

BRB No. 07-0459 BLA

J.M.)	
(Widow of G.M., Jr.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
SOUTHWESTERN VIRGINIA COAL CORPORATION)	DATE ISSUED: 02/29/2008
)	
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 Awarding Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart, & Eskridge), Bristol, Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-BLA-06006) of Administrative Law Judge William S. Colwell rendered 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). Claimant filed a survivor's claim on April 24, 2003.¹ Director's Exhibit 1. The district director issued his Proposed Decision and

¹ Claimant is the widow of the miner, G.M., Jr., who died on December 12, 2002.

Order denying benefits on February 12, 2004. Director's Exhibit 23. The district director specifically found that while the miner suffered from pneumoconiosis, the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant filed a request for modification on December 29, 2004 and submitted additional evidence. Director's Exhibits 24-25. On February 16, 2005, the district director issued a Proposed Decision and Order awarding benefits. Director's Exhibit 29. Employer requested a hearing, which was held on October 12, 2005. The administrative law judge reviewed all of the record evidence and determined that claimant satisfied her burden of establishing that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c). Accordingly, the administrative law judge found that claimant was entitled to modification pursuant to 20 C.F.R. §725.310 and awarded benefits.

Employer appeals, alleging that the administrative law judge erred in giving less weight to the opinion of Dr. Sutherland, the miner's treating physician, who did not identify pneumoconiosis as a cause of the miner's death on the death certificate. Employer also contends that the administrative law judge erred in assigning greater weight to Dr. Perper's opinion, that pneumoconiosis hastened the miner's death, over the contrary opinion of Dr. Naeye, that the miner's death was not hastened by pneumoconiosis. Employer maintains that a preponderance of the evidence fails to support claimant's burden of proof. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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.² 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).

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). See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). 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).

² Because the miner last worked in coal mine employment in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 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)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

The administrative law judge awarded benefits in this case because he credited Dr. Perper’s opinion that the miner suffered from severe pneumoconiosis, which caused pulmonary damage, predisposed the miner to acute bouts of pneumonia, and hastened the miner’s death by complicating his recovery from bronchopneumonia. Decision and Order at 12. Employer challenges the weight the administrative law judge accorded the medical evidence at Section 718.205(c), relevant to the cause of the miner’s death.³ Employer contends that the administrative law judge ignored Dr. Sutherland’s omission of pneumoconiosis on the death certificate, and that he did not give proper weight to Dr. Naeye’s opinion, that the miner had only mild pneumoconiosis, which did not cause or hasten the miner’s death. We reject employer’s assertions of error as they are without merit, and conclude that substantial evidence supports the administrative law judge’s award of benefits.

On the death certificate, Dr. Sutherland, the miner’s treating physician, listed the immediate cause of the miner’s death as bilateral pneumonia, with acute renal failure identified as another significant condition contributing to death, but not resulting in the underlying cause of death.⁴ Director’s Exhibit 8. An autopsy was performed by Dr.

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge’s finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) based on the autopsy evidence. *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

⁴ In a posthumous report transcribed on December 18, 2002, Dr. Sutherland indicated that the miner was well-known to him and had a history of heart disease, chronic obstructive pulmonary disease, coal workers’ pneumoconiosis, and bronchopneumonia. Director’s Exhibit 10. He indicated that the miner was hospitalized on December 6, 2002, in an altered state of consciousness with chest congestion and difficulty breathing. *Id.* The miner underwent endotracheal intubation on December 9, 2002, lost consciousness as a result of multi-organ failure, and had to be placed on a ventilator until his death on December 12, 2002. *Id.* The final diagnoses were listed as 1) bilateral bronchopneumonia; 2) acute renal failure; 3) multi-system organ failure; 4) chronic obstructive pulmonary disease; 5) non-sustained ventricular tachycardia; 6) dehydration; 7) chronic anticoagulation; 8) coronary artery disease; and 9) mitral regurgitation. *Id.* On December 10, 2002, Dr. Patel consulted with Dr. Sutherland regarding the miner’s treatment during his final hospitalization. Director’s Exhibit 10. In a December 10, 2002 report, Dr. Patel noted that the miner stopped smoking fifty years ago, at which time he had smoked one pack of cigarettes per day for about ten years. Dr.

Segen on December 12, 2002. Director's Exhibit 9. Dr. Segen reported that there was black pigment seen macroscopically on the surface of the lungs and throughout the pulmonary parenchyma. *Id.* His microscopic examination revealed "interstitial, subpleural and perivascular fibrosis and anthracotic pigment deposition in a background of dust macules, focal emphysema and congestion." *Id.* Dr. Segen further noted that there was one large silicotic nodule in the left upper lobe and a one centimeter silicotic nodule in the mediastinal tissues. *Id.* His final diagnoses were bronchopneumonia, coal workers' pneumoconiosis, changes of prior ischemia in the myocardium, and mechanical prosthetic mitral valve with minimal fibrin deposition. *Id.*

Dr. Naeye reviewed the autopsy protocol and prepared a report on November 11, 2003. Director's Exhibit 11. He indicated that he reviewed fourteen autopsy slides, of which eleven slides contained lung tissue. *Id.* Dr. Naeye stated that there was a moderate amount of black pigment in the subpleural sites and lung tissue with the two largest black deposits measuring 3.5 and 4.5 millimeters in diameter. *Id.* He identified mixed fibrosis and focal emphysema (accounting for less than one percent of the total emphysema in the lung tissue available for review). *Id.* Dr. Naeye noted advanced coal workers' pneumoconiosis lesions in the lymph nodes, but commented that these "of course have no effect on lung function." *Id.* Dr. Naeye found that centrilobular emphysema varied greatly from one piece of lung tissue to another, and graded the miner's emphysema, as a whole, to be mild to moderate in severity. *Id.* He indicated that the major abnormality in the lungs was severe acute lobular pneumonia, which at some sites had reached an early abscess stage at the time of death. *Id.* Dr. Naeye concluded that the miner had findings of simple coal workers' pneumoconiosis, but that the pneumoconiosis was too mild to have caused any respiratory impairment prior to his death, as confirmed by the absence of x-ray findings for pneumoconiosis, and the presence of normal pulmonary function and arterial blood gas study evidence. *Id.* Dr. Naeye further opined that the miner's pneumoconiosis was too mild to have had any role in, or influence on, the miner's death. *Id.*

In a report dated December 23, 2004, Dr. Perper reviewed the autopsy protocol and the record evidence. Director's Exhibit 26. Dr. Perper's microscopic findings included: (1) marked focal fibro-anthracosis with birefringent silica crystals; (2) numerous anthracotic macules with dense pigmentation and little fibrosis throughout the pulmonary

Patel also noted the miner's employment history. *Id.* Dr. Patel diagnosed acute respiratory distress with hypoxemia, bilateral bronchopneumonia with pleural effusions, underlying coal workers' pneumoconiosis and chronic obstructive pulmonary disease by history, coronary artery disease with a previous myocardial infarction, hypertension, dementia, and cardiac arrhythmia by history. *Id.*

parenchyma; (3) marked focal interstitial fibro-anthracosis; (4) moderate to marked centrilobular emphysema; (5) thickening and fibrosis of the small intra-pulmonary blood vessels; (6) acute bronchopneumonia with a few micro-abscesses; (7) multiple focal fibro-anthracosis in the pulmonary lymph nodes with one mediastinal lymph node totally replaced by coalescing anthraco-silicotic nodules; and, most significantly, (8) micronodules mostly measuring 1-2 mm but reaching up to 4-5 mm either as discrete nodules or in aggregate. *Id.* Dr. Perper criticized Dr. Naeye's diagnosis of mild pneumoconiosis in light of Dr. Naeye's microscopic findings, and opined, instead, that the miner suffered from severe coal workers' pneumoconiosis, based on forty years of coal mine employment, and centrilobular emphysema due to the miner's remote smoking history and coal dust exposure. Dr. Perper asserted that the contribution of coal dust exposure to the miner's emphysema could not be overstated, since the miner stopped smoking forty years prior to his death, and it was evident that the miner's respiratory condition had worsened over time, consistent with the progressive nature of pneumoconiosis. *Id.* Finally, Dr. Perper opined that pneumoconiosis was a substantial contributory cause of the miner's death because of the severity of the pneumoconiotic process observed on autopsy; the worsening of the miner's dyspnea and progression of respiratory symptoms many years after he quit smoking and in the absence of congestive heart failure; and the miner's predisposition to acute pneumonia by his pneumoconiosis-related chronic pulmonary disease. *Id.* He opined that coal workers' pneumoconiosis also hastened death through the chronic pulmonary damage and the complicating terminal bronchopneumonia. *Id.*

Employer contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis since the death certificate signed by claimant's treating physician, Dr. Sutherland, made no mention of pneumoconiosis. Employer states, "Dr. Sutherland was well aware of the miner's medical history, and therefore, had he intended to opine that the miner's death was in anyway [sic] caused, contributed to, or hastened by pneumoconiosis, he would have done so." Employer's Brief at 4. We disagree. In assessing the weight to accord the death certificate, the administrative law judge took into consideration Dr. Sutherland's omission of pneumoconiosis as a cause of death, or other significant condition, but reasonably refused to draw any negative inference from that omission, since Dr. Sutherland did not have an autopsy report available for review prior to signing the death certificate. Decision and Order at 11. Moreover, as there was no specific opinion from Dr. Sutherland in the record addressing what role, if any, pneumoconiosis played in the miner's death, the administrative law judge reasonably focused his analysis at Section 718.205(c) on the reports of Drs. Perper and Naeye, who specifically addressed the issue of whether pneumoconiosis hastened the miner's death. *Id.*

We also reject employer's assertion that the administrative law judge erred in crediting Dr. Perper's opinion over Dr. Naeye's opinion as to the degree of

pneumoconiosis present in the miner's lungs, and whether pneumoconiosis hastened the miner's death. The administrative law judge properly found Dr. Naeye's opinion, that the miner had only mild pneumoconiosis, "rest[ed] on an assumption of [bias] that has not been proven in this case."⁵ Decision and Order at 12. As noted by the administrative law judge, in attempting to explain why he noted moderate amounts of black pigment in the lungs, but diagnosed only mild pneumoconiosis, Dr. Naeye expressed his belief that the autopsy prosector had removed the most damaged lung tissue for pathological review, in order to assist claimant in proving the existence of pneumoconiosis in her federal black lung claim and, therefore, the tissue samples were not representative of the condition of the miner's lungs as a whole. *Id.* The administrative law judge noted, however, that, contrary to Dr. Naeye's assertion, autopsy evidence is generally accepted as "the best and most reliable evidence for diagnosing the existence of pneumoconiosis." Decision and Order at 11; *see Griffith v. Director, OWCP*, 49 F.3d 184, 187 (6th Cir. 1995) (noting that autopsy evidence is generally accorded greater weight than x-ray evidence). Moreover, the administrative law judge pointed out that if he were to presume that the autopsy prosector was biased, the same assumption would have to apply to Dr. Naeye because "it is just as likely that Dr. Naeye, hired by the [e]mployer, is as biased in favor of the party paying him, thereby calling into question the credibility of his opinions." *Id.* Because there was no evidence of bias on the part of Drs. Segen, Naeye, or Perper in the record, the administrative law judge permissibly found "Dr. Perper's assumption that the lung tissue harvested at autopsy is representative of the lungs" to be reasonable, and that Dr. Perper's diagnosis of severe pneumoconiosis was more consistent with the autopsy findings in this case. Decision and Order at 11-12; *see Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992), citing *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35 (1991) (*en banc*) (a finding of bias on the part of a physician must be supported by evidence in the record).

The administrative law judge also properly concluded that Dr. Naeye's opinion is belied by his reliance on an inaccurate smoking history. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); Decision and Order at 12. Dr. Naeye opined that the miner had

⁵ In a report dated February 1, 2005, Dr. Naeye responded to Dr. Perper's opinion, asserting that he accurately described the miner's pneumoconiosis as mild in light of the histopathological findings in the lungs. Director's Exhibit 28. Dr. Naeye asserted that "[i]t is a serious mistake to base claims of disability and to attribute death to [coal workers' pneumoconiosis] solely on the microscopic findings in a miner's lungs" since "the pathologist is usually asked to perform such an autopsy to determine the presence or absence of [coal workers' pneumoconiosis] and its severity for legal purposes at the request of the family." *Id.* Director's Exhibit 26.

severe emphysema due to a smoking habit of one to two packs of cigarettes per day “for most of his adult life ([more than] 50 pack years),” and stated that smoking was “three times more likely to have caused his centrilobular emphysema than his coal mine dust exposure.” Director’s Exhibit 11. However, the miner testified, prior to his death, that he smoked for about 24 years before quitting in 1954. Director’s Exhibit 1. The miner’s hospitalization records similarly report that the miner stopped smoking in the 1950s. Director’s Exhibit 10. Because Dr. Naeye overstated the miner’s smoking history by approximately twenty-five years, the administrative law judge reasonably gave Dr. Naeye’s opinion less weight at Section 718.205(c) regarding the etiology of the miner’s respiratory condition and whether it hastened the miner’s death. *Worhach* 17 BLR at 1-110; *Trumbo v. Reading Anthracite Co.*, 17 BLR at 1-89 (1993).

Furthermore, in contrast to Dr. Naeye’s opinion, the administrative law judge permissibly considered Dr. Perper’s opinion to be better reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 12. The administrative law judge was persuaded by Dr. Perper’s diagnosis of severe simple pneumoconiosis, noting that Dr. Perper explained that the miner’s more advanced pneumoconiosis, found in the lymph nodes, was indicative of the severity of the miner’s exposure to coal dust containing silica. Decision and Order at 12. The administrative law judge also determined that Dr. Perper persuasively explained how the miner’s severe emphysema, which was due, in part, to coal dust exposure, along with the miner’s simple coal workers’ pneumoconiosis, caused damage to the miner’s lungs, predisposing him to the development of his fatal pneumonia, and further hastening the miner’s death from a terminal bronchospasm. *Id.*

Employer’s argument on appeal is simply that Dr. Perper’s opinion is not sufficiently reasoned to support claimant’s burden of proof at Section 718.205(c). This is tantamount to a request that the Board reweigh the evidence, which we are not empowered to do. *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). It is well established that the determination as to whether a physician’s report is sufficiently documented and reasoned is essentially a credibility matter within the sound discretion of the trier-of-fact. *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge’s finding that the miner’s death was hastened by pneumoconiosis is supported by substantial evidence, we affirm the administrative law judge’s award of benefits pursuant to Section 718.205(c).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge