

BRB No. 12-0204 BLA

MARY MAYNARD )  
(Widow of CARL B. MAYNARD) )  
 )  
Claimant-Respondent )  
 )  
v. ) DATE ISSUED: 01/23/2013  
 )  
KENTUCKY CARBON CORPORATION )  
 )  
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 Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-5373) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) rendered on a survivor's claim<sup>1</sup> filed pursuant to the provisions of the Black Lung Benefits Act, as

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<sup>1</sup> Claimant is the widow of the miner, who died on October 5, 2003, Director's Exhibit 7. The miner was receiving federal black lung benefits at the time of his death. Director's Exhibit 1. Claimant filed her claim for benefits on November 13, 2003. Director's Exhibit 2.

amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case is before the Board for the second time.

In his initial decision, the administrative law judge credited the miner with at least thirty-five years of coal mine employment,<sup>2</sup> based on the parties' stipulation. The administrative law judge noted that the miner was receiving benefits at the time of his death, pursuant to a final award on his lifetime claim.<sup>3</sup> Based on the doctrine of collateral estoppel,<sup>4</sup> the administrative law judge found that employer was barred from relitigating the issues of the existence of pneumoconiosis<sup>5</sup> and that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. The administrative law judge further found that the medical evidence established that pneumoconiosis hastened the miner's death, and therefore was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). In so finding, the administrative law judge relied on the medical opinion of Dr. Mahmood, who was the miner's treating physician. The administrative law judge further found that the medical opinion of Dr. Perper supported that of Dr. Mahmood. The administrative law judge discounted the contrary opinions of Drs. Jarboe and Castle, because those physicians did not diagnose the miner with pneumoconiosis. Accordingly, the administrative law judge awarded benefits, contingent upon whether claimant could later establish, before the district director, that she is an eligible survivor of the miner under 20 C.F.R. §725.212.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits. The Board remanded the case for the administrative law judge to determine whether claimant established her eligibility for benefits as a survivor pursuant to 20 C.F.R. §725.212. *Maynard v. Ky. Carbon Corp.*, BRB No. 10-0122 BLA (Oct. 22,

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<sup>2</sup> The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

<sup>3</sup> On November 30, 1989, Administrative Law Judge W. Ralph Musgrove issued a Decision and Order awarding benefits in the miner's claim.

<sup>4</sup> Collateral estoppel forecloses the relitigation of issues of fact or law that are identical to issues that have been actually determined and necessarily decided in prior litigation, and in which the parties had a full and fair opportunity to litigate. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(en banc).

<sup>5</sup> Judge Musgrove found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Maynard v. Ky. Carbon Corp.*, BRB No. 10-0122 BLA (Oct. 22, 2010)(unpub.), slip op. at 2 n.5.

2010)(unpub.), slip op. at 3-4. If the administrative law judge, on remand, found that claimant established her eligibility as a survivor, the Board further instructed the administrative law judge to reconsider whether claimant established that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Specifically, the Board held that the administrative law judge did not adequately explain why he found that Dr. Mahmood's opinion was supported by his treatment records. *Maynard*, slip op. at 6. Additionally, the Board held that the administrative law judge did not explain how Dr. Perper's opinion supported that of Dr. Mahmood.<sup>6</sup> *Id.* However, the Board affirmed the administrative law judge's decision to discount the opinions of Drs. Jarboe and Castle regarding the cause of the miner's death, because these physicians did not diagnose the miner with pneumoconiosis, contrary to the administrative law judge's finding. *Maynard*, slip op. at 5-6.

On remand, the administrative law judge found that claimant established her eligibility as a survivor of the miner, pursuant to 20 C.F.R. §725.212. The administrative law judge further found that claimant established that pneumoconiosis hastened the miner's death 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 reliance on the opinions of Drs. Mahmood and Perper to find that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer also argues that the administrative law judge erred in taking judicial notice of Dr. Perper's qualifications.<sup>7</sup> Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response 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. 33 U.S.C. §921(b)(3), as incorporated by 30

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<sup>6</sup> The Board affirmed, as unchallenged, the administrative law judge's decision to credit the miner with at least thirty-five years of coal mine employment, and his finding that the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), was established by application of the doctrine of collateral estoppel. *Maynard*, slip op. at 3 n.6.

<sup>7</sup> The administrative law judge's finding that claimant is an eligible survivor, pursuant to 20 C.F.R. §725.212, is unchallenged on appeal. Therefore, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because this claim was filed after January 1, 1982, but before January 1, 2005,<sup>8</sup> to establish entitlement to survivor’s benefits, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). Where pneumoconiosis is not the cause of death, 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). 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); *Conley v. Nat’l Mines Corp.*, 595 F.3d 297, 302, 24 BLR 2-255, 2-264 (6th Cir. 2010); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge reconsidered the opinions of Drs. Mahmood and Perper. Dr. Mahmood, the miner’s treating physician from 1996 to 2003, submitted a one-page medical report in which he checked boxes indicating that he diagnosed the miner with both clinical and legal pneumoconiosis,<sup>9</sup> and in which he checked “yes,” in response to the question of whether the miner’s pneumoconiosis hastened his death. Director’s Exhibit 9 at 2. Dr. Mahmood indicated that the miner’s “recurrent lung infection [and] hypoxemia” contributed to his death.<sup>10</sup> *Id.* Dr. Mahmood treated the miner while he was hospitalized at Appalachian Regional

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<sup>8</sup> As the Board noted previously, because this claim was filed before January 1, 2005, recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case. *Maynard*, slip op. at 2 n.2.

<sup>9</sup> Clinical pneumoconiosis is a disease “characterized by [the] 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). 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b).

<sup>10</sup> By letter dated May 5, 2004, the district director requested that Dr. Mahmood identify the cause of the miner’s recurrent lung infection and hypoxemia. Director’s Exhibit 21. No response by Dr. Mahmood is contained in the record.

Hospital, and during his admission at the Good Shepherd Nursing Home. The treatment records from the hospital and nursing home reflect that the miner was treated for respiratory and pulmonary diseases, including coal workers' pneumoconiosis, "black lung," and chronic obstructive pulmonary disease (COPD). Director's Exhibits 10, 11. The treatment record notations did not indicate the etiology of the COPD. The death certificate, completed by Dr. Mahmood, listed "cerebrovascular accident" as the immediate cause of death, due to or as a consequence of "chronic obstructive lung disease." Director's Exhibit 7.

Dr. Perper reviewed Dr. Mahmood's report, the hospital and nursing home records, and the miner's death certificate. With respect to the cause of the miner's death, Dr. Perper stated that the miner died due to bronchopneumonia:

on the background of COPD/emphysema coal workers' pneumoconiosis and a history of pulmonary cancer. The COPD/centrilobular emphysema were joint complications of a long[-]standing smoking history and a long[-]standing occupational exposure to coal mine dust and coal workers' pneumoconiosis.

The pulmonary cancer, if indeed it occur[red], was also a joint complication of a long[-]standing smoking history and a long[-]standing occupational exposure to coal mine dust and coal workers' pneumoconiosis.

Claimant's Exhibit 1 at 22. Dr. Perper further explained, "Both chronic lung disease and pneumoconiosis, and pulmonary cancer, are usually associated with a depressed immune capability and predispose to pulmonary infection." *Id.* In response to whether pneumoconiosis hastened the miner's death, Dr. Perper replied that "[t]he answer is affirmative," and listed seven reasons in support.<sup>11</sup>

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<sup>11</sup> We paraphrase Dr. Perper's reasons that pneumoconiosis hastened the miner's death, as follows:

- 1) The miner had sufficient coal mine dust exposure to have caused coal workers' pneumoconiosis;
- 2) The miner had long-standing pulmonary symptoms requiring treatment with bronchodilators;
- 3) There were x-ray changes of pneumoconiosis;
- 4) The miner had severe pulmonary disability;

The administrative law judge found that, “although Dr. Mahmood did not thoroughly explain his rationale,” Dr. Mahmood’s opinion was well-reasoned, and well-supported by the treatment records and death certificate. Decision and Order at 8. In particular, the administrative law judge found that the listing of chronic obstructive lung disease on the miner’s death certificate was, “[n]ext to Dr. Mahmood’s questionnaire . . . the clearest evidence that pneumoconiosis was a substantially contributing cause” of the miner’s death.<sup>12</sup> Decision and Order at 9. The administrative law judge further determined that Dr. Mahmood’s opinion was entitled to additional weight as that of the miner’s treating physician, under the factors listed at 20 C.F.R. §718.104(d)(1)-(4).<sup>13</sup>

Additionally, the administrative law judge found that Dr. Perper was well-qualified, taking judicial notice of his qualifications as a Board-certified pathologist. The administrative law judge found that Dr. Perper’s opinion was well-reasoned, as it was thorough, well-explained, “careful, [and] precise.” Decision and Order on Remand at 11. The administrative law judge observed that Dr. Perper’s opinion was based on a

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5) If the mass in the upper lobe of the miner’s right lung was cancer, coal mine dust exposure was as important a contributing cause as was smoking, because the miner quit smoking thirty years before his death;

6) If the mass in the upper lobe of the miner’s right lung was complicated pneumoconiosis, the relationship between coal mine dust exposure and death “is even more dramatic”;

7) The miner died “in respiratory failure.”

Claimant’s Exhibit 1 at 22. Dr. Perper indicated that he could not determine the nature of the mass in the miner’s right lung because no biopsy or autopsy was performed.

<sup>12</sup> The administrative law judge stated that he previously “found, and the Board affirmed, that [the] [m]iner suffered from legal pneumoconiosis arising out of coal mine employment. The ‘chronic obstructive lung disease’ cited by Dr. Mahmood on the death certificate *is* that legal pneumoconiosis.” Decision and Order at 9; *but see Maynard*, slip op. at 2 n.5 (noting that the finding in the miner’s claim, to which collateral estoppel effect was given in this claim, was of the existence of pneumoconiosis by chest x-ray evidence under 20 C.F.R. §718.202(a)(1)).

<sup>13</sup> The administrative law judge found that Dr. Mahmood’s qualifications were not in the record and thus were “a neutral factor” in assigning weight to Dr. Mahmood’s opinion. Decision and Order at 10 n.5.

“substantial amount of evidence,” and that Dr. Perper diagnosed the miner with pneumoconiosis, consistent with the administrative law judge’s finding of pneumoconiosis. *Id.* Consequently, the administrative law judge accorded significant weight to Dr. Perper’s opinion. Based on the opinions of Drs. Mahmood and Perper, the administrative law judge found that claimant established that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Employer argues that the administrative law judge erred, because the opinions of Drs. Mahmood and Perper do not meet the legal standard set forth in *Conley*, 595 F.3d at 303-04, 24 BLR at 2-266-67, and *Williams*, 338 F.3d at 518, 22 BLR at 2-655, for establishing that pneumoconiosis hastened a miner’s death pursuant to 20 C.F.R. §718.205(c). Employer’s Brief at 6, 8, 9. Moreover, employer asserts that the administrative law judge erred in relying on Dr. Mahmood’s opinion, as it is unexplained, and in relying on Dr. Perper’s opinion, because it is speculative and conclusory. *Id.* at 6-10. Lastly, employer argues that the administrative law judge erred in taking judicial notice of the qualifications of Dr. Perper. *Id.* at 10 n.2.

In *Williams*, the United States Court of Appeals for the Sixth Circuit held that pneumoconiosis hastens a miner’s death only “if it does so through a specifically defined process that reduces the miner’s life by an estimable time.” *Williams*, 338 F.3d at 518, 22 BLR at 2-655. The Sixth Circuit has acknowledged that “[t]here is some room for argument . . . about what it means to hasten death ‘by an estimable time.’” *Conley*, 595 F.3d at 303, 24 BLR at 2-266, *quoting Williams*, 338 F.3d at 518, 22 BLR at 2-655. The court has further held that, although “context and common sense will govern the resolution” of this question, “[a] medical opinion that pneumoconiosis expedited death through a ‘specifically defined process’ must explain why that is so and generally should be able to explain how and to what extent – customarily through a range of time – that process hastened a specific patient’s death.” *Conley*, 595 F.3d at 303, 24 BLR at 2-266.

Based on the arguments raised by employer, we are unable to determine whether substantial evidence supports the administrative law judge’s finding that pneumoconiosis hastened the miner’s death. The administrative law judge did not cite *Conley* or *Williams* in his decision, and his decision contains no analysis of whether the opinions of Drs. Mahmood and Perper are sufficient to meet the *Conley* and *Williams* standard.<sup>14</sup>

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<sup>14</sup> In the prior appeal, no party raised the issue of whether the opinions of Drs. Mahmood and Perper are sufficient to establish that the miner’s pneumoconiosis hastened his death pursuant to 20 C.F.R. §718.205(c) under *Conley v. Nat’l Mines Corp.*, 595 F.3d 297, 24 BLR 2-255 (6th Cir. 2010) and *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

We must therefore vacate the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and remand the case for further consideration. On remand, the administrative law judge must make specific findings as to whether the evidence is sufficient to establish that pneumoconiosis caused or substantially contributed to the miner's death pursuant to 20 C.F.R. §718.205(c), in accordance with the legal standard set forth in *Conley* and *Williams*. The administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In reconsidering the medical opinions of Drs. Mahmood and Perper pursuant to *Conley* and *Williams*, on remand, the administrative law judge should address the credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). If, on remand, the administrative law judge takes judicial notice of the qualifications of either Dr. Mahmood or Dr. Perper, the administrative law judge must provide employer with notice and an opportunity to respond. See *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits 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.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge