argues that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).³ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v.*

¹ Claimant is the widow of the deceased miner, who died on April 9, 2004. Director's Exhibit 10.

² Because no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence

Director, OWCP, 11 BLR 1-85 (1988). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

In his consideration of whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge considered the opinions of Drs. Javed, Turjman, Crouch and Tomashefski.

In a hospital discharge summary, Dr. Javed, a physician Board-certified in Internal Medicine and Cardiovascular Disease, reported that the miner was admitted to the hospital because of severe congestive heart failure and difficulty in breathing. Director's Exhibit 12; Claimant's Exhibit 2. Dr. Javed reported that over the course of several days, the miner's condition worsened and he developed pneumonia, and he died on April 9, 2004. *Id.* Among his "Final Discharge Diagnoses," Dr. Javed listed severe congestive heart failure due to end-stage cardiomyopathy, chronic obstructive pulmonary disease, acute respiratory failure, and pneumonia. *Id.* Dr. Javed also completed the miner's death certificate, listing the immediate cause of death as cardiopulmonary arrest due to acute respiratory failure, due in turn to end stage cardiomyopathy. Director's Exhibit 10. No contributory causes or conditions were listed. However, in a subsequent letter dated May 18, 2004, Dr. Javed opined that the miner's death was "hastened by and contributed [to] by Coal Workers' Pneumoconiosis complicated by Pneumonia." Claimant's Exhibit 2. Although the administrative law judge acknowledged Dr. Javed's status as the miner's treating physician, the administrative law judge accorded Dr. Javed's opinion "less weight due to the lack of support for his medical conclusion." Decision and Order at 16.

Dr. Turjman, a physician Board-certified in Anatomic and Clinical Pathology, performed the miner's autopsy, which was limited to the lungs. Director's Exhibits 11, 12. In the autopsy report, Dr. Turjman diagnosed, *inter alia*, "Coal workers' pneumoconiosis, moderately advanced stage with diffuse coal macules, associated with emphysematous change and with the presence of scattered coal micronodules." Dr. Turjman also opined that:

establishes that pneumoconiosis was a substantially contributing cause of death.

(5) 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).

Examination of the lungs reveals a moderately advanced stage of coal workers' pneumoconiosis including the presence of diffuse coal macules and scattered coal micronodules. The patient's compromised respiratory status due to his coal workers' pneumoconiosis appears to be a major contributing factor to his death which is attributed to the terminal event of extensive bronchopneumonia.

Director's Exhibit 11. The administrative law judge found that Dr. Turjman's opinion was well documented and well reasoned. Decision and Order at 14.

Dr. Crouch, a physician Board-certified in Anatomic Pathology, reviewed the miner's sixteen autopsy slides, the autopsy report and the death certificate. Employer's Exhibit 3. Dr. Crouch noted that three slides were broken in transit, but stated this did not compromise her histological evaluation. *Id.* Dr. Crouch opined that the miner suffered from mild simple coal workers' pneumoconiosis. *Id.* Dr. Crouch opined that the "the dust-related changes [were] too mild in extent and severity to have caused a clinically significant degree of respiratory impairment or disability and could not have caused, contributed to or otherwise hastened [the miner's] death" *Id.* Dr. Crouch opined that the miner's death was "most likely secondary to complications [of] pneumonia and/or . . . cardiomyopathy." *Id.* The administrative law judge found that Dr. Crouch's opinion was less documented than Dr. Turjman's report. The administrative law judge stated that:

Dr. Turjman not only reviewed a greater amount of histological evidence, but he also supports his conclusions with gross findings. Dr. Crouch's conclusion that pneumoconiosis was minimal was based upon solely the histological evidence. She did not review Dr. Turjman's gross findings. She also had access to fewer slides than Dr. Turjman because a number of the slides had been broken during transport. Both Drs. Crouch and Turjman provide sufficient support for their conclusions based on the information available to them. Despite Dr. Turjman's reliance on a greater length of coal mine employment than found by this Court, I find that Dr. Turjman's greater access to data, namely the gross findings and a greater

number of slides, yielded a more persuasive report.

Decision and Order at 15.

Dr. Tomashefski, a physician Board-certified in Anatomic and Clinical Pathology, reviewed the miner's autopsy slides, the autopsy report, and other medical evidence. Employer's Exhibit 2. Dr. Tomashefski opined that:

[T]he immediate cause of [the miner's] death is acute pneumonia complicated by sepsis, shock, and acute respiratory distress syndrome. Underlying causes of death include left ventricular cardiac failure and moderate centrilobular emphysema.

Based on the findings of scattered coal macules and micronodules within his lung tissue, it is also my opinion that [the miner] had mild simple coal workers' pneumoconiosis. The degree of simple pneumoconiosis which is present, in my opinion, would not have caused [the miner] any significant respiratory symptoms or respiratory impairment and, in my opinion, within reasonable medical certainty neither caused nor contributed to his death. It is also my opinion that [the miner's] simple coal workers' pneumoconiosis minimally contributed to his emphysema which is distributed throughout his lungs.

With reasonable medical certainty, neither mild simple coalworkers' pneumoconiosis, coal dust exposure nor coal mine employment is a cause of acute pneumonia, acute respiratory distress syndrome or left ventricular cardiac failure. It is therefore also my opinion that [the miner's] coal mine employment and coal dust exposure were neither a cause nor a contributory factor in his death. In my opinion he would have died at the same time and in the same manner even if he had never worked as a coal miner or developed simple coalworkers' pneumoconiosis.

Employer's Exhibit 1.

The administrative law judge found that:

Dr. Tomashefski . . . explained that the emphysema was distributed throughout [m]iner's lungs and was an underlying cause of death. He then goes on to state that pneumoconiosis minimally contributed to the emphysema. He does not provide any support for this conclusion. Dr. Turjman had stated that the emphysematous change was found in tissue surrounding coal macules, thereby supporting his contention that

pneumoconiosis was related to the emphysema. Dr. Crouch explained that the lack of concordance between the severity of emphysematous changes and changes associated with pneumoconiosis rule against the conclusion that pneumoconiosis contributed to the emphysema. Both of these doctors provided an explanation for their respective conclusions pertaining to the relationship between pneumoconiosis and emphysema. Dr. Tomashefski does not offer such an explanation. An unsupported medical conclusion is not a reasoned diagnosis. I grant less weight to Dr. Tomashefski's opinion because he failed to support the conclusion that pneumoconiosis did not contribute to emphysema, the very disease which Dr. Tomashefski identified as an underlying cause of [m]iner's death.

Decision and Order at 15 (case citations omitted).

After noting that Drs. Javed, Turjman, Tomashefski, and Crouch were all Board-certified,⁴ the administrative law judge concluded that:

Dr. Turjman delivered the most persuasive and credible opinion of all the physicians. His opinion is supported by [the] [m]iner's treating physician, who also concluded that [m]iner's death was hastened by pneumoconiosis, albeit with very little explanation. Both Drs. Crouch and Tomashefski are very well qualified. However, Dr. Crouch did not have access to all of the slides nor Dr. Turjman's report of gross findings from the autopsy. Even though her opinion is well reasoned, I still grant more weight to Dr. Turjman's report. Dr. Tomashefski's report is the most well documented. He had access to the autopsy slides and report of gross findings, treatment records and clinical test results. Dr. Tomashefski's opinion was not well reasoned in that he failed to explain why pneumoconiosis did not contribute to Miner's emphysema.

⁴ The administrative law judge took judicial notice of the Board-certification of Drs. Javed and Turjman since he found that neither physician submitted a curriculum vitae. Decision and Order at 16 n.13. However, the record does, in fact, reflect Dr. Javed's Board-certification in Internal Medicine and Cardiovascular Disease, and Dr. Turjman's Board-certification in Anatomic and Clinical Pathology. Director's Exhibit 12. Moreover, as previously noted, Dr. Crouch is Board-certified in Anatomic Pathology and Dr. Tomashefski is Board-certified in Anatomic and Clinical Pathology. Employer's Exhibits 2, 4.

For the reasons stated above, I find that the medical evidence as a whole establishes that pneumoconiosis was a substantially contributing factor in Miner's death under §718.205(c).

Decision and Order at 16-17.

Employer initially contends that the administrative law judge erred in his consideration of Dr. Turjman's opinion. Employer specifically argues that the administrative law judge erred in finding that Dr. Turjman's opinion was sufficiently reasoned. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). However, in this case, the administrative law judge erred in failing to provide any basis for finding that Dr. Turjman's opinion regarding the cause of the miner's death was sufficiently reasoned.⁵ *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, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Employer also argues that the administrative law judge failed to address the equivocal nature of Dr. Turjman's opinion. Employer's contention has merit. The administrative law judge failed to address whether Dr. Turjman's opinion, that the miner's "compromised respiratory status due to his coal workers' pneumoconiosis *appear[ed] to be* a major contributing factor to his death" was too equivocal to support a finding that the miner's death was due to pneumoconiosis. Director's Exhibit 11 (emphasis added); *see U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Employer also contends that the administrative law judge erred in crediting Dr. Turjman's opinion as to the cause of the miner's death merely because he had the opportunity to conduct a gross examination of the miner's lungs. This contention has merit. An administrative law judge may not credit the opinion of the autopsy prosector solely because the autopsy prosector was the only physician to conduct a gross examination of the body. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 191-92, 22 BLR 2-251, 2-262 (4th Cir. 2000); *see also Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992) (holding that the administrative law judge did not explain how the autopsy prosector's ability to conduct a gross examination gave him an advantage over

⁵ The administrative law judge stated, without explanation, that Dr. Turjman "adequately supports his conclusion that pneumoconiosis compromised Miner's respiratory health and contributed to his death." Decision and Order at 14.

reviewing pathologists). In this case at bar, the administrative law judge has not adequately explained his conclusion that Dr. Turjman's gross examination of the lung tissue provided him with an advantage in providing a more credible assessment regarding the cause of death than the physicians who reviewed the lung tissue slides provided by Dr. Turjman, and other documentation.

When evaluating the pathology-related evidence, an administrative law judge must first determine the credibility and weight of the reviewing pathologists' contrary opinions before deferring to the autopsy prosecutor's opinion. *Urgolites*, 17 BLR at 1-23. Should the administrative law judge on remand credit Dr. Turjman's opinion based upon his status as the autopsy prosecutor, he must provide an adequate rationale for concluding that the prosecutor's additional gross examination provided him with an advantage over the reviewing physicians under the particular facts of this case. *Id.*

Employer also contends that the administrative law judge erred in his consideration of Dr. Crouch's opinion. Employer argues that the administrative law judge mischaracterized Dr. Crouch's opinion. We agree. The administrative law judge stated that Dr. Crouch did not review Dr. Turjman's gross findings. Although Dr. Crouch did not comment upon Dr. Turjman's gross findings, Dr. Crouch indicated that she reviewed Dr. Turjman's autopsy report, which included Dr. Turjman's gross examination findings. Employer's Exhibit 3. Consequently, the administrative law judge's finding that Dr. Crouch did not review Dr. Turjman's gross findings is not supported by substantial evidence. See 33 U.S.C. §921(b)(3); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer also argues that the administrative law judge erred in according less weight to Dr. Crouch's findings because Dr. Crouch "had access to fewer slides than Dr. Turjman because a number of the slides had been broken during transport." Decision and Order at 15. In her report, Dr. Crouch indicated that three of the sixteen autopsy slides had been broken during transport. Employer's Exhibit 3. The administrative law judge, however, did not address Dr. Crouch's assessment that the broken slides "did not compromise [her] histologic evaluation." *Id.* Because neither Dr. Crouch nor any other physician opined that the three broken autopsy slides compromised Dr. Crouch's opinions, the administrative law judge erred in according less weight to Dr. Crouch's opinion on this basis. See *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Employer further argues that the administrative law judge erred in his consideration of Dr. Tomaszewski's opinion. Dr. Tomaszewski opined that the immediate cause of the miner's death was acute pneumonia complicated by sepsis, shock, and acute respiratory distress syndrome. Employer's Exhibit 1. Dr. Tomaszewski also opined that left ventricular cardiac failure and moderate centrilobular emphysema were underlying

causes of the miner's death. *Id.* Although the administrative law judge noted that Dr. Tomashefski opined that the miner's pneumoconiosis minimally contributed to the miner's emphysema, the administrative law judge found that Dr. Tomashefski did not provide any support for this conclusion. Decision and Order at 15. The administrative law judge, therefore, found that this aspect of Dr. Tomashefski's opinion was not sufficiently reasoned. However, the administrative law judge subsequently stated that he accorded "less weight to Dr. Tomashefski's opinion because he failed to support [his] conclusion that pneumoconiosis *did not* contribute to the emphysema." *Id.* (emphasis added). As noted above, Dr. Tomashefski opined that the miner's pneumoconiosis contributed minimally to his emphysema. The administrative law judge, therefore, mischaracterized Dr. Tomashefski's opinion.⁶ On remand, the administrative law judge should reconsider Dr. Tomashefski's opinion that the miner's pneumoconiosis neither caused nor contributed to his death.

Employer also contends that the administrative law judge erred in finding that Dr. Turjman's opinion was supported by Dr. Javed's opinion. Although Dr. Javed was the miner's treating physician, the administrative law judge found that Dr. Javed's opinion, that the miner's "death was hastened by and contributed [to] by Coal Workers Pneumoconiosis complicated by Pneumonia," was not sufficiently reasoned. Decision and Order at 16. Because Dr. Javed provided no explanation for his conclusion, the administrative law judge permissibly found that Dr. Javed's opinion was not sufficiently reasoned. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. However, the administrative law judge, nevertheless, credited Dr. Turjman's opinion in part because it was supported by Dr. Javed's opinion, "albeit with little explanation." *Id.* Because the administrative law judge properly found that Dr. Javed's opinion regarding the cause of the miner's death was not sufficiently reasoned, the administrative law judge erred in failing to explain how Dr. Javed's opinion supported that of Dr. Turjman. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

In light of the above-referenced errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration.

⁶ Moreover, in his consideration of Dr. Turjman's opinion, the administrative law judge stated that Dr. Turjman had related the miner's pneumoconiosis to his emphysema:

Dr. Turjman . . . stated that the emphysematous change was found in tissue surrounding coal macules, thereby supporting his contention that pneumoconiosis was related to the emphysema.

Decision and Order at 15. Contrary to the administrative law judge's characterization, Dr. Turjman did not opine that the miner's pneumoconiosis was related to his emphysema. Director's Exhibit 11.

On remand, when reconsidering whether the medical opinion evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge