

BRB No. 05-0408 BLA

PAULINE TOMBLIN)
(Widow of EUGENE TOMBLIN))
)
 Claimant-Respondent)
)
 v.)
)
 ISLAND CREEK COAL COMPANY) DATE ISSUED: 01/31/2006
)
 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 of Stuart A. Levin,
Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0082) of Administrative Law
Judge Stuart A. Levin 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 October 20, 1997¹
and is before the Board for the third time.

¹The miner filed a claim for benefits on August 18, 1986. Director's Exhibit 36-1.
In a Decision and Order dated December 14, 1989, Administrative Law Judge John H.
Bedford found that the x-ray evidence was sufficient to establish the existence of

In his initial Decision and Order, Administrative Law Judge Stuart A. Levin (the administrative law judge) credited the miner with at least twenty-eight years of coal mine employment and found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). The administrative law judge also found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated April 24, 2001, the Board affirmed the administrative law judge's length of coal mine employment finding and his finding that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). *Tomblin v. Island Creek Coal Co.*, BRB No. 00-0725 BLA (Apr. 24, 2001) (unpublished). However, the Board vacated the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge again found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and, therefore, awarded benefits. By Decision and Order dated May 29, 2003, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c) and remanded the case for further consideration. *Tomblin v. Island Creek Coal Co.*, BRB No. 02-0538 BLA (May 29, 2003) (Hall, J., dissenting) (unpublished).

On remand for the second time, the administrative law judge again found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, awarded benefits. On appeal, employer argues that the administrative law judge erred in finding

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). Director's Exhibit 36-39. However, Judge Bedford found that the evidence was insufficient to establish that the miner was totally disabled due to pneumoconiosis. *Id.* Accordingly, Judge Bedford denied benefits. *Id.*

Claimant subsequently filed a request for modification. On April 15, 1991, the district director denied the miner's request for modification. Director's Exhibit 36-48. At the miner's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 36-50, 36-56. However, the miner subsequently requested that he be permitted to withdraw his request for modification. Director's Exhibit 36-58. By Order dated April 14, 1992, Administrative Law Judge E. Earl Thomas granted the miner's request. *Id.* There is no indication that the miner took any further action in regard to his 1986 claim.

the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant² responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because the instant 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 is sufficient to establish 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); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

As the administrative noted in his initial decision, the "principal cause of the miner's death is undisputed." 2000 Decision and Order at 16. The miner died from carcinoma of the brain which had metastasized from carcinoma in the upper right lobe of his lung. *Id.* The administrative law judge found that the issue before him was whether "the miner's exposure to coal dust caused or contributed to the lung cancer." *Id.* In resolving this question, the administrative law judge found that "a key issue" was whether the miner's pneumoconiosis "produced a scar out of which [his] cancer grew." 2005 Decision and Order on Remand at 2.

In the most recent decision, the administrative law judge considered the opinions of Drs. Coogan, Perper, Kleinerman, Caffrey and Naeye. While Dr. Perper opined that the miner's death was due to pneumoconiosis, Drs. Kleinerman, Caffrey and Naeye opined that the miner's death was not due to the disease.³ Although Dr. Coogan, the

²Claimant is the surviving spouse of the deceased miner who died on June 18, 1996. Director's Exhibit 5.

³Dr. Perper, a reviewing pathologist, attributed the miner's death to pneumoconiosis because he found that the miner's adenocarcinoma of the lung had arisen "in the scar tissue of a pneumoconiotic nodule." Director's Exhibit 24. Dr. Kleinerman, a reviewing pathologist, disagreed with Dr. Perper's conclusion, opining that the nodule in question "stopped the growth of the carcinoma which had originated elsewhere."

autopsy prosector, did not express an opinion regarding the cause of the miner's death, she provided both a gross and microscopic description of the miner's lungs. Dr. Coogan opined that the center of the miner's tumor was comprised of a large anthrasicotic macule. Director's Exhibit 6. The administrative law judge found that "Dr. Coogan's unique opportunity to examine and analyze the tumor both grossly and microscopically render[ed] her findings more credible and persuasive." 2005 Decision and Order on Remand at 3. The administrative law judge further found that Dr. Perper's opinion, as supported by the autopsy findings of Dr. Coogan, was sufficient to establish that the miner's death was due to pneumoconiosis. *Id.* at 4.

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's award of benefits on the survivor's claim under 20 C.F.R. Part 718. The administrative law judge permissibly found that Dr. Perper's opinion was better reasoned than the opinions of Drs. Kleinerman, Caffrey and Naeye.⁴ 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). Dr. Perper provided a detailed explanation for his opinion regarding the etiology of the miner's lung cancer. The following exchange took place during Dr. Perper's October 21, 1998 deposition:

[Employer's counsel]: How do you distinguish, based on a viewing of one microscopic slide, whether the adenocarcinoma radiated out from the pneumoconiosis that was there or whether the adenocarcinoma had arisen elsewhere and it just engulfed all the tissue around the pneumoconiosis?

[A]: If this would be the situation, then your assumption would be that there was another primary or adenocarcinoma of the lung, and there's no other primary.

[Employer's counsel]: So, the fact that you found only one source of adenocarcinoma led you to conclude that it was a scar adenocarcinoma?

[A]: No, no. What I am saying is adenocarcinoma and scar

Employer's Exhibit 5 at 49-40. Dr. Kleinerman attributed the miner's lung cancer to his smoking history. Two additional pathologists, Drs. Caffrey and Naeye, also attributed the miner's lung cancer to his smoking history. Employer's Exhibit 4 at 9; Employer's Exhibit 12 at 31.

⁴The Board previously held that the administrative law judge permissibly discredited Dr. Naeye's opinion because it is equivocal. *Tomblin v. Island Creek Coal Co.*, BRB No. 02-0538 BLA (May 29, 2003) (Hall, J., dissenting) (unpublished).

adenocarcinoma, or scar carcinoma, are not common carcinoma. They don't occur commonly. And sometimes the amount of the scar is very little. In this particular case, it was very convincing. In other words, it's like taking a large piece of the sphere which is of pneumoconiotic nodule and everything arranging itself in a very, in a dramatic almost radiant pattern around. So I don't have any, any question that – I don't have a question about my examination.

[Employer's counsel]: Wouldn't you have the same appearance, though, if the adenocarcinoma had started alongside of the pneumoconiosis and then it had just engulfed – let's say it started on the right side – had engulfed the pneumoconiosis going from right to left and then it'd be sections – you'd have the same type of appearance wouldn't you?

[A]: I never saw it before. I tell you what, very rarely you see this kind of pattern, but there would be no reason – in other words, if you have a process which expands in a centrifugal manner and almost – the entire expansion, if you look at the slide, you see about the width of the corona of the cancer, it's almost the same all around the pneumoconiotic nodule. Which indicates to me at least, that it started at the same time, it progressed at the same rate and it stopped when the person died.

So, if this would be true that it arrived from one other point then it would expand into the lung, it would be in more – it wouldn't be this – there would be no reason for this to do this, first to go circumferentially around the tumor and then to expand at the exact same rate when it started at a different point.

Employer's Exhibit 3 at 24-26.

Dr. Perper testified that he was "very confident" that the original site of the miner's tumor was from the scar in the lungs. *Id.* at 58. Dr. Perper further stated that:

It is my opinion, within a reasonable degree of medical certainty, basically beyond that, that the cancer was a direct complication of the coal worker[s'] pneumoconiosis nodular scar because of the characteristic, the type and the location of the cancer.

Employer's Exhibit 3 at 60-61.

The administrative law judge reasonably found that Dr. Perper's opinion was entitled to additional weight because it was consistent with the findings of the autopsy prosector, Dr. Coogan. 2005 Decision and Order on Remand at 4. On microscopic examination, Dr. Coogan, like Dr. Perper, opined that the center of the miner's lung tumor was "comprised of a large anthrasilicotic macule..." Director's Exhibit 6. Dr. Coogan also similarly opined that the miner's tumor *radiated* from the fibrous scar. *Id.* Even on gross examination of the miner's lungs, Dr. Coogan identified a "*centrally anthracotic* 2.0 cm. tumor mass." *Id.* (emphasis added). Thus, the administrative law judge rationally accorded greater weight to Dr. Perper's opinion because he found that it was more consistent with the objective evidence. *See generally Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982). The administrative law judge permissibly accorded less weight to the opinions of Drs. Kleinerman and Caffrey because they failed to account for the fact that the miner's tumor was *centered* around the pneumoconiotic nodule. *See Clark, supra; Lucostic, supra*; 2005 Decision and Order on Remand at 3-4. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

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