

BRB No. 05-0863 BLA

SHARON J. ASKEW)
(Widow of HARRY E. ASKEW))
)
Claimant-Petitioner)
)
v.)
)
GREENWICH COLLIERIES COMPANY) DATE ISSUED: 07/24/2006
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

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

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (04-BLA-5000) of Administrative Law Judge Daniel L. Leland denying benefits 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). This case involves a survivor's claim filed on September 25,

¹Claimant is the surviving spouse of the deceased miner who died on November 5, 2000. Director's Exhibit 7.

2002. The only contested issue in this case is whether the miner's death was due to pneumoconiosis. The administrative law judge 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(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Because the survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).² See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's

²Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) 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).

death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

All of the physicians who addressed the cause of the miner's death agreed that the miner's death was due to heart failure. However, while Drs. Dvorchak, Goldblatt, Schaaf and Begley opined that the miner's pneumoconiosis contributed to his death, *see* Director's Exhibit 7; Claimant's Exhibits 8, 10, 12, 14, Drs. Bush, Hurwitz and Castle opined that the miner's pneumoconiosis did not contribute to his death. Director's Exhibits 10, 14; Employer's Exhibits 2, 4.

In his consideration of whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge found that the opinions of Drs. Dvorchak, Goldblatt, Schaaf and Begley were poorly reasoned. Decision and Order at 5-6. The administrative law judge found that Dr. Bush's opinion, that the miner's death was not related to his pneumoconiosis, was well reasoned since it was "consistent with [the miner's] long history of severe heart disease and the pathological findings." *Id.* at 6. The administrative law judge also accorded great weight to Dr. Hurwitz's opinion, that the miner's underlying lung disease did not contribute to his death, because Dr. Hurwitz was the only cardiologist to offer an opinion in this case. *Id.* The administrative law judge, therefore, 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(c).³

Claimant argues that the administrative law judge committed numerous errors in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant argues that the administrative law judge "dismissed" the opinions of Drs. Dvorchak, Schaaf and Begley in "summary fashion." Claimant's Brief at 6. We disagree. Dr. Dvorchak completed the miner's death certificate. Dr. Dvorchak attributed the miner's death, *inter alia*, to pneumoconiosis. Director's Exhibit 7. The administrative law judge permissibly found that the miner's death certificate was insufficient to establish that the miner's death was due to pneumoconiosis because it was not a reasoned medical finding.⁴ Decision and

³Although the administrative law judge summarized Dr. Castle's February 3, 2004 report and October 5, 2004 deposition testimony in his decision, *see* Decision and Order at 4-5; Employer's Exhibits 2, 5, the administrative law judge did not consider Dr. Castle's opinion in his weighing of the evidence pursuant to 20 C.F.R. §718.205(c).

⁴Dr. Dvorchak provided no explanation for his findings on the miner's death certificate. *See* Director's Exhibit 7.

Order at 6; *See generally Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997) (The mere statement of a conclusion by a physician, without any explanation of the basis for that statement, does not take the place of the required reasoning).

Although Dr. Schaaf opined that the miner's pneumoconiosis was a substantial contributing factor to his death, the administrative law judge properly discredited his opinion because he found that it was not sufficiently reasoned.⁵ *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 6; Claimant's Exhibit 10.

We also reject claimant's contention that the administrative law judge failed to provide a basis for discrediting Dr. Begley's opinion. Dr. Begley opined, *inter alia*, that the miner's "*chronic hypoxemia and desaturation with exercise was a significant contributing factor to his cardiac dysfunction.*" Claimant's Exhibit 12 (emphasis added). Although the administrative law judge acknowledged that Dr. Begley noted "two isolated instances of oxygen desaturation," the administrative law judge discredited his opinion because there was no evidence of "sustained hypoxemia" in the miner's records. Decision and Order at 6 n.1. Because claimant does not challenge the administrative law judge's basis for discrediting Dr. Begley's opinion, the administrative law judge's finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant, however, also argues that the administrative law judge erred in his consideration of Dr. Goldblatt's opinion. Dr. Goldblatt, assisted by Dr. Labeeb, performed the miner's autopsy on November 5, 2000. In an Autopsy Protocol dated December 19, 2000, Dr. Goldblatt rendered the following final anatomic diagnoses: (1) micronodular simple coal workers' pneumoconiosis; (2) pulmonary emphysema; (3) acute aspiration bronchopneumonia; (4) cardiomegaly; (5) cor pulmonale; (6) severe coronary artery disease; and (7) an old myocardial infarction scar. Director's Exhibit 8.

During a deposition on January 13, 2004, Dr. Goldblatt identified a moderate degree of coal workers' pneumoconiosis on both gross and microscopic examination. Claimant's Exhibit 8 at 15-16. Dr. Goldblatt also diagnosed centrilobular emphysema attributable to the miner's smoking and coal dust exposure. *Id.* at 16-17. Dr. Goldblatt further testified that:

Coal workers' pneumoconiosis played a significant role in the death of [the miner]. In his case his disease was of moderate degree. It produced thickening of the small to medium sized pulmonary arterioles which

⁵Dr. Schaaf did not provide an explanation for his finding that the miner's pneumoconiosis was a substantial contributing factor to his death. *See* Claimant's Exhibit 10.

resulted in increased vascular resistance which was felt in the back flow all the way to the right side of the heart producing increased thickening of the right ventricular wall. And of course, a thickened or enlarged heart will be less efficient because it has greater oxygen demands. Combine that with the fact that he also had fairly severe emphysema which was produced, at least in part due to his coal dust exposure, that would decrease the oxygen supply coming in the blood to this now thickened heart muscle, so just those – those two factors alone, which are both due to coal dust exposure, would put him at high risk for arrhythmia.

Claimant's Exhibit 8 at 20-21.

Dr. Goldblatt opined that the miner's heart muscle was rendered less efficient by his primary heart and lung disease and, in conjunction with his emphysema, caused a decreased oxygen supply that caused his death. Claimant's Exhibit 8.

The administrative law judge, in his consideration of Dr. Goldblatt's opinion, stated:

Dr. Goldblatt's opinion is poorly reasoned and unpersuasive. He does not explain in what manner the miner's relatively mild pneumoconiosis caused ventricular thickening to occur and readily admitted that there were no blood gas studies showing hypoxemia in the last years of the miner's life. Regarding the miner's emphysema, Dr. Goldblatt significantly underestimated the miner's smoking history stating that he had smoked cigarettes for ten years and quit fifteen years before he died. The miner's hospital records conclusively show that the miner smoked cigarettes for forty years and was still smoking as late as 1997. Dr. Goldblatt's conclusion that the miner's centrilobular emphysema was caused by his exposure to coal dust is therefore based on inaccurate information. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Because Dr. Goldblatt's opinion is poorly reasoned and based on an incorrect smoking history, I give it little weight.

Decision and Order at 5.

Claimant specifically argues that the administrative law judge erred in finding that Dr. Goldblatt's opinion was poorly reasoned. In finding Dr. Goldblatt's opinion poorly reasoned, the administrative law judge noted that the doctor did not explain the manner in which the "miner's relatively mild pneumoconiosis caused ventricular thickening to occur." Decision and Order at 5. The administrative law judge failed to explain his basis for finding the miner's pneumoconiosis "relatively mild." Dr. Goldblatt identified a

“moderate degree” of coal workers’ pneumoconiosis on both gross and microscopic examination of the miner’s lungs.⁶ See Claimant’s Exhibit 8 at 15-16. By characterizing the miner’s pneumoconiosis as “relatively mild,” the administrative law judge improperly substituted his opinion for that of the medical experts. See generally *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

The administrative law judge also erred in finding that Dr. Goldblatt did not explain the manner in which the miner’s pneumoconiosis caused pleural thickening to occur. See Decision and Order at 5. In fact, Dr. Goldblatt explained that the miner’s pneumoconiosis produced “thickening of the small to medium sized pulmonary arterioles which resulted in increased vascular resistance which was felt in the back flow all the way to the right side of the heart producing increased thickening of the right ventricular wall.” Claimant’s Exhibit 8 at 20.

Claimant argues the administrative law judge erred in stating that Dr. Goldblatt acknowledged that all of the miner’s treatment had been for his heart disease. While Dr. Goldblatt did so indicate, he also testified that the miner was treated with Ventolin on April 10, 1997. Claimant’s Exhibit 8 at 43. Dr. Goldblatt testified that this medication is used to treat chronic obstructive pulmonary disease or asthma. *Id.* Dr. Goldblatt also testified that the miner had a “pulse ox of 81” on February 12, 1988, a finding that “could reflect an underlying hypoxemia due to chronic obstructive pulmonary disease.” *Id.* at 44.

The administrative law judge also discredited Dr. Goldblatt’s opinion because the doctor “readily admitted that there were no blood gas studies showing hypoxemia in the last years of the miner’s life.” Decision and Order at 5. The administrative law judge, however, failed to address the fact that Dr. Goldblatt testified, during his deposition, that he was able to render his opinions regarding the cause of the miner’s death with the knowledge that the miner did not undergo any arterial blood gas studies during the last

⁶The other physicians differed in their characterization of the extent of the miner’s pneumoconiosis. Dr. Begley opined that the miner’s lungs were severely damaged by his coal workers’ pneumoconiosis, noting that the miner had “70-80% involvement of his pulmonary parenchyma with coal maculae and 30-40% involvement of his parenchyma with fibrotic nodules.” Claimant’s Exhibit 12. Dr. Bush, however, noted that the coal mine dust disease in the miner’s lungs was “very limited.” Employer’s Exhibit 3 at 33. Dr. Castle opined that the miner’s pneumoconiosis did not impact on his functional status. Employer’s Exhibit 5 at 14.

years of his life.⁷ Claimant's Exhibit 8 at 21.

The administrative law judge also discredited Dr. Goldblatt's opinion that the miner's emphysema was due in part to his coal dust exposure because the doctor relied upon an inaccurate coal mine employment history. Dr. Goldblatt explained that both smoking and coal dust exposures were "significant contributors" to the miner's emphysema. Claimant's Exhibit 8 at 17. In rendering his opinion, Dr. Goldblatt relied upon the fact that the miner smoked a half a pack of cigarettes a day for ten years, stopping fifteen years prior to his death. *Id.* at 24. The administrative law judge, however, found that the evidence established that the miner smoked cigarettes for forty years and was still smoking as late as 1997. Decision and Order at 5. The administrative law judge, therefore, found that Dr. Goldblatt's conclusion that the miner's emphysema was caused by his coal dust exposure was based upon inaccurate information. *Id.* The administrative law judge, however, failed to address the fact that Dr. Goldblatt was informed, during his deposition, that the miner may have had a smoking history of as much as forty pack years. Claimant's Exhibit 8 at 25. Dr. Goldblatt acknowledged that this smoking history, if accurate, "would increase the contribution of smoking." *Id.* However, Dr. Goldblatt did not indicate that such a smoking history would change his opinion that the miner's coal dust exposure also contributed to the miner's chronic obstructive pulmonary disease. Moreover, Dr. Goldblatt's reliance upon an inaccurate coal mine employment history would not undermine his finding regarding the contribution of the miner's clinical pneumoconiosis to his death because his finding of clinical pneumoconiosis was not based upon the length of the miner's coal mine employment.

Claimant also argues that the administrative law judge failed to provide a basis for his finding that Dr. Bush's opinion is well reasoned. Dr. Bush attributed the miner's death to congestive heart failure due to severe artery disease. Director's Exhibit 10. Dr. Bush further opined that the miner's coal dust exposure did not play any role in the events leading to his death. *Id.* The administrative law judge found that Dr. Bush's opinion was well reasoned "as it is consistent with the decedent's long history of severe heart disease and the pathological findings." Decision and Order at 5. The administrative law judge's basis for finding that Dr. Bush's opinion is well reasoned cannot be affirmed. First, the fact that the miner suffered from severe heart disease is not disputed. Moreover, although the administrative law judge found that Dr. Bush's opinion was consistent with "the pathological findings," he failed to identify the relevant pathological findings or discuss why they are relevant. Consequently, the administrative

⁷There is other evidence of hypoxemia in the record. Dr. Begley indicated that he found evidence of hypoxemia in the miner's August 23, 1998 respiratory therapy records. *See* Claimant's Exhibit 14 at 12. Dr. Begley also found evidence of hypoxemia in the miner's hospital records from October of 1998. *Id.*

law judge's analysis of whether Dr. Bush's opinion is well reasoned does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in 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) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, the administrative law judge, on remand, must reconsider whether Dr. Bush's opinion is sufficiently reasoned.⁸

Claimant also argues that the administrative law judge erred in crediting Dr. Hurwitz's opinion based upon his status as a Board-certified cardiologist and in giving less weight to physicians who are Board-certified in pathology or pulmonology. Although the miner's death was attributable to his heart disease, the miner also suffered from pulmonary disease. The administrative law judge failed to explain why Dr. Hurwitz's status as a Board-certified cardiologist entitled his opinion to more weight than the opinions of Dr. Goldblatt, a Board-certified pathologist, and Dr. Begley, a Board-certified internist. *See* Claimant's Exhibits 8, 12. The administrative law judge also failed to address the reasons that Dr. Hurwitz provided for his opinion. Consequently, on remand, the administrative law judge must address whether Dr. Hurwitz's opinion is sufficiently reasoned. *See Clark, supra; Lucostic, supra.*

In light of the above referenced errors, we vacate the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) and remand the case for further

⁸Although Dr. Bush concluded that the miner's death was due to congestive heart failure due to severe artery disease, he opined that the miner's immediate cause of death was "severe acute bronchopneumonia associated with marked chronic bronchitis and emphysema." *See* Director's Exhibit 10. Although Dr. Bush attributed the miner's emphysema exclusively to cigarette smoking, some of the other physicians of record attributed the miner's emphysema to both cigarette smoking and coal dust exposure. For example, Dr. Goldblatt attributed the miner's emphysema to both cigarette smoking and coal dust exposure. Claimant's Exhibit 8 at 20-21. Dr. Begley also attributed the miner's emphysema to both cigarette smoking and coal dust exposure. *See* Claimant's Exhibit 14 at 18. On remand, the administrative law judge must consider all of the medical evidence and determine whether or not the evidence supports a finding that the miner's emphysema was attributable in part to his coal dust exposure, *i.e.*, determine whether the miner's emphysema constitutes a diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

consideration.⁹

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁹Because no evidence of record supports a finding that pneumoconiosis was the cause of the miner's death, claimant is precluded from establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1). Moreover, because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that claimant is precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3); Decision and Order at 6.