



BRB No. 16-0179 BLA

JANICE FAYE TRUMP )  
(Widow of JESSEE WILLARD TRUMP) )  
 )  
 Claimant-Petitioner )

v. )

EASTERN ASSOCIATED COAL )  
CORPORATION )

and )

PEABODY INVESTMENTS, )  
INCORPORATED )  
 )  
 Employer/Carrier- )  
 Respondents )

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

Party-in-Interest )

DATE ISSUED: 01/04/2017

DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas M. Burke,  
Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell and Daniel K. Evans (Black Lung Legal Clinic,  
Washington & Lee University School of Law), Lexington, Virginia, for  
claimant.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Maia Fisher,  
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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order on Remand (08-BLA-5114) of Administrative Law Judge Thomas M. Burke awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on December 19, 2006, and is before the Board for the third time.<sup>2</sup>

In its most recent decision, the Board agreed with claimant that the administrative law judge, in adjudicating the survivor's claim,<sup>3</sup> did not adequately explain his decision to discredit Dr. Houser's opinion regarding the cause of the miner's death. *Trump v. E. Assoc. Coal Corp.*, BRB Nos. 13-0537 BLA and 13-0546 BLA (May 29, 2014) (unpub.). The Board, therefore, vacated the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and remanded the case for further consideration. *Id.*

In a Decision and Order on Remand dated December 8, 2015, the administrative law judge again found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits.

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on October 22, 2006. Director's Exhibit 7.

<sup>2</sup> For a complete procedural history of this case, see *Trump v. E. Assoc. Coal Corp.*, BRB Nos. 13-0537 BLA and 13-0546 BLA (May 29, 2014) (unpub.).

<sup>3</sup> The Board also addressed the administrative law judge's denial of the miner's subsequent claim filed on November 1, 2001. *Trump*, BRB Nos. 13-0537 BLA and 13-0546 BLA, slip. op. at 4-6. The Board affirmed the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.* Consequently, the Board affirmed the administrative law judge's denial of benefits in the miner's claim. *Id.* In light of its affirmance of the administrative law judge's denial of benefits in the miner's claim, the Board affirmed the administrative law judge's determination that claimant is not entitled to derivative survivor's benefits. *Id.*; see 30 U.S.C. §932(*l*). Pursuant to claimant's appeal, the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision. *Trump v. E. Assoc. Coal Corp.*, No. 14-1745 (4th Cir. Apr. 10, 2015) (unpub.).

On appeal, claimant contends that the administrative law judge erred in finding that Dr. Houser's opinion was insufficient to establish that the miner's death was due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, responds,<sup>4</sup> asserting that the administrative law judge permissibly discredited Dr. Houser's opinion that pneumoconiosis hastened the miner's death. In a reply brief, claimant reiterates her previous contentions.

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.<sup>5</sup> 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).

### **Death Due to Pneumoconiosis**

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable, or the presumption set forth at 20 C.F.R. §718.305 is invoked and not rebutted. 20 C.F.R. §718.205(b)(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(b)(6).

The sole issue in this case is whether the administrative law judge permissibly found that Dr. Houser's opinion was insufficient to establish that the miner's pneumoconiosis-induced hypoxemia hastened the miner's death from a heart attack. Although Dr. Houser acknowledged that the miner's immediate cause of death was from

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<sup>4</sup> In a "Motion for Enlargement of Time to Submit a Response Brief" filed on April 29, 2016, the Director, Office of Workers' Compensation Programs (the Director), informed the Board that employer's parent company, Patriot Coal Corporation, was in bankruptcy. The Director further informed the Board that, while the case was pending before the administrative law judge, Greenberg Traurig, LLP, counsel for employer, moved to withdraw as counsel. The Director subsequently filed his response brief with the Board on June 24, 2016.

<sup>5</sup> The miner's last coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

an acute cardiac infarct, he opined that hypoxemia “has an adverse effect on cardiac function, and when associated with co-existing coronary artery disease can contribute to precipitating an acute myocardial infarct.” Claimant’s Exhibit 7 at 3-5.

In its previous decision, the Board held that the administrative law judge erred in discrediting Dr. Houser’s opinion on the issue of whether pneumoconiosis caused or hastened the death for the same reason that the administrative law judge had relied upon to discredit Dr. Houser’s opinion regarding the extent of the miner’s disability:

The administrative law judge permissibly interpreted Dr. Houser’s opinion as concluding that the miner’s clinical and legal pneumoconiosis resulted in hypoxemia, which combined with the miner’s coronary artery disease to precipitate the heart attack that caused the miner’s death. In discrediting Dr. Houser’s opinion, the administrative law judge noted that the opinion depended upon Dr. Houser’s determination that the miner “suffered from hypoxemia,” but stated that “[a]s described *supra* . . . Dr. Houser’s finding that the miner suffered from hypoxemia during his lifetime is rejected as poorly supported by the objective medical data.”

A review of the administrative law judge’s decision does not disclose substantial evidence for his analysis of Dr. Houser’s opinion. When the administrative law judge found that the evidence did not establish that the miner was totally disabled, he did not state that he rejected Dr. Houser’s opinion that the miner suffered from any hypoxemia at all; he stated that he rejected Dr. Houser’s conclusion that the miner’s hypoxemia was severe enough to be totally disabling. Whether the miner suffered from a totally disabling respiratory impairment is a distinct issue from whether pneumoconiosis was a substantially contributing cause of his death. Thus, claimant need not establish that the miner was totally disabled in order to prove that hypoxemia from pneumoconiosis hastened his death. Moreover, the administrative law judge did not find that Dr. Houser’s opinion, that hypoxemia from pneumoconiosis contributed to the miner’s death, depended on a determination that the hypoxemia was moderately severe or severe.

*Trump*, BRB Nos. 13-0537 BLA and 13-0546 BLA, slip op. at 8-9 (citations and footnote omitted).

The Board, therefore, concluded that the administrative law judge did not adequately explain his decision to discredit Dr. Houser’s opinion regarding the cause of the miner’s death. *Id.* The Board, therefore, vacated the administrative law judge’s finding pursuant to 20 C.F.R. §718.205(b), and remanded the case for the administrative

law judge to reconsider whether Dr. Houser's opinion establishes that pneumoconiosis hastened the miner's death. *Id.*

On remand, the administrative law judge again found that Dr. Houser's opinion was insufficient to establish that the miner's pneumoconiosis hastened his death. The administrative law judge specifically found that Dr. Houser's opinion, that the miner's pneumoconiosis-induced hypoxemia<sup>6</sup> hastened the miner's fatal heart attack, was not sufficiently reasoned. 2015 Decision and Order at 7-8. The administrative law judge, therefore, found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *Id.*

Claimant contends that the administrative law judge erred in finding that Dr. Houser's opinion did not establish that the miner's death was due to pneumoconiosis. We disagree. The administrative law judge found that, while Dr. Houser stated generally that hypoxemia "can contribute" to precipitating an acute myocardial infarction, the doctor did not adequately explain how the miner's hypoxemia hastened the miner's death from a heart attack in this particular case. 2015 Decision and Order on Remand at 15. The administrative law judge has the discretion as the trier-of-fact to render credibility determinations, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because substantial evidence supports his findings with respect to Dr. Houser, we affirm the administrative law judge's determination that Dr. Houser's opinion regarding the cause of the miner's death was not sufficiently reasoned.<sup>7</sup> *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-

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<sup>6</sup> The administrative law judge also questioned Dr. Houser's basis for attributing the miner's hypoxemia to his pneumoconiosis. 2015 Decision and Order at 6-7.

<sup>7</sup> Because the administrative law judge provided a valid basis for according less weight to Dr. Houser's opinion, we need not address claimant's remaining arguments regarding the weight he accorded to Dr. Houser's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

155 (1989) (en banc). Because claimant does not allege any additional errors,<sup>8</sup> the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b) is affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

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<sup>8</sup> Dr. Imbling is the only other physician to opine that the miner's pneumoconiosis contributed to, or hastened, his death from a myocardial infarction. Claimant's Exhibit 8. The Board previously affirmed the administrative law judge's determination that Dr. Imbling's opinion merited little weight. *Trump*, BRB Nos. 13-0537 BLA and 13-0546 BLA, slip. op. at 8 n.15.