

BRB No. 99-0420 BLA

LELIA NAPIER	)	
(Administratrix of the Estate of JOHN	)	
NAPIER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Gary W. Napier (Napier, Reece & Associates), London, Kentucky, for claimant.

Jeffrey S. Goldberg (Henry L. Solano, 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 McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0661) of Administrative Law Judge Donald W. Mosser denying waiver of recovery of the overpayment 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).<sup>1</sup> This case is before the Board for the second time. The record reflects an overpayment of \$20,848.20, Director's Exhibits 6, 9-10,

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<sup>1</sup> Claimant is the surviving spouse of the miner, John Napier, who died on November 23, 1988, Director's Exhibit 16.

19.<sup>2</sup> Originally, in a Decision and Order issued on February 28, 1990, the administrative law judge accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant was without fault in the creation of the overpayment, Director's

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<sup>2</sup> The miner originally filed a claim on September 22, 1978, Director's Exhibit 1, and was awarded interim benefits on September 17, 1980, Director's Exhibit 2. Subsequently, in a Decision and Order issued on August 11, 1983, Administrative Law Judge Robert L. Hillyard adjudicated the claim pursuant to the interim presumption at 20 C.F.R. §727.203, Director's Exhibit 4. Judge Hillyard found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(2)-(4), but further found that rebuttal of the interim presumption was established pursuant to 20 C.F.R. §727.203(b)(3)-(4) and that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied.

Claimant appealed and the Board affirmed Judge Hillyard's finding that rebuttal of the interim presumption was established pursuant to Section 727.203(b)(4), *i.e.*, that the evidence established that the miner did not have pneumoconiosis, Director's Exhibit 5. *Napier v. Peabody Coal Co.*, BRB No. 83-2146 BLA (Mar. 27, 1987)(unpub.). Consequently, the miner was notified of an overpayment by the Department of Labor, *see* 20 C.F.R. §725.542, Director's Exhibit 10.

Exhibit 11. In relevant part, the administrative law judge rejected claimant's contention that recovery of the overpayment would defeat the purpose of the Act because the miner's death certificate and autopsy evidence established the existence of pneumoconiosis and, therefore, the miner's entitlement to benefits. The administrative law judge held that he had no authority to question the denial of the miner's claim at issue and found that claimant failed to establish that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. *See* 20 C.F.R. §§725.542, 725.543, 410.461a, 410.561b, 410.561c.<sup>3</sup> Accordingly, the administrative law judge denied claimant's request for waiver of recovery of the overpayment.

Claimant appealed the administrative law judge's denial of claimant's request for waiver of recovery of the overpayment, *see* Director's Exhibit 16. On appeal, the Board held that the miner's death certificate and autopsy evidence were not relevant to the overpayment issue which arose out of the finally denied miner's claim, Director's Exhibit 15. *Napier v. Director, OWCP*, BRB No. 90-1009 BLA (June 26, 1992)(unpub.). Ultimately, the Board affirmed the administrative law judge's denial of claimant's request for waiver of recovery of the overpayment.

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<sup>3</sup> The regulations provide that the "standards for determining the applicability of the criteria listed in [20 C.F.R.] §725.542 shall be the same as those applied by the Social Security Administration under [20 C.F.R.] §§410.561-410.561h...." 20 C.F.R. §725.543.

Claimant appealed the Board's Decision and Order affirming the administrative law judge's denial of claimant's request for waiver of recovery of the overpayment to the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. The court held that the administrative law judge and the Board erred in relying on the doctrine of *res judicata* to preclude consideration of the autopsy evidence offered by claimant to show that the miner did suffer from pneumoconiosis, in order to "justify retention of the interim benefits on the basis of evidence, not available when the original miner's claim was denied, indicating that the claim was meritorious," *see Napier v. Director, OWCP*, 999 F.2d 1032, 1033, 1035, 17 BLR 2-186, 2-187, 2-191 (6th Cir. 1993). Thus, the Court vacated the Board's Decision and Order affirming the administrative law judge's denial of claimant's request for waiver of recovery of the overpayment and remanded the case, directing "that the question of recoupment be reexamined in light of the post mortem evidence of pneumoconiosis," *see Napier*, 999 F.2d at 1033, 17 BLR at 2-187.<sup>4</sup>

On remand, the administrative law judge stated that, in accordance with the court's decision, he was to waive recovery of the overpayment if the autopsy evidence established that the miner had pneumoconiosis and, consequently, established that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. However, the administrative law judge found that the autopsy evidence was insufficient to establish the existence of pneumoconiosis and therefore, did not establish that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. Accordingly, the administrative law judge denied waiver of recovery of the overpayment. On appeal, claimant contends that the administrative law judge erred in finding that the autopsy evidence was insufficient to establish the existence of pneumoconiosis. The Director responds, urging that the administrative law judge's Decision and Order denying waiver of recovery of the overpayment be affirmed.

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

The administrative law judge considered the autopsy evidence from Dr. Dahlenburg,

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<sup>4</sup> The court expressed no opinion as to whether the autopsy evidence established that the miner had pneumoconiosis and/or was entitled to benefits, *see Napier*, 999 F.2d at 1036 n. 5, 1037, 17 BLR at 2-192 n. 5, 2-193.

Claimant's Exhibit 1, who diagnosed "anthracosilicosis of lungs and pleura not inconsistent with simple coal worker's pneumoconiosis" and "pigmentary changes not inconsistent with simple coal worker's pneumoconiosis." While the administrative law judge found that Dr. Dahlenburg's diagnosis fit the definition of pneumoconiosis as defined by the Act and the regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201; 20 C.F.R. §727.202, the administrative law judge found the diagnosis "questionable," because neither the clinical summary nor the microscopic findings from the autopsy report indicate anthracosilicosis, but only "small amounts of black carbonaceous pigment in the subpleural lymphatics," *see* Claimant's Exhibit 1. Decision and Order at 9-10. The administrative law judge noted that an autopsy finding of anthracotic pigment is not sufficient, by itself, to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Thus, the administrative law judge questioned whether Dr. Dahlenburg's autopsy findings supported a finding of pneumoconiosis. Consequently, the administrative law judge found that whether the miner had pneumoconiosis at his death was questionable and concluded that the autopsy evidence did not establish that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.

Claimant contends that the administrative law judge erred by making his own finding that the autopsy evidence was insufficient to establish the existence of pneumoconiosis, rather than accepting Dr. Dahlenburg's diagnosis of anthracosilicosis. We agree. Although the weighing of the evidence is for the administrative law judge, the interpretation of medical evidence is a medical determination for which an administrative law judge may not substitute his own opinion, *see Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993; *Castle v. Eastern Associated Coal Co.*, 12 BLR 1-105 (1988); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986), nor may he selectively analyze the evidence, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984). Dr. Dahlenburg's autopsy diagnosis of "anthracosilicosis...not inconsistent with simple coal workers' pneumoconiosis" meets the definition of pneumoconiosis as defined by the Act and the regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201; 20 C.F.R. §727.202. Consequently, we reverse the administrative law judge's finding that the autopsy evidence was insufficient to establish the existence of pneumoconiosis and, therefore, did not establish that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.

Accordingly, the Decision and Order of the administrative law judge denying waiver of recovery of the overpayment is reversed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge