

BRB No. 00-1040 BLA

THELMA SHIPLEY)
(Widow of FORREST SHIPLEY))

Claimant-Petitioner)

v.)

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

Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, 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 and DOLDER, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-1277) of Administrative Law Judge Daniel L. Leland (the administrative law judge) on a survivor's claim filed by claimant, the miner's widow,¹ 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).² The administrative law judge initially noted that the miner had been awarded benefits

¹The miner's death certificate, signed by Dr. Landreneau, indicates that he died on October 13, 1997 due to liver failure. Director's Exhibit 6.

²The Department of Labor has amended the regulations implementing the Federal Coal

pursuant to claims he filed during his lifetime. Decision and Order - Denying Benefits at 2; *see* Director's Exhibit 15. Regarding the instant survivor's claim, the administrative law judge indicated that the parties stipulated to thirty-six and one-half years of coal mine employment and the issue before him was whether the miner's death was due to pneumoconiosis. Considering the merits of the claim pursuant to 20 C.F.R. §718.205(c) (2000), the administrative law judge found that the preponderance of the evidence does not support the conclusion that the miner's pneumoconiosis made a substantial contribution to his death. Accordingly, benefits were denied.

On appeal, claimant and the Director, Office of Workers' Compensation Programs (the Director), contend that the administrative law judge's Decision and Order fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 30 U.S.C. §932(a), that the administrative law judge consider all of the relevant evidence and provide reasoning in support of his findings on all issues. Claimant and the Director each request a remand of the case to the administrative law judge for redetermination of the issue of death due to pneumoconiosis. Claimant alternatively suggests that the Board find claimant entitled to benefits.

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 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 Association 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 April 23, 2001, to which claimant and the Director have responded. Claimant argues that the revision to the definition of "pneumoconiosis" contained at 20 C.F.R. §718.201, defining "clinical" and "legal" pneumoconiosis, is important to this case because Dr. Goldblatt "confirms a more serious pneumoconiosis because of this." Claimant's Response to the Board's Order dated April 23, 2001 at 2. The

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.

Director asserts that the regulations at issue in the lawsuit do not affect the outcome of this case.

Based on the briefs submitted by claimant and the Director, and our review of the case, we hold that the disposition of this case is not impacted by the challenged regulations. The issue in this case is whether claimant has met her burden to establish that the miner's death was due to his pneumoconiosis under 20 C.F.R. §718.205(c). The administrative law judge properly did not determine the issue of whether claimant established the existence of pneumoconiosis arising out of coal mine employment in the instant survivor's claim.³ The revised regulations concerning the cause of the miner's death add that 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). Application of the regulation at 20 C.F.R. §718.205(c)(5) will not affect the outcome of this case because the regulation codifies the existing standard approved by the United States Court of Appeals for the Third Circuit in *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). We thus proceed to adjudicate the merits of this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

³The list of contested issues in the instant survivor's claim indicates that the Director, Office of Workers' Compensation Programs (the Director), did not contest the issue of pneumoconiosis arising out of coal mine employment. Director's Exhibit 16. The record also shows that, in awarding benefits under the Act pursuant to a claim which the miner filed during his life, Administrative Law Judge George P. Morin noted the stipulation of the parties, namely claimant and the Director, that the miner had pneumoconiosis which arose from his coal mine employment. Director's Exhibit 15-83 at 2, 9; *see* Director's Exhibit 67.

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, 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. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 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).

The administrative law judge found that the preponderance of the medical evidence does not support the conclusion that the miner's pneumoconiosis made a substantial contribution to his death. Decision and Order - Denying Benefits at 5. The evidence of record relevant to the cause of the miner's death consists of the following: Dr. Malhis completed the discharge summary for the miner's final hospitalization which terminated in his death on October 13, 1997. Dr. Malhis listed hiatal hernia and intractable gastroesophageal reflux disease as the miner's Admitting Diagnoses and indicated that the miner expired due to cardiopulmonary failure due to multi-organ system failure. The following Additional Diagnoses were listed: chronic obstructive pulmonary disease; hypertension; gastrointestinal bleed; renal failure; esophageal perforation; liver failure; serratia pneumonia; enterococcus urinary tract infection; ileus; status post tracheostomy; anterobacter line sepsis and thrombocytopenia. Director's Exhibit 11.

An autopsy was performed by Dr. Zhang, with Dr. Yakulis as attending pathologist. The Final Anatomic Diagnoses are as follows: Blood Clot and dark hemorrhagic discoloration of small intestine...; congestion and edema of lung, bilateral; bilateral pleural adhesions; congestive heart failure...; calcific aortic valve; cardiomegaly...; atherosclerosis of aorta, moderate; focal ulcer of gastric mucosa; multiple cysts and arterionephrosclerosis of both kidneys; brain infarction...; status post trans hiatal esophagectomy, esophagogastric anastomosis, left thyroidectomy, pyloromyotomy with feeding jejunostomy... . Director's Exhibit 7. Drs. Zhang and Yakulis indicated:

The patient is a 77-year-old white male with a history of chronic obstructive pulmonary disease and gastroesophageal reflex disease who underwent transitional esophagectomy and esophagogastric anastomosis at approximately 5 cm below the cricopharyngeus and feeding jejunostomy on August 7, 1997.

On October 5, the patient started having gastrointestinal bleeding, fever, respiratory failure, unresponsiveness and unstable blood pressure for more than one week. He was pronounced dead at 2009 pm, October 13, 1997.

The main findings at autopsy were congestion and edema of both lung[s], serosanguinous pleural effusion about 200 cc, pleural adhesions, passive congestion of liver, focal hepatic necrosis, cardiomegaly, aortic valve calcification, ulceration of gastric mucosa with acute inflammatory cell infiltration, congestion and transmural acute and chronic inflammatory cell infiltration of the small intestine wall.

This patient suffered cardiopulmonary collapse of unknown etiology. Possible causes and/or contributing factors could have been fibrosis of myocardium, congestive heart failure, bilateral pleural effusion, gastrointestinal tract bleeding.

Id.

Dr. Goldblatt reviewed the autopsy protocol and slides and the medical record. Dr. Goldblatt included the following Final Anatomic Diagnoses: acute myocardial infarction, less than twenty-four hours' duration; cardiomegaly, myocardial hypertrophy and fibrosis; diffuse alveolar damage; simple coal workers' pneumoconiosis; pulmonary arteriolar muscular hypertrophy consistent with pulmonary hypertension; aspiration pneumonia; cerebrovascular accident with cerebral infarct; esophageal and gastric surgery; pulmonary failure; and hepatic failure. Director's Exhibit 11. Dr. Goldblatt indicated that the miner

died of very early acute myocardial infarction and acute respiratory failure caused by the combined effects of diffuse alveolar damage (DAD), aspiration pneumonia and simple coal workers' pneumoconiosis of longstanding. Liver failure and remote cerebrovascular accident are contributory causes of death. Mr. Shipley was an underground coal worker for 38 to 40 years. He was a long time cigarette smoker. Pulmonary symptoms of shortness of breath were recorded as early as 1982-83. Confirming pulmonary function tests and blood gas studies predated the postoperative period when DAD was superimposed on his chronic pulmonary disorders. Pulmonary arteriolar hypertrophy is evidence of cor pulmonale.

There is also a history of alcohol abuse, gastric esophageal reflux disease, hiatal hernia and hypertension.

Id.

In his deposition on August 20, 1998, Dr. Goldblatt indicated that he diagnosed simple coal workers' pneumoconiosis based on the tissue slides taken on autopsy. Director's Exhibit 11 Deposition Transcript at 19, 27. Dr. Goldblatt indicated that the miner died as a result of pulmonary failure whose underlying causes were the combined effects of diffuse

alveolar damage, simple coal workers' pneumoconiosis, pulmonary hypertension and aspiration pneumonia, with acute myocardial infarction and cardiac arrest as the final mechanism of death. *Id.* at 30. He also explained that the miner's simple coal workers' pneumoconiosis was a primary cause of his death. *Id.* at 31-33.

Dr. Perper, a forensic pathologist, reviewed the autopsy report and slides and the miner's medical records. Dr. Perper found that claimant had evidence of "minimal simple coal workers' pneumoconiosis, with very mild focal anthracosis with few silica crystals and a few rare questionable micronodules," which he related to the miner's coal mine employment. Director's Exhibit 12. Dr. Perper indicated that the miner's coal workers' pneumoconiosis did not contribute to or hasten his death. He explained:

The extent and severity of coal workers' pneumoconiosis demonstrated at autopsy and in the reviewed microscopic slides was to (sic) mild to conclude that this process was a substantial contributory cause of death or that hasten (sic) Mr. Shipley's death. Mr. Shipley died of a combination of complications that included initially aspiration pneumonia and diffuse pulmonary alveolar damage that followed gastric surgery done because of gastro-esophageal reflux disease and hiatal hernia. Further complications that included gastro-intestinal hemorrhages in a patient with severe cardiomegaly and sepsis lead to heart and liver failure, progressive and irreversible decline in the patient's condition and ultimately death.

Id. Dr. Perper concluded that the miner's simple coal workers' pneumoconiosis did not significantly contribute to or hasten death, which was a result of complications following stomach surgery, including aspiration pneumonia, sepsis, intestinal hemorrhages and precipitated cardiac and liver failure on a background of severe cardiomegaly. *Id.*

In answering claimant's interrogatories, Dr. Perper opined:

It is my professional opinion that Mr. Shirley's (sic) death was not caused, contributed to any significant degree or hastened by his minimal coal workers' pneumoconiosis.

Can I exclude or prove the outside possibility that the death of [the miner] was hastened by a minute, a second or a fraction thereof by his minimal CWP? Obviously I cannot, but there is no reasonable medical explanation or theory that I know, that could substantiate how [the miner's] minimal coal workers' pneumoconiosis could be significant or effective to any realistic degree in the causation or hastening of [the miner's] death.

Director's Exhibit 17.

Dr. Goldblatt reviewed Dr. Perper's report and in a report dated May 17, 2000, he indicated his disagreement with Dr. Perper's findings. He opined:

It was the combined effects of CWP and the more acute pulmonary pathologies (aspiration pneumonia and DAD) that caused Mr. Shipley's death. It would be incorrect to exclude CWP from the causes of death, since it is clearly a pulmonary failure death and chronic coal workers' pneumoconiosis had been a well-documented cause of his pulmonary dysfunction for many years before these more acute processes were superimposed on the chronic process and became a cumulative effect to end his live (sic).

Claimant's Exhibit 1.

In considering the evidence, the administrative law judge found that Dr. Goldblatt was the only physician of record to conclude that pneumoconiosis was a substantially contributing cause of the miner's death, while Drs. Malhis, Landreneau, Zhang and Yakulis did not mention the disease. The administrative law judge also noted that Dr. Perper specifically excluded pneumoconiosis as having substantially contributed to, or hastened, the miner's death. The administrative law judge then indicated that Dr. Malhis attributed death to cardiopulmonary failure due to multi-organ failure, Dr. Landreneau cited liver failure, Drs. Zhang and Yakulis opined that death was due to cardiopulmonary collapse and gave several possible causes, none of which was pneumoconiosis, and Dr. Perper maintained that death was due to complications following stomach surgery, including several conditions unrelated to the miner's pneumoconiosis. The administrative law judge then found as follows:

Dr. Goldblatt is also the only physician to find that the miner had an acute myocardial infarction. The hospital records do not indicate that the decedent had a myocardial infarction and neither does the autopsy report. Dr. Perper stated that there was insufficient evidence to conclude that a myocardial infarction occurred. Dr. Goldblatt stands alone in his conclusions. Although Dr. Goldblatt is a board certified pathologist, I can find no basis for according his opinion more weight than the opinions of Dr. Perper, Dr. Zhang and Dr. Yakulis, who are also pathologists. The preponderance of the medical evidence therefore does not support the conclusion that the decedent's pneumoconiosis made a substantial contribution to his death. There is no evidence of complicated pneumoconiosis. *See* [20 C.F.R.] §718.304. The claim will therefore be denied.

Decision and Order - Denying Benefits at 5.

Claimant contends that the administrative law judge failed to consider the entirety of Dr. Goldblatt's opinion regarding the cause of the miner's death. Claimant further argues

that the administrative law judge applied the incorrect legal standard and asserts that a medical opinion that pneumoconiosis contributes in “any amount” to death would be sufficient to meet the standard set forth in *Lukosevicz*. Claimant’s Brief at 13 - 14 (emphasis provided.). In this regard, claimant refers to Dr. Perper’s opinion that he could not exclude the possibility that the miner’s death was hastened by a minute, a second or a fraction thereof by his minimal pneumoconiosis. *Id.* at 14; *see* Director’s Exhibit 17. Claimant submits that the administrative law judge’s Decision and Order fails to comply with the APA. The Director seeks a remand of the case based on his argument that the administrative law judge’s Decision and Order fails to comply with the requirements of the APA. The Director argues that the administrative law judge failed to consider fully all the relevant evidence and to explain fully his findings regarding the cause of the miner’s death.

We agree with the contentions of claimant and the Director that the administrative law judge’s Decision and Order fails to comply with the requirements of the APA. The APA requires that every decision contain a statement of “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record.” 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d), 932(a). Where the record contains conflicting evidence, such as in the instant case, the administrative law judge must provide adequate explanation and reasoning for his decision to credit certain evidence while rejecting evidence to the contrary. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997). In the instant case, the administrative law judge set forth the relevant evidence regarding the cause of the miner’s death and properly characterized that evidence. He did not, however, make credibility determinations concerning the conflicting reports such as would allow a reviewing body “to determine the analytic process behind the result.” *Witmer, supra* 111 F.3d at 354, 21 BLR at 2-87. Specifically, with regards to Dr. Goldblatt’s opinion, the administrative law judge merely stated that Dr. Goldblatt was the only physician to conclude that the miner’s death resulted from pulmonary or respiratory failure due to, *inter alia*, coal workers’ pneumoconiosis, and that Dr. Goldblatt was also the only physician to find that the miner had suffered an acute myocardial infarction as part of his demise. Decision and Order - Denying Benefits at 4-5. These characterizations of the record are not credibility determinations such as those required by the APA. Moreover, the administrative law judge did not explain how the issue of whether the miner suffered a myocardial infarction at the time of his demise, is relevant to the issue *sub judice*, namely whether the miner’s death was due to pneumoconiosis. Further, while the administrative law judge properly considered the relative qualifications of the physicians of record, *see generally Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), he did not determine whether their respective opinions regarding the cause of the miner’s death were reasoned and documented and therefore, credible. *See Mancina v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Witmer, supra*.

Based on the foregoing errors on the part of the administrative law judge, we vacate his finding at 20 C.F.R. §718.205(c) (2000) and remand the case for reconsideration. On remand, the administrative law judge must make credibility findings which comport with the requirements of the APA in resolving the conflicting evidence of record relevant to the issue of whether claimant has met her burden to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c)(2), (c)(5).⁴

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is vacated and the 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

⁴Claimant argues that the administrative law judge “made no comment” or “made little or no comment” on Dr. Goldblatt’s opinion written in response to Dr. Perper’s opinion, *see* Claimant’s Exhibit 1, and failed to address Dr. Goldblatt’s testimony that the autopsy report was in agreement with his own finding that the miner suffered a cardio-pulmonary collapse, *see* Director’s Exhibit 11 at 28. Claimant’s Brief at 8, 12, 14. The administrative law judge included each of Dr. Goldblatt’s opinions, as well as his deposition, in his summary of the evidence, and found that the autopsy report did not indicate that the miner had a myocardial infarction. Decision and Order - Denying Benefits at 3-5. On remand, the administrative law judge must reconsider the entirety of Dr. Goldblatt’s opinion and make credibility determinations based on all the relevant evidence of record.