



BRB No. 18-0547 BLA

YETTA S. SCOTT )  
(Widow of DONALD L. SCOTT) )

Claimant-Petitioner )

v. )

WESTMORELAND COAL COMPANY )

Employer- )  
Respondent )

DATE ISSUED: 02/27/2020

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Party-in-Interest )

DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of  
Carrie Bland, Administrative Law Judge, United States Department of  
Labor.

Yetta S. Scott, Pennington Gap, Virginia.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West  
Virginia, for employer/carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H.  
Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative  
Litigation and Legal Advice), Washington, D.C., for the Director, Office of  
Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and  
JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel,<sup>2</sup> appeals the Decision and Order Denying Request for Modification<sup>3</sup> (2014-BLA-05438) of Administrative Law Judge Carrie Bland on a survivor's claim filed on May 23, 2011, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting the miner with at least twenty years of underground coal mine employment<sup>4</sup> based on the parties' stipulation, the administrative law judge found claimant did not establish complicated pneumoconiosis. Therefore claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). The administrative law judge also found claimant did not establish the miner was totally disabled by a respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and thus did not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.<sup>5</sup> Turning to whether claimant could

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<sup>1</sup> Claimant is the widow of the miner, who died on November 7, 2009. Director's Exhibit 12.

<sup>2</sup> Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on claimant's behalf that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

<sup>3</sup> This case involves claimant's request for modification of a district director's denial of benefits. Decision and Order at 3. In cases involving a request for modification of a district director's decision, the administrative law judge proceeds de novo and "the modification finding is subsumed in the administrative law judge's findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

<sup>4</sup> The miner's coal mine employment occurred in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>5</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(l) of the Act also provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to

establish entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge found claimant did not establish pneumoconiosis and thus denied benefits. 20 C.F.R. §718.202(a).

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's finding claimant did not establish total disability, but concedes she erred in finding claimant did not establish pneumoconiosis.<sup>6</sup>

As claimant filed this appeal without the assistance of counsel, the Board considers whether substantial evidence supports the Decision and Order Denying Request for Modification. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

### **The Section 411(c)(3) Presumption — Complicated Pneumoconiosis**

The only medical opinion finding complicated pneumoconiosis is Dr. Dennis's autopsy report. He opined the miner had progressive massive fibrosis. Director's Exhibit 13. The administrative law judge noted that claimant did not designate Dr. Dennis's autopsy report on her evidentiary designations form. 20 C.F.R. §725.414(a)(2), (3); Decision and Order at 32. Further, even if claimant had designated his report, the administrative law judge alternatively and permissibly found Dr. Dennis's opinion entitled to little probative weight because the evidence establishes his medical license was suspended for professional misconduct that included falsification of medical records. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 32. Because there otherwise is no evidence of complicated pneumoconiosis, claimant cannot establish invocation of the irrebuttable presumption of death due to pneumoconiosis under Section

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pneumoconiosis. 30 U.S.C. §932(l) (2012). Claimant cannot benefit from Section 422(l), however, as the miner's lifetime claims for benefits were denied.

<sup>6</sup> Although employer initially filed a response to claimant's appeal, employer's counsel subsequently filed a Notice of Bankruptcy and Withdrawal of Counsel. Counsel stated that employer has filed for bankruptcy protection and will no longer have assets available to pay black lung benefits or related expenses or charges. In her response to claimant's appeal, the Director concedes that the Black Lung Disability Trust Fund would be liable for any benefits that might be awarded in this claim. Director's Response at 2 n.2.

411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 5 n.12.

### **The Section 411(c)(4) Presumption — Total Disability**

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge correctly found the record in the survivor's claim contains no pulmonary function or arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 8 n.14.

She then weighed the opinions of Drs. Rasmussen and Perper that the miner was totally disabled.<sup>7</sup> 20 C.F.R. §718.204(b)(2)(iv). She permissibly found Dr. Rasmussen's opinion that the miner had a "disabling chronic lung disease" vague and not well-reasoned because she determined he did not identify the basis for his conclusion or indicate the evidence he relied upon. Decision and Order at 23; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Director's Exhibit 31. Moreover, she rationally found Dr. Rasmussen did not identify the physical limitations the miner's pulmonary or respiratory condition imposed upon him "such that [she] would have enough information to make a finding that these limitations would have prevented the miner from performing the duties of his last coal mine job." Decision and Order at 23; *see Horn v. Jewell Ridge Coal Corp.*, 6 BLR 1-933, 1-938 (1984).

With respect to Dr. Perper, she noted the doctor opined the miner was totally disabled because he had shortness of breath with exertion, hypoxemia, and required the use of supplemental oxygen. Decision and Order at 23-25; Claimant's Exhibit 1 at 57. She permissibly found this aspect of his opinion "too general to establish that the miner could

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<sup>7</sup> The administrative law judge also considered the opinions of Drs. Caffrey, Oesterling, Fino, Rosenberg, and Zaldivar, and accurately found that none of these physicians opined the miner was totally disabled and thus did not assist claimant in establishing total disability. Decision and Order at 23.

not have performed the duties of his last regular coal mine job.” Decision and Order at 25; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Further, she noted Dr. Perper diagnosed total disability because he indicated “most physicians who examined [the miner’s] condition prior to his death or evaluated his medical conditions” found the miner totally disabled. Decision and Order at 23-25; Claimant’s Exhibit 1 at 57. The administrative law judge correctly noted that Dr. Perper considered the medical reports of Drs. Hixson, Cox, Baker, McSharry, Castle, and Hippensteel in reaching this conclusion. *Id.* None of these reports, however, were admitted in the survivor’s claim. *Id.*

The administrative law judge found the “reasoning Dr. Perper gave for concluding that the miner was totally disabled is too vague to identify and separate his reliance on individual pieces of evidence.” Decision and Order at 24. She therefore permissibly discredited Dr. Perper’s opinion because she found “it is not possible to consider his opinion on this issue without reference to one or more identifiable pieces of evidence that is outside the record.” *Id.* at 25; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240 (2007) (en banc); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-109 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff’d on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting). Consequently, substantial evidence supports the administrative law judge’s finding that the medical opinion evidence does not establish the miner was totally disabled. 20 C.F.R. §718.204(b)(2)(iv); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013).

Finally, weighing the totality of the probative medical evidence, the administrative law judge permissibly found claimant failed to establish the miner was disabled by a pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Because claimant failed to establish total disability, we affirm the administrative law judge’s finding that claimant did not invoke the Section 411(c)(4) presumption that the miner’s death was due to pneumoconiosis. 20 C.F.R. §718.305(b)(1)(iii).

### **Part 718 Entitlement**

In a survivor’s claim where no statutory presumptions are invoked, claimant must establish the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(b)(1), (2). The

administrative law judge found claimant did not establish the miner had legal or clinical pneumoconiosis.<sup>8</sup> Decision and Order at 27-34.

The administrative law judge first weighed the x-ray evidence on clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 28-29. She considered eight readings of four x-rays dated March 15, 2005, July 20, 2005, November 16, 2005, and December 20, 2005. Decision and Order at 28. She accurately noted all of the readings were from dually qualified radiologists (Board-certified radiologists and B readers). *Id.*

The record contains no positive readings of the March 15, 2005 and December 20, 2005 x-rays.<sup>9</sup> Based on the uncontradicted negative readings, she found the March 15, 2005 and December 20, 2005 x-rays negative for pneumoconiosis. Decision and Order at 28-29. Dr. DePonte read the July 20, 2005 x-ray as positive for pneumoconiosis, but Dr. Wiot read it as negative. Director's Exhibit 17; Employer's Exhibit 5. Dr. DePonte read the November 16, 2005 x-ray as positive for pneumoconiosis, but Drs. Wiot and Meyer read it as negative. Director's Exhibit 16; Employer's Exhibits 4, 6. In light of the conflicting readings from equally-qualified radiologists, the administrative law judge permissibly found these x-rays in equipoise. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 28-29. Because the record contains two negative x-rays and two x-rays in equipoise, she found claimant failed to establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 28-29. We affirm the administrative law judge's determination as it is rational and supported by substantial evidence. *See Greenwich Collieries [Ondecko]*, 512 U.S. 267, 280-81 (1994); *Adkins*, 958 F.2d at 52.

The administrative law judge then weighed the medical opinions of Drs. Rasmussen and Perper on whether the miner had legal or clinical pneumoconiosis.<sup>10</sup> 20 C.F.R.

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<sup>8</sup> "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

<sup>9</sup> Drs. Wiot and Meyer read the March 15, 2005 x-ray as negative for pneumoconiosis, and Dr. Spitz read the December 20, 2005 x-ray as negative. Employer's Exhibits 1-3.

<sup>10</sup> The administrative law judge noted the record contains the autopsy reports of Drs. Caffrey and Oesterling and medical opinions from Drs. Fino, Zaldivar, and Rosenberg. 20 C.F.R. §718.202(a)(2), (4); Decision and Order at 29-34. She determined all these doctors

§718.202(a)(4); Decision and Order at 31-34. Dr. Rasmussen reviewed Dr. Dennis's autopsy report and opined the miner had emphysema and clinical pneumoconiosis based on Dr. Dennis's findings. Director's Exhibit 31. He concluded that the emphysema arose out of the miner's cigarette smoking and coal mine dust exposures. *Id.* As discussed above, the administrative law judge determined Dr. Dennis's autopsy findings, though not designated by claimant, are not credible because of his professional misconduct. Decision and Order at 32. Because Dr. Rasmussen did not cite any other evidence of record to support his opinion apart from Dr. Dennis's discredited findings, the administrative law judge permissibly found Dr. Rasmussen's opinion not well-reasoned or documented regarding whether the miner had legal or clinical pneumoconiosis. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 33-34.

Dr. Perper reviewed the miner's treatment records, the results of x-rays, CT scans, pulmonary function testing, arterial blood gas testing, and the opinions of Drs. McSharry, Hixon, Baker, Castle, Rasmussen, Hippensteel, Fino, Rosenberg, Oesterling, and Caffrey. Claimant's Exhibit 1. He also reviewed the miner's death certificate, the autopsy report of Dr. Dennis, and fifteen autopsy slides. *Id.* Based on this evidence, he opined the miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and emphysema due to cigarette smoking and coal mine dust exposures. *Id.* at 44-58. He also opined the miner had clinical pneumoconiosis. *Id.*

With respect to the issue of legal pneumoconiosis, the administrative law judge found the pulmonary function and blood gas studies Dr. Perper relied on to support his diagnosis were not admitted into evidence in the survivor's claim. Decision and Order at 31-33. She also found Dr. Perper considered the medical reports of Drs. Hixson, Cox, Baker, McSharry, Castle, and Hippensteel in reaching his conclusion, but again noted none of these reports were admitted in the survivor's claim. *Id.* She found that he "did not set out his opinion on the question of the miner's purported pneumoconiosis in terms that would allow [her] to redact his opinion to exclude reliance on inadmissible or non-designated evidence" and thus found his opinion could not be separated from "his reliance on evidence that was not properly admitted." *Id.* She permissibly assigned his legal pneumoconiosis opinion diminished weight because he relied on evidence outside of the record in the survivor's claim to make this diagnosis. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Keener*, 23 BLR at 1-240; *Harris*, 23 BLR at 1-108-109; Decision and Order at 31-33.

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opined the miner did not have legal or clinical pneumoconiosis. *Id.* Because she found claimant's evidence insufficient to establish pneumoconiosis, she did not indicate what weight, if any, she assigned to these opinions.

She also found Dr. Perper diagnosed legal pneumoconiosis based on his rationale that the “miner’s extensive coal mine dust exposure history [was] sufficient to cause disabling COPD [and emphysema] in a susceptible miner” and thus his “emphysema must have been caused by coal mine dust exposure.” Decision and Order at 33; *see* Claimant’s Exhibit 1. She permissibly found this reasoning unpersuasive because it was based on generalities and not on the miner’s specific condition. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 32-33.

On the issue of clinical pneumoconiosis, the administrative law judge discredited Dr. Perper’s medical opinion because she found he relied on evidence outside of the record in the survivor’s claim and Dr. Dennis’s discredited autopsy findings. Decision and Order at 31-33. Thus she found his opinion does not establish clinical pneumoconiosis. *Id.* The Director requests the Board vacate this finding because she notes “Dr. Perper’s report contains a discrete section addressing his independent review of the autopsy slides” and that “section contains diagnoses [of pneumoconiosis] based solely on the doctor’s review of those slides.”<sup>11</sup> Director’s Brief at 14, *quoting* Claimant’s Exhibit 1 at 38-41. Thus the Director asserts the administrative law judge erred by failing “to consider whether this diagnosis [of clinical pneumoconiosis] could be isolated from the other diagnoses/rationales contained in Dr. Perper’s [medical] report.”<sup>12</sup> Director’s Brief at 14; *see* 30 U.S.C. §923(b); *Hicks*, 138 F.3d at 531-33; *Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991). We agree with the Director’s position, and therefore vacate the administrative law judge’s finding that claimant failed to establish clinical pneumoconiosis and remand for further consideration of Dr. Perper’s report.<sup>13</sup> 20 C.F.R. §718.202(a)(2), (4).

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<sup>11</sup> Dr. Perper diagnosed “[i]nterstitial pulmonary fibrosis type of coal workers’ pneumoconiosis (Diffuse Dust – related Fibrosis or DDF).” Claimant’s Exhibit 1 at 40. He reported that slide F revealed “severe interstitial fibro-anthracosis with marked anthracotic pigmentation.” *Id.* On other slides he identified “interstitial fibrosis” with “anthracotic pigmentation” or “deposition.” *Id.*

<sup>12</sup> A report from a pathologist who has reviewed the autopsy tissue slides constitutes autopsy evidence. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237-42 (2007) (en banc); 20 C.F.R. §§718.106(a), 725.414(a)(2)(i), (a)(3)(i). A report constitutes both an autopsy report and a medical report when a physician reviews autopsy slides and additional medical records, and then bases his report on both the pathological and clinical evidence. *Keener*, 23 BLR at 1-239.

<sup>13</sup> The record reflects that claimant has evidentiary slots available to designate autopsy evidence. *See* Claimant’s Evidence Form. The administrative law judge may

If she finds Dr. Perper's review of the autopsy slides can be considered independently, and is credible and sufficient to establish clinical pneumoconiosis, she should weigh all relevant evidence on the issue of clinical pneumoconiosis, including the contrary medical opinions of Drs. Fino, Zaldivar, and Rosenberg and the contrary autopsy reports of Drs. Oesterling and Caffrey. Employer's Exhibits 8-10, 12. She should address the comparative credentials of the 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; *Akers*, 131 F.3d at 441. If she finds claimant has established clinical pneumoconiosis, she should address whether claimant established the miner's death was due to clinical pneumoconiosis. 20 C.F.R. §718.205(c).

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consider whether it is appropriate to reopen the record for the parties to redesignate their evidence.

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification 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.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge