

BRB No. 00-0874 BLA

MARGARET MAGYAR)
(Widow of STEPHEN MAGYAR))
)
Claimant-Respondent))
)
v.)
)
EASTERN ASSOCIATED COAL)
CORPORATION)
)
and)
)
OLD REPUBLIC INSURANCE)
COMPANY)
)
Employer/Carrier-)
Petitioner)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
)
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick and Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebsensburg, Pennsylvania, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Mary Forrest-Doyle (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate

Solicitor; Richard A. Seid and 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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier appeals the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration Awarding Benefits (99-BLA-0844) of Administrative Law Judge Richard A. Morgan 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).¹ The administrative law judge credited the miner with at least 40.82 years of coal mine employment and adjudicated this case pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) (2000), but found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000), and found that the miner's pneumoconiosis arose out of his coal mine employment. The administrative law judge determined that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1) or (c)(3) (2000) but found the evidence sufficient to establish that the miner's pneumoconiosis hastened his death pursuant to 20 C.F.R. §718.205(c)(2) (2000) and *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Accordingly, the administrative law judge awarded benefits. On reconsideration, the administrative law judge reaffirmed his finding that pneumoconiosis hastened the miner's death.

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Employer appeals, asserting that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not submit a brief in this appeal. Employer filed a reply brief, restating its position.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which all of the parties have responded. Claimant and the Director state that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer maintains that the litigation will not impact this case unless there is a determination by the court that the hastening death standard codified at 20 C.F.R. §718.205(c)(5) is unsupported. Based on the briefs submitted by claimant, employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

Employer asserts that the administrative law judge erred by failing to address whether the medical opinions are reasoned and documented, and by relying upon medical opinions in which the physicians presumed that all pulmonary conditions are interrelated.

² We affirm the administrative law judge's length of coal mine employment finding and his finding that claimant has established the existence of pneumoconiosis arising out of coal mine employment, as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer also maintains that the administrative law judge improperly shifted to employer the burden to rebut the evidence indicating that pneumoconiosis contributed to the miner's death. Employer challenges the administrative law judge's weighing of the medical opinion evidence, as well as his consideration of the physicians' credentials. Employer also contends that the administrative law judge was inconsistent when he relied upon the opinions of Drs. Koh and Stone to support his finding of death due to pneumoconiosis where, earlier in the Decision and Order, the administrative law judge found that Dr. Stone did not provide a cause of death and Dr. Koh did not diagnose death due to pneumoconiosis. Employer also maintains that since the administrative law judge discredited the bases for the prosectors' report, it was irrational for the administrative law judge to rely on their opinion concerning the cause of the miner's death. Employer also challenges the administrative law judge's discrediting of Dr. Naeye's opinion. Finally, employer challenges the reliability of the opinions of Drs. Schaaf and Perper because they did not consider the x-ray evidence of record which, employer asserts, would undermine their opinions.

In finding the evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death, the administrative law judge considered the medical opinions of record. The administrative law judge summarized the medical evidence, stating:

The autopsy prosectors, Dr. Perper, and Dr. Schaaf all found that CWP either caused or contributed to the miner's death. The autopsy prosectors attributed death to "complicated" CWP, but all the more highly qualified physicians found no "complicated" CWP. Although Dr. Koh, who had treated the miner during his terminal hospital admission, had diagnosed simple macular CWP and pneumonia, he did not relate the miner's cause of death to clinical CWP in the death certificate, which he signed, but rather respiratory failure, COPD, and interstitial lung disease. Dr. Koh did not set forth the etiology of the respiratory failure. Drs. Naeye, Bush, and Branscomb all ruled out CWP as either a cause or contributor to the miner's death....Cardiologist Dr. Stone did not provide a cause of death, but diagnosed the miner's respiratory failure as secondary to CWP/chronic lung disease, during his terminal hospital admission.

Decision and Order at 20-21. The administrative law judge also found that, "Neither Dr. Bush nor Dr. Naeye adequately rebutted the causation of death espoused by both Dr. Perper and Dr. Schaaf concerning the miner's predisposition to infection...." Decision and Order at 21. The administrative law judge found that "because Dr. Branscomb lacks the pulmonary specialty held by Dr. Schaaf, I give Dr. Schaaf's opinion more weight." *Id.*

Subsequently, in finding the evidence sufficient to establish that pneumoconiosis was a substantial contributing cause to the miner's death, the administrative law judge found that:

At least six physicians attributed the miner's death in part to CWP. Dr. Koh listed respiratory failure as an immediate cause of death. Cardiologist Stone attributed the respiratory failure to CWP/chronic lung disease. The autopsy prosectors attributed the respiratory failure to (complicated) CWP. Dr. Schaaf best described the indirect chain of causation pointing out the CWP predisposed the miner to infection with Mycobacterium which complicated his CWP which led to the severe pneumonia and respiratory failure.

Only three physicians found no relationship between the miner's CWP and his death. The analysis in Dr. Naeye's two-page report pales in comparison with the thorough reports by Drs. Perper and Schaaf. Both Dr. Perper and Dr. Schaaf found this process "substantially contributed" to the miner's death. Dr. Naeye reviewed only 25 histologic slides versus the 27 examined by Dr. Perper. Moreover, Dr. Naeye focused on the direct relationship of CWP to the miner's death not sufficiently addressing the indirect effects.

Decision and Order at 21.

The record contains numerous medical opinions relating to the cause of the miner's death.³ Dr. Koh treated the miner during his final hospitalization and in his description of treatment and condition, identified pneumonia as his principal diagnosis, and among the secondary diagnoses, listed chronic obstructive pulmonary disease, interstitial lung disease, coal workers' pneumoconiosis and respiratory failure. Director's Exhibit 9. Dr. Koh completed the miner's death certificate, which indicates that the miner died on March 11, 1998 and identifies the immediate cause of death as respiratory failure, COPD and interstitial lung disease. Other significant conditions identified are right pneumothorax, probable CAD, CHF and anemia. Director's Exhibit 7. The autopsy, conducted by Drs. Pisano and Chikersal, identified complicated, nodular coal workers' pneumoconiosis as one of the final anatomic diagnoses, and in the

³ The record does not contain Dr. Stone's report. Dr. Perper's opinion includes his summary of Dr. Stone's report. Director's Exhibit 21 at 3-4.

clinicopathological summary, the physicians stated that the miner died due to respiratory failure secondary to complicated coal workers' pneumoconiosis. Director's Exhibit 8.

Dr. Schaaf, who is Board-certified in internal medicine, reviewed evidence and opined that the miner's pneumoconiosis caused and substantially contributed to his death. Dr. Schaaf opined that coal workers' pneumoconiosis predisposed the miner to the development of mycobacteriosis, which led to severe pneumonia which did not respond to therapy, and ultimately led to his death. Claimant's Exhibits 1, 2. Dr. Perper, who is Board-certified in anatomic and forensic pathology, reviewed the evidence and stated that it is well known that coal workers' pneumoconiosis decreases the body's immune resistance to infections, particularly those caused by Mycobacterium. Dr. Perper opined that coal workers' pneumoconiosis was a substantial contributory cause of the miner's death. Director's Exhibit 21.

Dr. Naeye, who is Board-certified in anatomic and clinical pathology, opined that the coal workers' pneumoconiosis lesions the miner had were too few in size and number to have shortened the miner's life. Dr. Naeye opined that the miner's death was due to tuberculosis and severe, terminally rapid spreading acute lobular pneumonia, and stated that the miner would have died at the same time and in the same manner if he had never been a coal miner. Employer's Exhibit 1. Dr. Bush, who is Board-certified in anatomic and clinical pathology and medical microbiology, reviewed the evidence and opined that coal workers' pneumoconiosis was not a substantial contributing factor in the miner's death because the pneumoconiosis was mild in degree and extent. Dr. Bush opined that the "fatal pneumonia" was causally unrelated to the miner's coal dust exposure. Employer's Exhibit 3. Dr. Branscomb, a Board-certified internist also reviewed the evidence. See Exhibit 4. Dr. Branscomb opined that there is no basis for attributing the miner's infections, terminal illness or death to coal workers' pneumoconiosis, and stated that pneumoconiosis did not hasten his final illness or death. Employer's Exhibit 4.

We agree with employer that the administrative law judge was inconsistent in his findings regarding the medical opinions. The administrative law judge notes that the prosecutors attributed the miner's death to complicated pneumoconiosis, but that the better qualified physicians found no complicated pneumoconiosis, that Dr. Koh did not relate the miner's death to clinical pneumoconiosis, and that Dr. Stone did not provide a cause of death. Decision and Order at 20-21. However, the administrative law judge then counts these opinions as part of "six physicians [who] attributed the miner's death in part to CWP." Decision and Order at 21. Inasmuch as these inconsistencies in the administrative law judge's analysis render his finding of death due to pneumoconiosis unreasoned, see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); see also *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), we vacate the administrative law judge's finding that pneumoconiosis was a substantially contributing cause of the miner's death

and we remand the case for further consideration of the medical opinion evidence.

However, we reject employer's assertion that the administrative law judge erred by relying exclusively on the physicians' Board certifications in weighing their respective credentials. The weighing of the physicians' qualifications is a matter within the discretion of the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). While the administrative law judge is not limited to consideration of these qualifications, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), the administrative law judge did not err by not considering other aspects of the physicians' qualifications.

Further, contrary to employer's assertions, in weighing the medical opinion evidence, the administrative law judge may accord less weight to a medical opinion of a physician who has a less complete picture of the miner's health, *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and to the opinion of a physician who relies upon limited medical data, *see Sabett v. Director, OWCP*, 7 BLR 1-299 (1984).⁴

In weighing the medical opinion evidence on remand, the administrative law judge must determine whether the medical opinions of record are reasoned and documented. In order to be relied upon, a medical opinion must be both documented and reasoned. The administrative law judge is charged with determining whether the medical opinion evidence is reasoned and documented. The Board has held that in order to be considered documented, a medical opinion must set forth the clinical findings, observations and facts upon which the physician based his diagnosis. In order to be considered reasoned, the documentation must support the physician's assessment of the miner's health. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

⁴ The administrative law judge indicated that the opinions of Drs. Bush and Naeye do not rebut the cause of death identified by Drs. Perper and Schaaf. Decision and Order at 21. In the instant case, claimant bears the burden of establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). There is no presumption for employer to rebut. Therefore, on remand, the administrative law judge should avoid referring to "rebuttal" evidence.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and his Decision and Order on Reconsideration Awarding Benefits are affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge