

BRB No. 07-0888 BLA

L.N.)	
(Widow of A.N.))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 07/30/2008
)	
WESTMORELAND COAL COMPANY)	
)	
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 Denying Survivor's Benefits on Remand of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Kathy L. Synder (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Survivor's Benefits on Remand (2003-BLA-06065) of Administrative Law Judge William S. Colwell rendered 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 was

¹ Claimant, L.N., is the widow of the deceased miner, A.N., who died on September 12, 2001. Survivor's Director's Exhibit (SDX) 1.

before the Board previously and was remanded for further consideration as to whether claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).² [A.N.] v. *Westmoreland Coal Co.*, BRB Nos. 05-0126 BLA/A (Sept. 30, 2005) (unpub.) On remand, the case was reassigned to the administrative law judge who reviewed all of the evidence *de novo* on this issue. The administrative law judge determined that while the miner suffered from simple coal workers' pneumoconiosis, the weight of the more persuasive medical opinion evidence established that the miner's death was neither caused nor hastened by pneumoconiosis. Accordingly, benefits were denied.

Claimant appeals, asserting that the administrative law judge erred in failing to credit the opinions of Dr. Gale, the autopsy prosector, and Dr. Metzger, the miner's treating cardiologist, that pneumoconiosis contributed to the miner's death. Employer responds, urging affirmance of the denial of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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,

² This case involves claimant's request for modification of the denial of the miner's 1997 duplicate claim, which was consolidated with claimant's survivor's claim filed on October 26, 2001. The procedural history of the case is set forth in the Board's prior decision, [A.N.] v. *Westmoreland Coal Co.*, BRB Nos. 05-0126 BLA/A, slip op. at 2 n.2 (Sept. 30, 2005) (unpub.) The Board previously affirmed the findings of Administrative Law Judge Mollie W. Neal that claimant failed to establish a basis for modification in the miner's claim because the evidence was insufficient to establish that the miner had complicated pneumoconiosis that would entitled him to a presumption that he was totally disabled due to pneumoconiosis, and was insufficient to establish total disability under any of the subsections of 20 C.F.R. §718.204(b)(2)(i)-(iv). *Id.* at 3-6. Thus, the Board affirmed the denial of benefits in the miner's claim. *Id.* at 6. With respect to the survivor's claim, however, the Board vacated Judge Neal's award of benefits because she failed to properly explain her credibility determinations pursuant to 20 C.F.R. §718.205(c). *Id.* at 6-7. Claimant appealed to the United States Court of Appeals for the Fourth Circuit and the court affirmed the Board's holding with respect to the miner's claim, but dismissed claimant's appeal of the Board's decision with regard to the survivor's claim for lack of jurisdiction. [A.N.] v. *Westmoreland Coal Co.*, No. 05-2234 (4th Cir. June 30, 2006) (unpub.). On remand, because Judge Neal had retired and, therefore, was no longer available to hear the case, it was reassigned to Administrative Law Judge William S. Colwell (the administrative law judge). On June 26, 2007, the administrative law judge issued his Decision and Order Denying Survivor's Benefits on Remand, which is the subject of this appeal.

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).

To establish entitlement to survivor’s benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner’s death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor’s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner’s death, pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The issue presented in this case is whether pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or whether pneumoconiosis hastened the miner’s death. 20 C.F.R. §718.205(c)(2), (5). The record indicates that the miner developed severe respiratory symptoms prior to his death and was diagnosed with several conditions, which included chronic renal insufficiency, chronic atrial fibrillation, pulmonary edema, cor pulmonale, coal workers’ pneumoconiosis, congestive heart failure, anemia and chronic obstructive pulmonary disease (COPD). Survivor Claim Director’s Exhibits (SDX) 9, 33. The miner died on September 12, 2001. Dr. Tomski signed the death certificate, indicating that the miner’s death was due to acute respiratory failure, chronic respiratory failure, coal worker’s pneumoconiosis and COPD. SDX 7.

Dr. Gale performed the autopsy and prepared a preliminary report on September 13, 2001. SDX 9. Dr. Gale noted that the miner had a history of COPD and cor pulmonale. *Id.* On gross-examination, he found anthracosilicosis, pleural fibrosis, pulmonary hemosiderosis, early bronchopneumonia, and probable complicated pneumoconiosis (pending microscopic examination). *Id.* In a report issued on June 20, 2002, following his microscopic examination of the lungs, he stated that the miner had mixed dust pneumoconiosis which was “one of the most severe cases of pneumoconiosis [he] had seen.” SDX 29. Dr. Gale opined that pneumoconiosis significantly contributed to, and hastened the miner’s death. *Id.*

On September 3, 2001, Dr. Leslie indicated that he had also reviewed sections of the miner's lungs, at the request of Dr. Gale. Dr. Leslie diagnosed early bronchopneumonia, mixed dust pneumoconiosis with anthrasilicosis and pleural fibrosis and "non-specific hemosiderin deposition in the lung parenchyma (pulmonary hemosiderosis) possibly related to the [miner's] heart failure." SDX 8, 29.

The miner's treating cardiologist, Dr. Metzger, prepared a report on July 7, 2002, stating that the miner's respiratory symptoms and his death were not related to cardiac disease. SDX 33. Dr. Metzger specifically noted that the miner had a normal stress test in September 2000 and that the miner underwent an echocardiogram on August 28, 2001, less than one month prior to his death, which showed normal left ventricular function and no evidence of left ventricular hypertrophy. *Id.* He opined that pulmonary disease significantly contributed to the miner's death. *Id.*

Dr. Naeye reviewed the autopsy slides and certain medical records. Dr. Naeye diagnosed moderately severe to severe pneumoconiosis, SDX 10, and opined that the very large burden of hemosiderin in the miner's lungs "only happens when somebody had really severe heart failure over a long period of time." SDX 35. Dr. Naeye opined that the miner's heart problems did not stem from cor pulmonale but were attributable to arteriosclerotic heart disease caused by smoking and hypertension. *Id.* Dr. Naeye attributed the miner's death to pneumonia, resulting from a combination of heart disease, kidney failure and diabetes. *Id.* Based on his review of the miner's pulmonary function and arterial blood gas testing, Dr. Naeye opined that pneumoconiosis would have had only an "insignificant" role in the miner's death since the miner suffered from only a mild respiratory impairment. *Id.*

Dr. Oesterling reviewed the autopsy slides and opined that the miner died as a result of a "severe coronary artery disease and a failing left heart" unrelated to coal dust exposure. SDX 11. Because Dr. Oesterling found that the miner's objective test results showed that he had only minimal, if any, lifetime respiratory impairment, Dr. Oesterling concluded that the miner's moderately severe coal workers' pneumoconiosis was insufficient to have caused or hastened the miner's death. *Id.*

Dr. Caffrey reviewed the autopsy protocol and slides and opined that there were "focal areas of acute bronchopneumonia in both lungs," a moderate degree of centrilobular emphysema, acute passive congestion, and hemosiderin-laden macrophages in many of the alveoli. Employer's Exhibit 1. He diagnosed bilateral acute bronchopneumonia, bilateral hemosiderosis, bilateral fibrosis, mild to moderate mixed-dust pneumoconiosis, and chronic bronchitis. *Id.* Dr. Caffrey opined that the miner's death was due to congestive heart failure as evidenced by the hemosiderin present in the miner's lungs. *Id.* Dr. Caffrey noted that the miner retained the respiratory capacity to perform the work of a coal miner as late as 1998, and that his respiratory symptoms

coincided with the development of significant heart disease. *Id.* Dr. Caffrey opined that the miner's death was due to complications from severe heart disease and stated that pneumoconiosis did not contribute to the miner's heart disease, nor did it hasten the miner's death. *Id.*

Drs. Dahhan, Morgan, Rosenberg and Castle reviewed the miner's medical records. Dr. Dahhan opined that a pulmonary function study conducted on November 22, 2000, showed that the miner had only a slight respiratory impairment during his lifetime. Employer's Exhibit 8. Dr. Dahhan did not offer an opinion as to the cause of the miner's death, although he noted that the accumulation of hemosiderin was a condition unrelated to coal dust exposure or coal workers' pneumoconiosis. *Id.*

Dr. Morgan specifically opined that the miner's heart condition was unrelated to any respiratory disease. Employer's Exhibit 4. Dr. Morgan explained that the miner had a mild to moderate respiratory impairment due to obesity and smoking during his lifetime, but that this impairment "in no way" affected his life. *Id.* Dr. Morgan opined that pneumoconiosis played no role in the miner's death. *Id.*

Dr. Rosenberg similarly opined that the miner suffered from congestive heart failure arising from an "occult case of constrictive pericarditis." Employer's Exhibit 6. In support of his diagnosis, he referenced the autopsy finding of "dense calcified plaque formation involving 65-70 [percent] of the pericardium" and opined that "this type of constriction around the heart is the only explanation why he had congestive heart failure without evidence of either right or left-sided dysfunction." *Id.* Dr. Rosenberg stated that constrictive pericarditis caused the miner to have atrial fibrillation and passive congestion leading to hemosiderin development. He opined that while this condition had not been diagnosed previously, it would have been discovered during the course of a cardiac catheterization, if one had been performed. *Id.* According to Dr. Rosenberg, the miner's death was neither caused nor hastened by pneumoconiosis, since the objective evidence showed that pneumoconiosis did not result in any significant respiratory impairment during the miner's lifetime. *Id.*

Finally, Dr. Castle prepared a report, concurred with Dr. Rosenberg's diagnosis of constrictive pericarditis as a "unifying concept to indicate the type of cardiac problem" that the miner suffered. Employer's Exhibit 9. Dr. Castle stated that it was "very likely" that the miner's respiratory symptoms were related to his heart disease and not pneumoconiosis. *Id.* Dr. Castle found no evidence to support a diagnosis of cor pulmonale and concluded that, since the miner had no significant respiratory impairment prior to his death, it was his opinion that pneumoconiosis did not hasten the miner's death from heart disease. *Id.*

Under Section 718.205(c), the administrative law judge credited Dr. Gale's opinion that the miner had severe pneumoconiosis, noting that it was "not inconsistent" with the diagnoses of moderately severe to severe pneumoconiosis rendered by the other pathologists of record.³ Decision and Order on Remand at 28. The administrative law judge also found that the miner suffered from a significant cardiac condition at the time of his death, noting that it was "undisputed on this record that hemosiderosis, the product of 'heart failure cells' was present on autopsy." Decision and Order at 29. The administrative law judge specifically credited Dr. Rosenberg's opinion, that the miner suffered from constrictive pericarditis, which condition accounted for the miner's respiratory symptoms and history of atrial fibrillation. After having determined that the miner had severe pneumoconiosis and a cardiac condition, the administrative law judge considered whether pneumoconiosis contributed to or hastened the miner's death. In weighing the conflicting opinions on this issue, the administrative law judge credited the opinions of Drs. Naeye, Oesterling, Caffrey, Tomashefski, Dahhan, Rosenberg, and Castle, that the miner's death was not hastened by pneumoconiosis, over the contrary opinions of Drs. Gale and Metzger, that pneumoconiosis substantially contributed to the miner's death. *Id* at 31.

On appeal, claimant contends that the administrative law judge failed to properly consider and weigh the evidence regarding heart disease as a contributing factor in the miner's death. Claimant maintains that employer's experts are not credible in concluding that the miner had a heart condition, other than cor pulmonale. Claimant asserts that she satisfied her burden of establishing that the miner's death was hastened by pneumoconiosis since the miner's medical and treatment records include diagnoses of cor pulmonale and complicated pneumoconiosis to substantiate the severity of his respiratory disease. Claimant's Brief at 4. We disagree.

The Board previously affirmed the findings by Administrative Law Judge Mollie W. Neal that the evidence of record was insufficient to establish either that the miner had cor pulmonale or that he suffered from complicated pneumoconiosis. [*L.N.*], BRB Nos. 05-0126 BLA/A, slip op. at 6. Because claimant has not shown that the Board's holding was clearly erroneous, and she has not set forth any other valid exception to the law of the case doctrine,⁴ we decline to disturb our affirmance of Judge Neal's findings. *See*

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner's had severe pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The doctrine of "the law of the case" is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter; therefore, it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case. *See Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 n.4 (2000) (*en banc*) (Hall, J. and Nelson, J., concurring and dissenting).

U.S. v. Aramony, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 (2000) (*en banc*) (Hall, C.J., and Nelson, J., concurring and dissenting); *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Furthermore, contrary to claimant's assertion, the administrative law judge properly considered Dr. Metzger's opinion that the miner had cor pulmonale and that his respiratory symptoms prior to death were due to pneumoconiosis and not a cardiac condition. The administrative law judge, however, found Dr. Metzger's opinion less persuasive in view of the opinion of Dr. Rosenberg. As noted by the administrative law judge, there was a split in the medical opinions as to whether the miner's death was due to a heart condition or a respiratory condition. The administrative law judge permissibly credited Dr. Rosenberg's opinion on this issue and explained:

The undersigned is persuaded that there was sufficient evidence on autopsy that the miner suffered from cardiac failure. Dr. Rosenberg's diagnosis of constrictive pericarditis is supported by medical data of record and plausibly accounts for certain normal cardiac testing conducted by Dr. Metzger and other physicians during the miner's lifetime as well as findings of hemosiderin and transudate pleural effusion on autopsy, which are the products of cardiac failure. Dr. Rosenberg [also] noted that, had a cardiac catheterization been performed during the miner's lifetime, then "equalization of the intracardiac pressures would have been found, establishing the diagnosis of chronic constrictive pericarditis."

Decision and Order on Remand at 29. Because the weight to be accorded the evidence and determinations as to the credibility of the medical experts are within the discretion of the trier-of-fact, we affirm the administrative law judge's crediting of Dr. Rosenberg's opinion as to whether the miner suffered from heart disease. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Furthermore, we reject claimant's contention that the administrative law judge erred in failing to give proper weight to the opinion of Dr. Gale, based on his status as the autopsy prosector, and to Dr. Metzger, based on his status as the miner's treating physician. As we previously recognized in the prior appeal, the opinion of the autopsy

prosector should not be credited solely because he was the only physician to conduct a gross examination of the lungs. [*L.N.*], BRB No. 05-0126 BLA/A, slip op. at 6; *see Sparks*, 213 F.3d at 190, 22 BLR at 2-259. Therefore, we reject claimant's assertion that the administrative law judge was required to give Dr. Gale's opinion deferential weight.

Similarly, the administrative law judge was not required to automatically credit the opinion of claimant's treating cardiologist, Dr. Metzger. The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for considering a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5); *see also Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003) (the opinions of treating physicians get the deference they deserve based on their power to persuade).

In this case, the administrative law judge properly considered the documentation and reasoning underlying the opinions of all of the record physicians. The administrative law judge found that the opinions of Drs. Gale and Metzger, that the miner's death was hastened by pneumoconiosis, to be outweighed by the better reasoned opinions provided by Drs. Naeye, Oesterling, Tomashefski, Rosenberg, and Castle, as to why the miner's death was not hastened by pneumoconiosis. The administrative law judge explained:

Drs. Naeye, Oesterling, Tomashefski, Rosenberg, and Castle reasonably state that, in this case the very mild respiratory impairment stemming from pneumoconiosis would not have caused a strain on the miner's heart; rather, respiratory symptoms of shortness of breath and dyspnea stemmed from the miner's cardiac problems.

Decision and Order on Remand at 30. Insofar as the administrative law judge found that the opinions of Drs. Naeye, Oesterling, Tomashefski, Rosenberg, and Castle were better supported by the objective evidence of record, including the non-qualifying pulmonary function studies and arterial blood gas studies, and he also determined that these physicians based "their opinions on a more complete review of the medical data of

record, than those of Drs. Gale, Metzger and Tomski,” we affirm his finding that the miner’s death was not hastened by pneumoconiosis. Decision and Order on Remand at 31; see *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-151.

Although claimant cites to evidence to support her contention that the miner’s death was hastened by pneumoconiosis, her arguments on appeal amount to little more than a request that the Board reweigh the evidence. which we are not authorized to do. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge properly set forth the bases for his credibility determinations, we affirm his finding that claimant failed to satisfy her burden to establish the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). Decision and Order on Remand at 31. Thus, we affirm the administrative law judge’s denial of benefits in the survivor’s claim.

Accordingly, the Decision and Order Denying Survivor’s Benefits on Remand of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge