

BRB No. 10-0274 BLA

LINDA L. LEFFEL)
(Widow of LARRY D. LEFFEL))
)
Claimant-Respondent)
)
v.)
)
PHOENIX RESOURCES,)
INCORPORATED)
)
and)
) DATE ISSUED: 01/19/2011
WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)
)
Employer/Carrier-)
Petitioners)
)
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 Thomas M. Burke,
Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia,
for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia,
for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen
James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (07-BLA-5926) of Administrative Law Judge Thomas M. Burke rendered on a survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). In a Decision and Order dated December 28, 2009, the administrative law judge credited the miner with twenty-four years of coal mine employment² and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Weighing the autopsy and medical opinion evidence together, the administrative law judge initially found that claimant established the existence of both simple, clinical pneumoconiosis,³ arising out of coal mine employment, and legal pneumoconiosis,⁴ in the form of focal and centrilobular emphysema due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b). The administrative law judge further found that claimant established that the miner's death

¹ Claimant is the widow of the miner, who died on February 26, 2003. Director's Exhibit 9. Claimant filed her survivor's claim on July 11, 2006.

² The record indicates that the miner's coal mine employment was in West 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*).

³ "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). This definition "includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." *Id.*

⁴ "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief relevant to the merits of entitlement.⁵

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).

By Order dated April 16, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. The parties have responded.

The Director asserts that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, and the miner was credited with twenty-four years of coal mine employment, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits.⁶ Claimant asserts that, "insofar as [the miner] was receiving benefits" at the

⁵ We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established twenty-four years of coal mine employment, and the existence of both simple, clinical pneumoconiosis, arising out of coal mine employment, and legal pneumoconiosis, in the form of focal and centrilobular emphysema due, in part to coal dust exposure, pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b). See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁶ Section 1556 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time his death, he was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). The amendments also revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically

time of his death, she is entitled to continue to receive benefits. Claimant's Brief at 2. Employer responds, correctly asserting that, because the miner never filed a claim for federal black lung benefits, claimant is not entitled to automatic continuation of benefits pursuant to Section 932(l) of the recent amendments. Employer agrees with the Director, that amended Section 921(c)(4), is potentially applicable to this claim, as it was filed after January 1, 2005. Employer, however, contends that retroactive application of the amendment would be unconstitutional, because it would violate employer's due process rights, and would constitute an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution.

As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant carried her burden to establish each element of entitlement by a preponderance of the evidence, we need not remand this case for the administrative law judge to consider this case in light of the recent amendments to the Act.

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000).

The administrative law judge awarded benefits in this case because he credited Dr. Green's opinion, that the miner suffered from severe or moderately severe clinical pneumoconiosis, together with moderate legal pneumoconiosis, both of which contributed to a deficiency of oxygenation of the cardiac muscle, precipitating the cardiac arrhythmia that led to the miner's death. Decision and Order at 12-13, 15-16, 18-19; Director's Exhibit 10; Claimant's Exhibit 3. Employer challenges the weight the administrative law judge accorded to the medical evidence at 20 C.F.R. §718.205(c). Employer contends that the administrative law judge erred in according greater weight to the opinion of Dr. Green, than to the contrary opinions of Drs. Bush, Oesterling, and

entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

Rosenberg, that the miner's pneumoconiosis was mild and did not cause or hasten his 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.

In beginning his analysis of the medical evidence, the administrative law judge acted within his discretion in according greatest weight to the autopsy evidence as the most reliable evidence regarding the existence and extent of pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); Decision and Order at 12. The autopsy evidence consists of the opinion of Dr. Jelic, the autopsy prosector, and the reviewing opinions of Drs. Oesterling, Bush, and Green. The administrative law judge correctly found that, in an autopsy report dated February 27, 2003, Dr. Jelic diagnosed simple coal workers' pneumoconiosis and moderate emphysema "focally exaggerated by the macules." Decision and Order at 12; Director's Exhibit 10. Drs. Oesterling, Bush, and Green reviewed Dr. Jelic's report and examined the autopsy slides, and concurred that the autopsy evidence established simple coal workers' pneumoconiosis, arising out of coal mine employment, as well as focal emphysema due to coal mine dust exposure.⁷ Director's Exhibits 10, 12; Claimant's Exhibit 3; Employer's Exhibits 1, 5, 7.

The administrative law judge further found that, while the pathologists unanimously diagnosed the existence of pneumoconiosis, they disagreed as to the extent of the disease. Decision and Order at 18. Dr. Green diagnosed moderate to severe pneumoconiosis, while Drs. Oesterling and Bush diagnosed mild pneumoconiosis. Director's Exhibits 10, 12; Claimant's Exhibit 3; Employer's Exhibits 1, 5, 7. Contrary to employer's assertion, the administrative law judge acted within his discretion in according the greatest weight to Dr. Green's opinion, based on his superior "experience as a pathologist in reviewing lung autopsies to determine the extent of pneumoconiosis."⁸

⁷ Drs. Oesterling, Bush, and Green all diagnosed simple coal workers' pneumoconiosis and focal emphysema, due to coal mine dust exposure. Dr. Oesterling further diagnosed panlobular emphysema, unrelated to coal dust exposure. Dr. Bush also diagnosed centrilobular emphysema, unrelated to coal mine dust exposure. Dr. Green also diagnosed centriacinar emphysema, which the administrative law judge noted was also called centrilobular emphysema, due, in part, to coal mine dust exposure. Decision and Order at 12; Director's Exhibits 10, 12; Claimant's Exhibit 3; Employer's Exhibits 1, 5, 7.

⁸ The administrative law judge correctly noted that Dr. Green is Board-certified in Anatomic Pathology, Dr. Oesterling is Board-certified in Anatomic and Clinical Pathology, and in Nuclear Medicine, and Dr. Bush is Board-certified in Anatomic and

Decision and Order at 18; *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); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*), *vacated on other grounds, Sewell Coal Co. v. Director, OWCP [Dempsey]*, 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008). The administrative law judge found that, while Drs. Bush and Oesterling also have experience in reviewing autopsies for the presence and severity of pneumoconiosis, neither has the extent or depth of Dr. Green's experience, which includes having personally reviewed and graded the severity of pneumoconiosis in over six thousand autopsy cases while serving as the head of the autopsy section for NIOSH. Decision and Order at 18-19; Claimant's Exhibit 3 at 5, 6, 28-29. As substantial evidence supports the administrative law judge's permissible credibility determination, we affirm his conclusion that the miner had moderate to severe clinical pneumoconiosis, as well as legal pneumoconiosis, at the time of his death. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997); Decision and Order at 13, 19.

Having concluded that the miner suffered from moderate to severe clinical pneumoconiosis, as well as legal pneumoconiosis, the administrative law judge reviewed the autopsy and medical opinion evidence to determine whether pneumoconiosis hastened the miner's death. Decision and Order at 4-10, 14-19. The administrative law judge noted that the miner underwent aortofemoral bypass surgery, performed by Dr. Ali Aburahma, two days prior to his death. Decision and Order at 9-10; Director's Exhibits 10, 11. Following surgery, on February 26, 2003, he developed a fatal arrhythmia in the form of ventricular fibrillation. Decision and Order at 9-10; Director's Exhibits 10, 11. Efforts to resuscitate the miner were unsuccessful. Decision and Order at 9-10; Director's Exhibits 10, 11.

Dr. Aburahma prepared the death certificate and listed the immediate cause of the miner's death as "cardiac arrest," with no other conditions listed. Decision and Order at 14; Director's Exhibit 9. The administrative law judge properly found that while Dr. Jelic, the autopsy prosector, did not offer an opinion as to the cause of death, the remaining physicians of record concurred with Dr. Aburahma that the immediate cause of the miner's death was cardiac arrest. Decision and Order at 4-9; Director's Exhibits 10, 12; Claimant's Exhibit 3; Employer's Exhibits 1, 3, 5-8. The physicians disagreed, however, as to whether the miner's cardiac death was contributed to by his

Clinical Pathology. Decision and Order at 4-6; Claimant's Exhibit 3 at 6, 28-29; Director's Exhibit 12; Employer's Exhibit 2.

pneumoconiosis. Decision and Order at 14; Director's Exhibits 10, 12; Claimant's Exhibit 3; Employer's Exhibits 1, 3, 5-8.

Dr. Green opined that the miner's cardiac death had two causal factors: arterial narrowing due to atherosclerosis, and impaired gas exchange due to clinical and legal pneumoconiosis. Decision and Order at 5, 14-15; Director's Exhibit 10; Claimant's Exhibit 3 at 16-17. Dr. Green explained that both conditions resulted in a deficiency of oxygenation of the cardiac muscle, precipitating the cardiac arrhythmia that led to the miner's death. Decision and Order at 5, 15; Director's Exhibit 10; Claimant's Exhibit 3 at 16-17. Dr. Gaziano also opined that the miner's pneumoconiosis was a significant contributory factor in his death. Decision and Order at 7, 15; Director's Exhibit 10. Dr. Gaziano explained that the miner had a moderate degree of pulmonary functional impairment, and coexistent coronary disease, and that "the development of acute infectious component of illness with bronchitis and pneumonia at the time of surgery was an important factor in precipitating a cardiac arrest." Decision and Order at 7, 15; Director's Exhibit 10. By contrast, Drs. Oesterling, Bush, and Rosenberg opined that the miner's pneumoconiosis was too mild to have altered the miner's pulmonary function and thus, did not contribute to his death.⁹ Decision and Order at 5-9, 15; Director's Exhibit 12; Employer's Exhibits 3, 6, 8.

In weighing the conflicting medical opinions, the administrative law judge credited the opinion of Dr. Green, that pneumoconiosis hastened the miner's death, over the opinions of Oesterling, Bush, and Rosenberg.¹⁰ Employer challenges the administrative law judge's reliance on Dr. Green's opinion, asserting that Dr. Green's opinion is unreasoned and undocumented. Employer also asserts that the administrative law judge erred in failing to credit the opinion of Dr. Rosenberg. We disagree.

Contrary to employer's argument, the administrative law judge permissibly accorded diminished weight to Dr. Rosenberg's opinion, that the miner's clinical and legal pneumoconiosis were too mild to contribute to his death, because the physician relied, in part, on the pathologists' interpretations of the slides showing the condition of the miner's lungs at the time of his death, but had not reviewed the slides himself. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469, 22 BLR 2-311, 2-318 (7th Cir.

⁹ Dr. Oesterling concurred with Dr. Green that "pulmonary emphysema accelerat[ed] [the miner's] cardiac ischemia resulting in the cardiac arrest and death," but opined that this emphysema was panlobular emphysema, and was not related to coal mine dust exposure. Director's Exhibit 12.

¹⁰ The administrative law judge accorded diminished weight to the opinion of Dr. Gaziano, finding it to be conclusory and unreasoned. Decision and Order at 18.

2001); Decision and Order at 16; Employer's Brief at 14-16. As set forth above, the administrative law judge permissibly credited the opinion of Dr. Green, over those of Drs. Oesterling and Bush, to find that the miner's pneumoconiosis was moderate to severe. Decision and Order at 18-19; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). Thus, in considering the evidence as to the cause of the miner's death, the administrative law judge acted within his discretion in according greatest weight to the opinion of Dr. Green, as the only physician to opine that the miner's pneumoconiosis was sufficiently severe to contribute to his death. *See Akers*, 131 F.3d at 441, 21 BLR at 2-274 (holding that an administrative law judge may discount medical opinions he finds contradict his findings); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 18-19.

Finally, there is no merit to employer's contention that the administrative law judge failed to consider the reasoning and documentation underlying Dr. Green's opinion. Employer's Brief at 16-18, 28-29. The administrative law judge noted that Dr. Green thoroughly reviewed the medical evidence,¹¹ and explained his opinion that pneumoconiosis precipitated the miner's cardiac arrhythmia and death, with reference to pulmonary function and blood gas studies showing reduced diffusion capacity and hypoxemia at rest. Decision and Order at 15-17. Further, the administrative law judge acknowledged that Dr. Rosenberg questioned the validity of the diffusing capacity results, and the relevancy of the resting blood gas study results, cited by Dr. Green. Decision and Order at 16-17. The administrative law judge rationally found that, even assuming that the test results were of diminished probative value, they nonetheless yielded abnormal results, and, as they dated from 1989, 1996, and 1997, they did not establish that the miner's pulmonary condition was normal at the time of his death in 2003. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 210, 22 BLR 2-467, 2-480 (3d Cir. 2002)(explaining that lifetime evidence detecting no disability or impairment is not necessarily dispositive of whether pneumoconiosis hastened death); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 17. The administrative law judge also found that Dr. Green's opinion was supported by the opinion of Dr. Oesterling, that the miner's underlying emphysema accelerated his death, and was more consistent with the claimant's credible testimony that, shortly before the miner's death, he had trouble breathing and utilized several

¹¹ The administrative law judge specifically noted that, to assess the cause of the miner's death, Dr. Green reviewed the histologic slides, Dr. Jelic's autopsy report, the death certificate, the miner's hospitalization records, and the opinions of Drs. Rosenberg and Bush. Decision and Order at 4.

breathing medications.¹² See *Soubik v. Director, OWCP*, 366 F.3d 226, 232, 235 and n.13, 23 BLR 2-82, 2-95, 2-100 and n.13 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 587-88, 21 BLR 2-215, 2-230-32 (3d Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Thus, contrary to employer's arguments, the administrative law judge permissibly concluded that the pulmonary function and blood gas study results from 1989, 1996, and 1997 did not undermine Dr. Green's opinion. See *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); Decision and Order at 17; Employer's Brief at 18-21.

The administrative law judge is tasked with evaluating the physicians' opinions, see *Compton*, 211 F.3d at 211, 22 BLR at 2-175, and the Board will not substitute its inferences for those of the administrative law judge. See *Mays*, 176 F.3d at 763, 21 BLR at 2-605; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision and Order at 14. Because substantial evidence supports the administrative law judge's finding that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we affirm the award of survivor's benefits. See *Mays*, 176 F.3d at 763, 21 BLR at 2-605; *Lane*, 105 F.2d at 174, 21 BLR at 2-48.

¹² Claimant testified that the miner "got short of breath even taking a shower" and that he was treated with several different breathing medications, including [aminophylline], theophylline, and Dialor. Hearing Tr. at 17; Decision and Order at 17. Contrary to employer's assertion, the administrative law judge did not err in considering claimant's lay testimony in gauging the credibility of the medical opinions. See *Soubik v. Director, OWCP*, 366 F.3d 226, 232, 235 and n.13, 23 BLR 2-82, 2-95, 2-100 and n.13 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 587-88, 21 BLR 2-215, 2-230-32 (3d Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Employer's Brief at 25.

Accordingly, the administrative law judge's Decision and Order 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