

BRB No. 05-0223 BLA

VIOLA M. NECESSARY )  
(Widow of ALVIN H. NECESSARY) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
CONSOLIDATION COAL COMPANY ) DATE ISSUED: 07/19/2005  
 )  
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (2002-BLA-05497) of Administrative Law Judge Daniel F. Solomon awarding benefits on a survivor's claim<sup>1</sup> filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

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<sup>1</sup> The miner died on February 3, 2001 and claimant filed her application for survivor's benefits on April 6, 2001. Director's Exhibit 3. The record indicates that the miner filed three lifetime claims for benefits, which were finally denied and are not at issue herein. Director's Exhibit 1.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case has previously been before the Board. In his Decision and Order dated May 23, 2003, the administrative law judge accepted the parties' stipulations to twenty-four years of coal mine employment<sup>2</sup> and to the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge additionally found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and, accordingly, he awarded benefits.

On appeal, the Board vacated the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(5) and remanded the case for further consideration of the pathologists' opinions. *Necessary v. Consolidation Coal Co.*, BRB No. 03-0616 BLA (May 26, 2004) (unpub.) (Dolder, C.J. dissenting) (Judge Dolder would have reversed the administrative law judge's decision awarding benefits). The Board noted that when asked to specify how coal workers' pneumoconiosis related to the miner's death in this case, Dr. Racadag stated, *inter alia*, that coal workers' pneumoconiosis "can" lower one's resistance to other pathogens and that it "can" cause emphysema and pneumonia, Claimant's Exhibit 1 at 10, 21, and specifically labeled his opinion "a speculation," yet maintained that coal workers' pneumoconiosis contributed to death in this case. Claimant's Exhibit 1 at 22. The Board held that review of the administrative law judge's decision and order reflected that while he found Dr. Racadag's opinion to be unequivocal, he did not discuss the specific terms in which Dr. Racadag expressed his opinion. The Board noted that while an administrative law judge is not required to discount an opinion expressed in qualified terms, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999), he cannot credit an opinion which is pure speculation and he must explain the basis for his interpretation. *United States Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501, 1-503 (1984). Consequently, the Board remanded this case for the administrative law judge to reconsider Dr. Racadag's opinion in accordance with *Jarrell* and *Mays*.<sup>3</sup> *Necessary*, slip op. at 5.

The Board further held that, although the record contains evidence which could support a determination that Dr. Racadag's opportunity to view the gross anatomy of the

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<sup>2</sup> The record indicates that the miner's most recent coal mine employment occurred in Virginia. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

<sup>3</sup> In addition, the Board affirmed the administrative law judge's evidentiary determinations pursuant 20 C.F.R. §725.414.

lung placed him in a better position than Dr. Bush to calculate the extent of coal workers' pneumoconiosis, Director's Exhibit 9 at 2; Claimant's Exhibit 1 at 5-6, 12-13, 15, Dr. Racadag's response is also susceptible to the interpretation that he was merely in a better position than non-pathologists, Claimant's Exhibit 1 at 12-13; hence, the administrative law judge should explain the basis for his finding that Dr. Racadag's ability to conduct a gross examination placed him in a superior position than Dr. Bush, who reviewed the slides and the autopsy report. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Necessary*, slip op. at 6. In a Decision and Order on Remand dated October 18, 2004, the administrative law judge again found Dr. Racadag's opinion unequivocal and, therefore, sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the evidence when he found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer requests reversal of the award of benefits. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered 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), (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(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer initially asserts that in crediting Dr. Racadag's opinion on remand, the administrative law judge selectively analyzed the evidence to find it unequivocal, relying solely on Dr. Racadag's statement that his opinion was given to a reasonable degree of medical certainty and dismissing his speculative and equivocal language. Employer's Brief at 6-7. We disagree.

Contrary to employer's arguments, in re-weighting Dr. Racadag's opinion, the administrative law judge discussed the specific terms in which Dr. Racadag expressed his opinion, noting: his testimony that pneumoconiosis was definitely present in the miner's lungs and acted in combination with pneumonia and emphysema to cause death; his statement that his opinion was based not only on the microscopic examination of the tissue slides, but also upon gross examination of the organ; and his assertion that he could actually see the ravages of disease in the miner's lungs. Claimant's Exhibit 1 at 11-12; Decision and Order on Remand at 5. The administrative law judge further noted that, in contrast, at one point, Dr. Racadag stated that coal workers' pneumoconiosis "probably" contributed to the miner's death, and when asked on cross-examination whether he was speculating that coal workers' pneumoconiosis contributed to the miner's death, Dr. Racadag responded, "Yes. It's a speculation." However, the administrative law judge also noted that Dr. Racadag went on to explain this statement, by saying, "I said 'probably contributed,' because I believe there is no 100 percent in medicine," Claimant's Exhibit 1 at 22; Decision and Order on Remand at 5, and that, on rebuttal, Dr. Racadag testified that, notwithstanding calling his opinion a "speculation," and notwithstanding the opinions that were expressed in all the other reports, he firmly believed, within a reasonable degree of medical certainty, that coal workers' pneumoconiosis was a contributing factor to the miner's death. Claimant's Exhibit 1 at 22-23; Decision and Order on Remand at 5. In finding that Dr. Racadag did not equivocate, the administrative law judge concluded that, on redirect examination, Dr. Racadag rehabilitated his use of the word "speculation," and established that the word was used to contrast his opinion with a complete knowledge standard, such as "beyond a reasonable doubt." Decision and Order on Remand at 6. The administrative law judge then stated that, in the alternative, even if Dr. Racadag equivocated, which he did not believe he had, his opinion was comparable to the situation in *Mays*, where the Court found that a physician's use of the word "could" was simply consistent with his observed practice of delivering his opinions in cautious terms and was nonetheless an "affirmative assertion" that pneumoconiosis contributed to the miner's death. Decision and Order on Remand at 6. As the administrative law judge fully considered all aspects of Dr. Racadag's opinion which could be interpreted as speculative, together with the decisions of the United States Court of Appeals for the Fourth Circuit in *Jarrell* and *Mays*, and fully explained why he found that Dr. Racadag had not equivocated, we reject employer's contention that the administrative law judge selectively analyzed the evidence and affirm the administrative law judge's finding that Dr. Racadag's opinion is not equivocal.

Employer next asserts that, on remand, the administrative law judge erred in mechanically crediting Dr. Racadag's opinion, as autopsy prosector, over the opinion of Dr. Bush, the reviewing pathologist, as to the amount of coal workers' pneumoconiosis that was present in the miner's lungs.<sup>4</sup> In addition, employer asserts that the administrative law judge failed to weigh the pathology evidence together with the substantially negative x-ray data and the older objective data from the miner's lifetime. Employer's Brief at 9. Employer's arguments are without merit. On remand, the administrative law judge fully re-considered the opinions of Drs. Bush and Racadag, and found that, in fact, Dr. Bush had applied a mechanical standard by assuming that the tissue slides were completely representative of all the affected tissue.<sup>5</sup> The administrative law judge stated that he found Dr. Racadag's opinion, that ten to twenty percent of the lungs were affected, more persuasive than Dr. Bush's assessment of five percent, because Dr. Racadag had a better opportunity to examine the lung than did Dr. Bush, and because Dr. Racadag testified that he was able to see with his "own eyes" the extent of the disease. Decision and Order on Remand at 7. In addition, contrary to employer's arguments, in his prior decision, previously before the Board, the administrative law judge weighed the autopsy, x-ray and medical opinion evidence together, pursuant to *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and specifically stated that he gave little credence to the numerous, prior negative x-rays and medical evidence developed during the miner's lifetime, because the new pathology evidence conclusively established that the miner had pneumoconiosis, thus establishing that the prior evidence was unreliable. May 23, 2003 decision at 13.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). Because the administrative law judge examined each medical opinion in light of the objective material supporting that opinion, and in light of the contrary medical evidence of record, *see Compton*, 211 F.3d at 211, 22 BLR at 2-175, and further explained his decision to credit Dr. Racadag's opinion in light of the holdings set forth by the United States Court of Appeals in *Jarrell* and *Mays*, we affirm the administrative law judge's finding that the medical opinion

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<sup>4</sup> Both Dr. Racadag and Dr. Bush are Board-certified in Anatomical and Clinical Pathology.

<sup>5</sup> Dr. Bush counted the coal macules on the lung tissue slides and concluded that "less than 5 percent of lung tissue is affected by coal worker lesions." Employer's Exhibit 1 at 4. While Dr. Racadag agreed with Dr. Bush's count of the coal macules on the slides, he testified that "[p]robably a little bit more" than five percent of the lung tissue was affected, "[m]aybe 10, 20 percent." Claimant's Exhibit 1 at 19.

evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

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

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL  
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's award of benefits on remand. I believe employer's argument has merit. I would reverse the administrative law judge's award of survivor's benefits because his finding that pneumoconiosis hastened the miner's death rests on a medical opinion which Dr. Racadag admits is speculation that pneumoconiosis hastened death in this particular case. *See United States Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999). Absent Dr. Racadag's speculative opinion, there is no substantial evidence that the miner's death was hastened by pneumoconiosis. Dr. Racadag's autopsy report states only that the "above conditions," including coal workers' pneumoconiosis, "contributed to the patient's morbidity and demise." Director's Exhibit 9. Because Dr. Racadag provides no additional support or explanation for this notation, his autopsy report is insufficient to support a finding that pneumoconiosis hastened the miner's death. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192-93, 22 BLR 2-251, 2-259, 2-263 (4th Cir. 2000). Consequently, claimant has not proved by a preponderance

of the evidence that pneumoconiosis was a substantially contributing cause of the miner's death. 20 C.F.R. §718.205(c)(5).

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge