

BRB No. 06-0779 BLA

BUNA HUNT)	
(Widow of BENNETT HUNT))	
)	
Claimant)	
)	
v.)	
)	
KENTLAND ELKHORN COAL)	
CORPORATION)	DATE ISSUED: 07/31/2007
)	
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 – Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand – Awarding Benefits (2000-BLA-0939) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) rendered on a survivor's claim¹ filed pursuant to the provisions of Title IV of the

¹ Claimant is the widow of the miner, who died on October 1, 1999. Director's Exhibit 28. Claimant filed her survivor's claim on October 21, 1999. Director's Exhibit 21.

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. In his prior Decision and Order on the miner's² and survivor's claims, the administrative law judge credited the miner with at least thirty-six years of coal mine employment. Addressing the miner's claim, the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis. The administrative law judge determined that the evidence demonstrated a material change in the miner's condition pursuant to 20 C.F.R. §725.309 and therefore considered the merits of entitlement on the miner's claim. The administrative law judge found that the miner established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). In addition, the administrative law judge determined that the evidence is sufficient to establish that the miner was totally disabled due to a respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b). However, the administrative law judge found that the evidence is insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge denied benefits on the miner's claim. Turning to the survivor's claim, the administrative law judge found the evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Therefore, the administrative law judge awarded benefits on the survivor's claim.

Pursuant to employer's appeal and claimant's cross-appeal, the Board affirmed the administrative law judge's denial of benefits in the miner's claim, holding that the administrative law judge reasonably found the evidence insufficient to establish that the miner's total disability was due to pneumoconiosis. *Hunt v. Kentland Elkhorn Coal Corp.*, BRB Nos. 03-0644 BLA and 03-0644 BLA-A (Mar. 31, 2004)(Hall, J., concurring in part and dissenting in part)(unpub.). The Board vacated the administrative law judge's finding that the medical evidence was sufficient to establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c). Consequently, the Board remanded the case to the administrative law judge for further consideration of the survivor's claim. *Id.* Claimant appealed the denial of the miner's claim to the United States Court of Appeals

² The miner filed his first application for benefits on June 29, 1973, which was denied by the claims examiner on July 22, 1980. Director's Exhibit 20. No further action was taken on this claim. On March 18, 1985, the miner filed another claim for benefits, which the district director denied. The miner appealed to the Board, and subsequently requested that his appeal be dismissed for development of a modification request. On July 27, 1989, the Board granted the miner's motion to dismiss his appeal. Director's Exhibit 20. On June 15, 1999, the miner filed a new application for benefits. Director's Exhibit 1.

for the Sixth Circuit,³ which affirmed the administrative law judge's denial of benefits. *Hunt v. Kentland Elkhorn Coal Corp.*, 159 Fed.Appx. 659, 2005 WL 3334516 (6th Cir. 2005)(unpublished).

On remand of the survivor's claim, the administrative law judge found the evidence established that pneumoconiosis hastened the miner's death as it made "life prolonging bypass surgery" not a viable option. Decision and Order on Remand at 5. Therefore, the administrative law judge found that the medical evidence was sufficient to establish that the miner's pneumoconiosis was a substantially contributing factor in the miner's death pursuant to Section 718.205(c). Accordingly, the administrative law judge awarded benefits in the survivor's claim, commencing October 1, 1999.

On appeal, employer challenges the administrative law judge's award of survivor's benefits, arguing that the administrative law judge erred in crediting the opinions of Drs. Casey and Dennis over the opinions of employer's physicians. In addition, employer contends that the administrative law judge erred in not adequately explaining his decision to accord little weight to the opinions of employer's physicians, specifically, his finding that Dr. Fino's opinion was entitled to little weight because it was "conclusory." Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive response 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. See 20 C.F.R. §§718.202(a), 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). Pneumoconiosis is a "substantially contributing

³ Because the miner's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibits 2, 20, 24; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(2); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Pursuant to Section 718.205(c), the administrative law judge determined that the dispositive issue, as provided for in Dr. Casey's opinion,⁴ was that the miner's pneumoconiosis hastened his death because it prevented the miner from having life prolonging coronary bypass grafting surgery.⁵ In the Board's previous Decision and Order, the majority affirmed the administrative law judge's finding that the medical opinion of Dr.

⁴ Dr. Casey, in a 1999 letter, stated:

When that patient had his MI in April of 1999, he was found on cardiac catheterization to have multiple vessel coronary artery disease, severe left ventricular dysfunction, pulmonary hypertension. At that time the cardiothoracic surgeon recommended a coronary artery bypass grafting. However, this could not be done due to the patient's lung status in that his coal worker's [sic] pneumoconiosis was so severe that they were afraid he would not be able to tolerate the surgery, would never come off of the ventilator, or would have a large risk of mortality during surgery due to his lung disease. It is felt that much of his pulmonary hypertension was due to the coal worker's [sic] pneumoconiosis as well.

Claimant's Exhibit 1. Dr. Casey reiterated this opinion in her deposition. Claimant's Exhibit 1 at 12-13.

⁵ In his 2003 Decision and Order, that administrative law judge stated:

I find that Miner's death was hastened by pneumoconiosis. The record establishes that the primary cause of Miner's death was coronary artery disease. Miner's pneumoconiosis contributed to his diminished pulmonary capacity, which prevented him from being able to undergo coronary artery bypass surgery; a procedure that would have prolonged his life. Therefore, pneumoconiosis hastened Miner's death.

2003 Decision and Order at 39.

Casey, as supported by the treatment records of Dr. Coyer,⁶ was entitled to significant probative weight. *Hunt*, slip op. at 11. In addition, the Board affirmed that Dr. Casey's opinion was generally supported by the opinion of Dr. Dennis, that pneumoconiosis hastened the miner's death. *Id.* However, the Board vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to weigh the contrary evidence with these medical opinions, in order to determine whether claimant has established that the miner's pneumoconiosis was a substantially contributing cause of his death pursuant to Section 718.205(c). *Hunt*, slip op. at 12.

On remand, the administrative law judge incorporated by reference the medical evidence from his 2003 Decision and Order,⁷ specifically his determination that the opinions of Drs. Casey, Dennis, Branscomb, Broudy, Fino and Repsher were entitled to probative weight. He also noted that the Board affirmed his findings with regard to Dr. Casey's opinion and did not disturb his findings with regard to the other opinions. Decision and Order on Remand at 3.

Reweighting the medical opinions as instructed by the Board, the administrative law judge found that, while Drs. Branscomb, Broudy, Repsher, Caffrey and Fino all opined that the miner's death was due to his heart condition, only Dr. Fino directly addressed Dr. Casey's conclusion that the miner was not a viable candidate for bypass surgery. Decision and Order on Remand at 4. The administrative law judge found that Dr. Fino's conclusion, that the miner would have been a candidate for such bypass surgery despite the risks stated by Dr. Casey, was not convincing. *Id.* Consequently, the administrative law judge found

⁶ Dr. Coyer was one of the miner's treating physicians. During one of the miner's hospitalizations, Dr. Coyer stated:

Optimally this patient needs multi vessel coronary bypass surgery and mitral valve replacement. However, given this patient's left ventricular dysfunction with elevated left ventricular end diastolic pressure at rest and low cardiac index and given his severe pulmonary hypertension his risk is likely 25% or greater.

Director's Exhibit 8.

⁷ The administrative law judge mistakenly refers to his prior Decision and Order, issued on January 23, 2003, as his 2000 Decision and Order. Decision and Order on Remand at 3.

that while the opinions of Drs. Caffrey, Fino, Branscomb, Broudy Repsher, Dennis and Casey were all well-reasoned and well-documented, Dr. Casey's opinion, as supported by the opinions of Drs. Dennis and Coyer, was entitled to substantially more weight. Decision and Order on Remand at 5. The administrative law judge determined that because of Dr. Casey's familiarity with the miner and also the persuasiveness of her opinion, she provided the most convincing opinion regarding whether pneumoconiosis hastened the miner's death. Decision and Order on Remand at 5. Accordingly, the administrative law judge again found that the weight of the medical opinion evidence establishes that pneumoconiosis hastened the miner's death because it prevented life prolonging bypass graft surgery and, therefore, his death was significantly related to pneumoconiosis. *Id.*

Upon further reflection of the holdings in the Board's previous Decision and Order, as well as our review of the administrative law judge's current decision, we hold that the Dr. Casey's opinion is insufficient, as a matter of law, to establish that the miner's pneumoconiosis is a substantially contributing cause of the miner's death. Accordingly, we vacate the administrative law judge's findings under Section 718.205(c).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, states that "[l]egal pneumoconiosis only 'hastens' a death 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, 22 BLR 2-625, 2-655 (6th Cir. 2003). Consequently, claimant must establish that the miner's pneumoconiosis affected his medical condition, which resulted in a specifically delineated effect on the miner's ultimate demise. It is not sufficient to show that the miner's pneumoconiosis made him weaker, which would result in the miner being less resistant to another trauma to his health. *Williams*, 338 F.3d at 518, 22 BLR at 2-655.

In this case, Dr. Casey stated that following the miner's myocardial infarction in April 1999, the cardiothoracic surgeon recommended that the miner undergo a coronary artery bypass grafting. Claimant's Exhibit 1. However, it was determined, at that time, that the miner could not tolerate the surgery or that there was an increased risk of mortality because of his lung status. Director's Exhibit 8; Claimant's Exhibit 1. The miner died on October 1, 1999 as a result of an acute myocardial infarction, due to severe diffuse coronary artery disease.⁸ Director's Exhibit 28. Subsequently, in a letter dated November 22, 1999, Dr. Casey opined that because of the severity of the miner's respiratory condition, it was determined that the miner could not tolerate a coronary artery

⁸ The miner's death certificate also listed chronic obstructive pulmonary disease and prior myocardial infarctions as other significant conditions. Director's Exhibit 28.

bypass surgery and, therefore, Dr. Casey concluded that the miner's coal workers' pneumoconiosis was a contributing factor in his death. Claimant's Exhibit 1.

While Dr. Casey sets forth the process by which she opined that the miner's pneumoconiosis hastened the miner's death by preventing life prolonging bypass graft surgery, her opinion does not establish how this resulted in the miner's life being shortened by an estimable amount. *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Consequently, we hold that Dr. Casey's opinion, that the miner's pneumoconiosis prevented life prolonging bypass graft surgery, is insufficient, as a matter of law to establish that pneumoconiosis hastened the miner's death. *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Accordingly, as Dr. Casey's opinion was the medical opinion accorded determinative weight and relied upon by the administrative law judge, we vacate his finding that claimant established that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c), but remand the case for the administrative law judge to consider this issue in light of the opinion of Dr. Dennis.

On remand, the administrative law judge must consider whether Dr. Dennis's opinion, that the miner's death was hastened by the fact that the miner had significant anthracosilicosis, cor pulmonale and other findings of coal workers' pneumoconiosis, is sufficient to establish entitlement to benefits.⁹ 20 C.F.R. §718.205(c)(2), (c)(5); Claimant's Exhibit 2; *Williams*, 338 F.3d at 518, 22 BLR at 2-655; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). In particular, the administrative law judge must weigh the opinion of Dr. Dennis, that "this patient had a myocardial infarction, subsequently died and the death was hastened by the fact that the patient had significant anthracosilicosis, cor pulmonale and also microscopic findings compatible with anthracosilicosis, coal workers' pneumoconiosis," Claimant's Exhibit 2,¹⁰ with the

⁹ The Board, in its prior decision, rejected employer's contention that the opinion of Dr. Dennis was not credible because of his diagnosis of complicated pneumoconiosis. The Board held that, contrary to employer's contention, the administrative law judge did not reject Dr. Dennis's opinion but rather found that his diagnosis of complicated pneumoconiosis failed to meet the regulatory standard required for a diagnosis of complicated pneumoconiosis. *Hunt*, slip op. at 11; 2003 Decision and Order at 23; Claimant's Exhibit 2. Consequently, the administrative law judge found that complicated pneumoconiosis was not established pursuant to 20 C.F.R. §718.304.

¹⁰ In his deposition testimony, Dr. Dennis further explained:

I can certainly state that he had cardiovascular disease and also pulmonary disease and that they were concomitant. In

contrary opinions of record, that the miner's pneumoconiosis did not contribute to his death. We therefore remand the case for the administrative law judge to weigh all of the relevant evidence of record pursuant to Section 718.205(c)(2), (c)(5).

However, in remanding this case to the administrative law judge, we are troubled by the language used by the administrative law judge in his statements regarding the opinion of Dr. Fino, as well as his statements regarding the opinions of the other physicians submitted by employer. Decision and Order on Remand at 4 and n.3. While the administrative law judge states that his comments regarding Dr. Fino, or his opinion, do not undermine the probative value of this evidence or otherwise influence his weighing of the evidence, nonetheless, they raise the specter of bias in this case. *Id.* A finding of bias, or that the administrative law judge's opinion shows a lack of impartiality in the weighing of the relevant evidence, is not to be made lightly. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992); *Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568, 672 (1984). Herein, however, the language used by the administrative law judge in his commentary regarding Dr. Fino's opinion lends itself to just such an interpretation. Decision and Order on Remand at 4 n.3. Consequently, in order to avoid the appearance of bias or impropriety in the adjudication of this case, we remand this case to the Office of Administrative Law Judges for reassignment to a different administrative law judge. 20 C.F.R. §715.352; *c.f. Cochran*, 16 BLR at 1-107; *Zamora*, 7 BLR at 1-672.

expression, it certainly appears that the pulmonary problems present contributed to his demise. The fact that one has a myocardial infarction in this day and age and recovery is expected in a great majority of cases unless there are complications that are contributory and add to and/or become an additive cause of death, and he certainly had cardiovascular disease. There's no denial of that. But his reaction to an insult to the coronary circulation was hastened and caused even further problems with his pulmonary disease. Yes, it contributed to his death.

Claimant's Exhibit 2 at 13.

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is vacated and the case is remanded to the Office of Administrative Law Judges for reassignment to a different administrative law judge.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the opinion of the majority to vacate the administrative law judge's award of survivor's benefits. I disagree with the majority's holding that the opinion of Dr. Casey is insufficient as a matter of law to support a finding that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c).

Section 718.205(c)(5) provides that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it "hastens the miner's death." 20 C.F.R. §718.205(c)(5). As the majority sets forth, the Sixth Circuit court interprets this to mean that claimant must establish that, through a specifically defined process, pneumoconiosis reduced the miner's life by an estimable time. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). Herein, my colleagues take a very narrow interpretation of this definition by holding that Dr. Casey's opinion, that

the miner's pneumoconiosis prevented life prolonging bypass graft surgery, does not satisfy this standard. I disagree. Dr. Casey's opinion provides a sufficiently explained process from which she concludes that pneumoconiosis hastened the miner's ultimate demise. Consequently, by adopting such a narrow interpretation of Section 718.205(c)(5), the majority is thwarting the beneficent purpose of the Act. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-25 (6th Cir. 1993); *Southard v. Director, OWCP*, 732 F.2d 66, 71, 6 BLR 2-26, 2-34 (6th Cir. 1984)("[t]he Act is remedial in nature, and it, must be liberally construed to include the largest number of miners as benefit recipients."). While my colleagues remand this case for further consideration of whether the opinion of Dr. Dennis is supportive of a finding that pneumoconiosis hastened the miner's death, I would affirm the administrative law judge's findings.

In his Decision and Order on Remand, the administrative law judge followed the Board's remand instructions and fully explained his rationale for finding the opinion of Dr. Casey entitled to determinative weight. The administrative law judge reasonably found that Dr. Casey's opinion was not only supported by her extensive knowledge of the miner's medical and treatment history, but also was the most persuasive opinion of record because her diagnosis was supported by her actions. Decision and Order on Remand at 4, 5; *Williams*, 338 F.3d 501, 22 BLR 2-625.

Similarly, the administrative law judge provided a proper basis for according less weight to the contrary opinions of record. While finding all the medical opinions of record were well-reasoned and well-documented, the administrative law judge nonetheless reasonably accorded little weight to the opinions of Drs. Broudy, Branscomb, Caffrey and Repsher because these opinions did not address the issue found by the administrative law judge to be dispositive, that is, because of the miner's respiratory condition he was not a viable candidate for a life prolonging cardiac bypass. Decision and Order on Remand at 4; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Moreover, the administrative law judge reasonably found the opinion of Dr. Fino, the only contrary medical opinion to address the dispositive issue, to be entitled to less weight than Dr. Casey's opinion, based on his determination that Dr. Fino's conclusion, that cardiac bypass surgery could have been performed, even with the increased risks noted by Dr. Casey, was not sufficiently convincing. Decision and Order on Remand at 4 n.3; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984).

The administrative law judge, as the trier-of-fact, is charged with the responsibility of weighing the conflicting evidence and determining the credibility of such evidence. *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). In this case, the administrative law judge provided a rational interpretation of Section 718.205(c)(5), considered all of the relevant evidence and provided rationale bases

for according greater weight to the opinion of Dr. Casey, that the miner's pneumoconiosis hastened his death by preventing the miner from undergoing life prolonging bypass graft surgery. Accordingly, I would affirm the administrative law judge's credibility determinations pursuant to Section 718.205(c) and the award of benefits.

BETTY JEAN HALL
Administrative Appeals Judge