

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 18-0578 BLA

TEMPLE DUNCAN	)	
(Widow of RONALD DUNCAN)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TENNESSEE COAL COMPANY	)	DATE ISSUED: 01/10/2020
	)	
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 Granting Benefits on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Temple Duncan, Strunk, Kentucky.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits on Remand (2013-BLA-05355) of Administrative Law Judge Joseph E. Kane pursuant to the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim<sup>1</sup> filed on January 23, 2012, and is before the Board for a second time.<sup>2</sup>

In the initial decision in the survivor's claim, issued on April 28, 2016, the administrative law judge found the evidence sufficient to establish clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). He further found, however, that claimant failed to establish the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b) and he denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's finding that claimant failed to establish the miner's pneumoconiosis contributed to his death and therefore vacated the denial of benefits in the survivor's claim.<sup>3</sup> *Duncan v. Tenn. Coal Co.*, BRB Nos. 16-0137 BLA and 16-0415 BLA (Feb. 28, 2017) (unpub.), aff'd on recon. *Duncan v. Tenn. Coal Co.*, BRB Nos. 16-0137 BLA and 16-0415 BLA (July 7, 2017) (Order) (unpub.). Specifically, the Board directed the administrative law judge to reconsider Dr. Patton's opinion that the miner's death was due to pneumoconiosis, in light of the evidence of record and relevant case law. *Id.* On remand, the administrative law judge found claimant established the miner's death was due to pneumoconiosis and awarded benefits.

In the current appeal, employer argues the administrative law judge erred in finding the evidence established death causation. Claimant and the Director, Office of Workers' Compensations Programs, have not filed response briefs.<sup>4</sup>

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<sup>1</sup> Claimant is the widow of the miner, who died on October 26, 2011. Director's Exhibit 47.

<sup>2</sup> This case originally involved a miner's subsequent claim and a survivor's claim which were consolidated before the Board for purposes of decision only. Only the survivor's claim is currently before the Board. We incorporate the complete procedural history of this case as set forth in the Board's prior decision. *Duncan v. Tenn. Coal Co.*, BRB Nos. 16-0137 BLA and 16-0415 BLA (Feb. 28, 2017) (unpub.), aff'd on recon. *Duncan v. Tenn. Coal Co.*, BRB Nos. 16-0137 BLA and 16-0415 BLA (July 7, 2017) (Order) (unpub.).

<sup>3</sup> The Board affirmed the denial of benefits in the miner's claim. *Duncan*, BRB Nos. 16-0137 BLA and 16-0415 BLA, slip op. at 7. Thus claimant is not eligible for derivative benefits pursuant to Section 422(l) of the Act. 30 U.S.C. §932(l) (2012).

<sup>4</sup> Employer does not challenge the administrative law judge's findings, incorporated by reference, that claimant established the existence of clinical and legal pneumoconiosis

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817 (6th Cir. 1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). In cases where the statutory presumptions cannot be invoked,<sup>6</sup> a miner's death will be considered due to pneumoconiosis if it caused death or was a substantially contributing cause that hastened death. 20 C.F.R. §718.205(b); *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04 (6th Cir. 2010). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has explained that pneumoconiosis may be found to have hastened the miner's death only if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003). A physician who opines that pneumoconiosis hastened death through a "specifically defined process" must explain how and why it did so. *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04 (6th Cir. 2010).

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pursuant to 20 C.F.R. §718.202(a)(2), (4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2.

<sup>5</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment occurred in Tennessee. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 44.

<sup>6</sup> As affirmed by the Board in the prior appeal, because the record does not contain evidence of complicated pneumoconiosis, claimant cannot invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304; *Duncan*, slip op. at 7 n.11. Claimant is also precluded from invoking the rebuttable presumption of total disability or death due to pneumoconiosis at Section 411(c)(4) because the administrative law judge rationally found the evidence was insufficient to establish total respiratory or pulmonary disability, one of the prerequisites for invocation. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.305(b)(1)(iii); *Duncan*, slip op. at 7.

Having found claimant established the existence of clinical and legal pneumoconiosis, the administrative law judge reconsidered the opinions of Drs. Crouch and Patton, together with the miner's treatment records, relevant to whether pneumoconiosis caused or contributed to the miner's death from acute heart failure.<sup>7</sup> Decision and Order on Remand at 5-6. Dr. Crouch reviewed the autopsy slides and opined the dust-related changes of clinical pneumoconiosis she observed were too mild to have caused, contributed to, or hastened the miner's death, even as a complication of cardiac disease. Decision and Order on Remand at 5; Employer's Exhibit 12. In contrast, Dr. Patton opined the miner's pneumoconiosis caused hypoxia which was the immediate cause of the miner's acute heart failure which led to his death. Decision and Order on Remand at 5; Director's Exhibit 55. The administrative law judge accorded greater weight to Dr. Patton's opinion, finding it more persuasive, and determined claimant established the miner's death was due to pneumoconiosis. Decision and Order on Remand at 5-6.

We reject employer's argument that the administrative law judge erred in crediting Dr. Patton's opinion. Employer's Brief at 19-22. Dr. Patton diagnosed clinical pneumoconiosis, based in part on the autopsy evidence, and legal pneumoconiosis, in the form of asthma and chronic obstructive pulmonary disease due in part to coal mine dust exposure. Decision and Order on Remand at 5; Director's Exhibit 55. Dr. Patton initially opined the miner most likely died of an acute cardiac arrhythmia related to hypoxia and coronary artery disease,<sup>8</sup> and that the miner's coal workers' pneumoconiosis was the cause of the hypoxia. Director's Exhibit 55. He explained that the autopsy "showed coronary stenosis, up to grade II in severity, but there was no occlusion or acute thrombosis to have triggered a fatal arrhythmia without the presence of significant hypoxia." *Id.* In his supplemental report, he reiterated that the autopsy "showed no acute pulmonary embolus or coronary thrombosis to explain the Miner's death other than by hypoxia induced

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<sup>7</sup> The administrative law judge also considered the opinions of Dr. Nichols (the autopsy prosector) and Drs. Fino and Repsher. He noted Dr. Nichols opined the miner's death was due to acute heart failure and opined that coal workers' pneumoconiosis was present, but did not state whether it contributed to the miner's death. Decision and Order on Remand at 5; Director's Exhibit 48. The opinions of Drs. Fino and Repsher predated the miner's death and, thus, they did not provide opinions as to its cause. Decision and Order on Remand at 5.

<sup>8</sup> Dr. Patton noted that while the death certificate listed the cause of death as congestive heart failure, the post-mortem examination defined acute heart failure as the cause of death. Director's Exhibit 55.

arrhythmia.” *Id.* Thus, he reiterated his conclusion that the miner’s death resulted from acute cardiac failure triggered by hypoxia secondary to coal workers’ pneumoconiosis. *Id.*

In crediting Dr. Patton’s opinion, the administrative law judge noted Dr. Patton’s explanation that there are no findings besides the miner’s hypoxia, secondary to pneumoconiosis, to which he could attribute the miner’s fatal arrhythmia. Decision and Order on Remand at 5. He further found Dr. Patton’s opinion consistent with and supported by his own findings of clinical and legal pneumoconiosis and the autopsy evidence attributing the miner’s death to heart failure and confirming the lack of acute pulmonary embolus or coronary thrombosis. Decision and Order on Remand at 5. As the administrative law judge accurately observed, Dr. Patton acknowledged the miner had a small pulmonary embolus in November 2006, nearly five years before his death, but explained that it had resolved through medication.<sup>9</sup> Director’s Exhibits 47, 54. Thus, the administrative law judge rationally determined this past evidence of embolus did not undermine Dr. Patton’s opinion that, at the time of the miner’s death, there was no acute pulmonary embolus or coronary thrombosis that could have caused his acute cardiac failure. Decision and Order on Remand at 5 n.15; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Director’s Exhibit 55.

The determination of whether a medical opinion is adequately reasoned and documented is for the administrative law judge as the factfinder, *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Clark*, 12 BLR at 1-155, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the administrative law judge’s determination that Dr. Patton’s opinion is well-reasoned, well-documented, and “adequately explains the ‘specifically defined process’ by which pneumoconiosis caused or hastened the Miner’s death,” we affirm it.<sup>10</sup> See *Conley*, 595 F.3d at 303-04; *Williams*,

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<sup>9</sup> The treatment records and computed tomography scans showed a history of small right pulmonary thromboembolism in November 2006. See Director’s Exhibit 54.

<sup>10</sup> We reject, as unfounded, employer’s contention that the administrative law judge cannot credit Dr. Patton’s opinion on death causation as supported by the treatment records because he gave them little weight concerning the existence of clinical and legal pneumoconiosis; these are two separate issues. See Employer’s Brief at 19. The fact that the treatment records themselves were found insufficient to establish the existence of clinical or legal pneumoconiosis does not render them entirely irrelevant on other issues. Here the administrative law judge specifically referenced Dr. Patton’s review of the treatment records, indicating that the miner’s 2006 pulmonary embolism had resolved, as supporting his opinion.

338 F.3d at 518; *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 5.

We further affirm the administrative law judge's permissible finding that Dr. Patton's opinion is more persuasive than that of Dr. Crouch as it is "based on and supported by the entirety of the medical evidence, including his treatment and extensive knowledge of the Miner's condition gathered over a period of 34 years."<sup>11</sup> See *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); Decision and Order on Remand at 5-6. As the administrative law judge properly considered the credibility of Dr. Patton's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole," we affirm the administrative law judge's permissible finding that it is sufficient to establish death causation.<sup>12</sup> *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Conley*, 595 F.3d at 303-04; *Williams*, 338 F.3d at 518.

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<sup>11</sup> Employer asserts the administrative law judge failed to adequately address the physicians' relative qualifications in crediting the opinion of Dr. Patton over the opinion of Dr. Crouch. Employer's Brief at 20. Employer contends Dr. Patton's qualifications are not in the record, while Dr. Crouch is a Board-certified pathologist. *Id.* As the administrative law judge noted, Dr. Patton's opinion is consistent with his own findings that claimant established the existence of both clinical and legal pneumoconiosis. Decision and Order on remand at 5. In contrast, while Dr. Crouch explained that the changes of clinical pneumoconiosis she observed pathologically were too mild to have contributed to death, she did not address the contribution, if any, by the miner's emphysema, which the administrative law judge found to be legal pneumoconiosis. Employer's Brief at 20; Employer's Exhibit 12. Because the administrative law judge permissibly found Dr. Patton's opinion more persuasive, and did not credit or discredit the opinion of either physician on the basis of credentials, error if any in the administrative law judge's evaluation of the physicians' relative qualifications is harmless. See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Nor is there merit to employer's contention the administrative law judge erred in finding Dr. Patton treated the miner for 34 years. Employer's Brief at 19. Dr. Patton explicitly stated the miner was a patient in his office from 1977 to 2011, a period of 34 years. Director's Exhibit 55.

<sup>12</sup> In weighing the medical evidence of record relevant to whether a miner's death is due to pneumoconiosis, the adjudicator "must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the adjudicator shall take into consideration the following factors: nature of the relationship, duration of the relationship, frequency of

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treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudicator's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

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

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge