

BRB No. 05-0612 BLA

KATHRYN J. KALIST)	
(Widow of JOSEPH KALIST))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 01/31/2006
)	
BUCKEYE COAL COMPANY/ NEMACOLIN MINES CORPORATION)	
)	
Employer-Respondent)	
)	
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 Daniel A. Sarno, Jr.,
Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for
employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (02-BLA-5170) of
Administrative Law Judge Daniel A. Sarno, Jr., denying 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 has been before the Board
previously and involves a survivor's claim filed on March 19, 2001. In the original
Decision and Order, Administrative Law Judge Fletcher E. Campbell, Jr., found that the
evidence established that the miner's death was due to pneumoconiosis pursuant to 20
C.F.R. §718.205(c) and he awarded benefits.

Employer appealed and in *Kalist v. Buckeye Coal Co.*, BRB No. 03-0743 BLA (Jul. 23, 2004)(unpub.), the Board held that Judge Campbell mischaracterized Dr. Oesterling's opinion regarding the etiology of the miner's emphysema, and therefore erred in discounting Dr. Oesterling's opinion that the miner's death was unrelated to pneumoconiosis. Accordingly, the Board vacated Judge Campbell's finding pursuant to Section 718.205(c) and remanded the case to him for further consideration.

On remand, Judge Campbell was unavailable and the case was reassigned, without objection, to Administrative Law Judge Daniel A. Sarno, Jr. (the administrative law judge). The administrative law judge reviewed claimant's testimony, and the medical opinions of Drs. Perper, Wecht, and Oesterling, in light of the physicians' qualifications and medical reasoning. Decision and Order on Remand at 4-12. Drs. Perper and Wecht opined that the miner's death was due to pneumoconiosis, while Dr. Oesterling concluded that the miner's death was unrelated to the mild, simple coal workers' pneumoconiosis that was present in his lungs but was due largely to heart problems complicated by smoking-related panlobular emphysema. The administrative law judge found that all of the physicians were well qualified and that their opinions were well reasoned. The administrative law judge found that Dr. Oesterling's opinion was equally persuasive to the opinions of Drs. Perper and Oesterling, and effectively rebutted them. The administrative law judge therefore concluded that "the evidence submitted by the parties is in equipoise." Decision and Order on Remand at 12. Consequently, he found that claimant did not meet her burden of establishing that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that pneumoconiosis contributed to the miner's death pursuant to Section 718.205(c). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response 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).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, and that pneumoconiosis was a substantially contributing cause or factor leading to the miner's

death. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).¹

After considering the administrative law judge’s Decision and Order, the arguments of the parties and the evidence of record, we conclude that the administrative law judge’s Decision and Order on Remand is supported by substantial evidence and contains no reversible error.

Pursuant to Section 718.205(c), and in accordance with the Board’s remand instructions, the administrative law judge considered the three relevant medical opinions. Decision and Order on Remand at 3-10. Drs. Wecht, Perper, and Oesterling agreed that the miner suffered from coal workers’ pneumoconiosis and that the miner’s severe emphysema contributed to his death, but they disagreed as to the etiology of the emphysema. Drs. Wecht and Perper opined that the miner suffered from centrilobular emphysema attributable to his coal dust exposure, but Dr. Oesterling opined that the miner’s emphysema was predominantly of the panlobular type and was attributable to the miner’s cigarette smoking, not his coal dust exposure. Director’s Exhibit 12; Claimant’s Exhibit 1, 3-4; Employer’s Exhibit 1-3. Upon discussing these opinions, the administrative law judge addressed the issue of whether pneumoconiosis contributed to the miner’s loss of pulmonary function, which in turn played a role in his death. Decision and Order on Remand at 11. The administrative law judge stated:

Drs. Perper and Wecht opined that pneumoconiosis led to a progression of Decedent’s emphysema. This argument was effectively rebutted by Dr. Oesterling. Dr. Perper explained that the progression of Decedent’s emphysema even after he stopped smoking is explained by the progression of coal worker’s pneumoconiosis. Dr. Oesterling stated that such a small amount of pneumoconiosis is not expected to cause loss of pulmonary function. Dr. Oesterling also stated that progressive massive fibrosis after cessation of exposure to mine dust is not a prevalent finding in low levels of pneumoconiosis, as was present in this case. Dr. Oesterling attributed the progression of emphysema to the loss of elasticity that results from the aging process, which he explained in detail. Despite Dr. Perper’s dismissal of the effects of aging, and his argument that some individuals live into their 90s or 100s, I find Dr. Oesterling’s explanation of this process

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner’s last coal mine employment took place in Pennsylvania. Director’s Exhibit 1; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

persuasive, especially given the fact that Decedent was 88 years old at the time of his death. Dr. Oesterling further noted that DNA changes in lungs as a result of smoking can play a factor even after an individual stops smoking.

Dr. Perper noted that centrilobular emphysema is commonly associated with mine dust exposure. Dr. Oesterling agreed that there is some support in the medical literature for this proposition. However, Dr. Oesterling emphasized that Decedent's emphysema was of the panlobular type, extending to bullous emphysema. Although Dr. Perper stated in his report that Decedent had severe centrilobular emphysema, he later stated, on cross-examination during his deposition, that Decedent's emphysema could be characterized as panlobular. Dr. Oesterling stated also that there is a lack of association in the medical literature between panlobular emphysema and coal mine dust exposure. Dr. Oesterling stated that panlobular and bullous emphysema are most commonly associated with cigarette smoke inhalation or congenital abnormalities. Dr. Perper did not offer any medical bases to connect panlobular emphysema with mine dust exposure.

Decision and Order on Remand at 11-12. The administrative law judge found that "given the sufficient and effective rebuttals by Dr. Oesterling to the opinions submitted by Drs Wecht and Perper," the conflicting evidence was in equipoise. Decision and Order on Remand at 12.

Claimant contends that substantial evidence does not support the administrative law judge's finding that Dr. Perper did not offer a medical basis for connecting the miner's panlobular emphysema to his coal mine dust exposure. Claimant's Brief at 5. Specifically, claimant highlights Dr. Perper's testimony that the progression of the miner's centrilobular emphysema after he quit smoking pointed to coal workers' pneumoconiosis and coal dust as the causes for the progression. Claimant's Brief at 5-8. What claimant does not acknowledge, however, is that the administrative law judge found that Dr. Oesterling's contrary opinion "effectively rebutted" this testimony by Dr. Perper. Decision and Order on Remand at 11. He also found that Dr. Oesterling indicated that the miner's emphysema was panlobular, a type that the medical literature most commonly associates with smoking or congenital abnormalities, and it was in this respect that Dr. Perper did not offer a basis for connecting panlobular emphysema with coal mine dust exposure. Decision and Order on Remand at 12. It was for the administrative law judge to weigh the medical opinions, *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986), and there is substantial evidence in Dr. Oesterling's opinion to support the administrative law judge's finding. The Board is not authorized to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12

BLR 1-111, 1-113 (1989). We therefore reject claimant's contention that the administrative law judge erred in his weighing of Dr. Perper's opinion.

Claimant further contends that the administrative law judge failed to consider a diagnosis of cor pulmonale by the miner's treating physician, Dr. Gosai. In support of this argument, claimant cites Director's Exhibit 12, which is not a report by Dr. Gosai, but is Dr. Wecht's autopsy report. Director's Exhibit 12. Upon review of the two exhibits of record that relate to Dr. Gosai--the miner's death certificate and one hundred sixteen pages of Dr. Gosai's medical treatment notes--the Board could not find a diagnosis of cor pulmonale by Dr. Gosai. Director's Exhibits 11, 14. Many of Dr. Gosai's entries are illegible.² At any rate, the Board could find no support in the record for claimant's contention that the administrative law judge failed to consider a diagnosis of cor pulmonale by Dr. Gosai. Moreover, claimant does not explain how such a diagnosis, if present in Dr. Gosai's notes, would alter the administrative law judge's finding that the expert pathology opinions of Drs. Perper, Wecht, and Oesterling, which contained extensive analysis and discussion of the presence or absence of cor pulmonale, were at best equally persuasive on that issue. Decision and Order on Remand at 11.

Claimant also contends that the administrative law judge failed to acknowledge that Dr. Gosai listed "coal workers' pneumoconiosis" as a cause of death on the miner's death certificate. Director's Exhibit 11. The first administrative law judge in this case, Judge Campbell, found that Dr. Gosai's notation of coal workers pneumoconiosis as a cause of death, without some explanation by Dr. Gosai, was "not competent medical evidence capable of supporting a claim for survivor's benefits." July 9, 2003 Decision and Order at 6. Although the current administrative law judge was not precluded from revisiting that finding on remand, claimant does not explain why his failure to do so constitutes reversible error. A death certificate listing pneumoconiosis as a cause of death, without any explanation, is not a reasoned medical opinion. *Lango v. Director, OWCP*, 104 F.3d 573, 5778, 21 BLR 2-12, 2-21 (3d Cir. 1997). On this record as weighed by the administrative law judge, claimant presents no reason to disturb the administrative law judge's findings.

Therefore, we affirm the administrative law judge's finding that the medical evidence was in equipoise and that consequently, claimant did not carry her burden to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Because claimant failed to establish that the miner's death was due to

² The record also reflects that when Dr. Perper reviewed Dr. Gosai's treatment notes, he did not mention a diagnosis of cor pulmonale by Dr. Gosai. Claimant's Exhibit 1 at 2-11.

pneumoconiosis, a necessary element of entitlement in a survivor's claim under Part 718, we affirm the administrative law judge's denial of benefits. *See* 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge