

BRB No. 10-0600 BLA

VIOLA MEADE)	
(Widow of WALTER MEADE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
OLIVER COAL COMPANY)	DATE ISSUED: 06/09/2011
)	
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 Second Remand of Pamela Lakes Wood, 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.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (05-BLA-6297) of Administrative Law Judge Pamela Lakes Wood awarding benefits on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for the third time.¹ In its prior Decision and Order, the Board vacated Administrative Law Judge

¹ The Board set forth the complete procedural history of this case in its prior decision. *V.M. [Meade] v. Oliver Coal Co.*, BRB No. 08-0593 BLA (May 21, 2009)(unpub.). Our prior discussion of the procedural history is incorporated by reference.

Daniel F. Solomon's second decision awarding benefits, and remanded this case for further consideration of the medical opinion evidence as to death causation under 20 C.F.R. §718.205(c).² The case was reassigned to Judge Wood (the administrative law judge) on remand. The administrative law judge found that the evidence established that the miner had legal pneumoconiosis,³ in the form of emphysema due to mixed silica-coal dust, pursuant to 20 C.F.R. §718.202(a)(4), and that his death was due to pneumoconiosis at Section 718.205(c). Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal that the administrative law judge did not properly weigh the medical opinion evidence under Sections 718.202(a)(4), 718.205(c). Claimant did not respond. The Director, Office of Workers' Compensation Programs, declined to file a response brief.⁴

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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment⁵ and that his death was due to

² In his initial decision, Administrative Law Judge Daniel F. Solomon credited the miner with thirty-three years of coal mine employment and, based on employer's stipulation, that "there was evidence of mild simple coal workers' pneumoconiosis," Hearing Transcript at 9, found that claimant established that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The Board affirmed Judge Solomon's findings under Sections 718.202(a), 718.203(b). *V.M. [Meade] v. Oliver Coal Co.*, BRB No. 06-0965 BLA, slip op. at 2 n.2 (Sept. 24, 2007)(unpub.).

³ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

⁴ The recent amendment to the Act, which became effective on March 23, 2010, and which applies to claims filed after January 1, 2005, does not apply to this claim, filed on June 8, 2004. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

⁵ Because the miner's last coal mine employment was in Virginia, 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 (1989)(*en banc*).

pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' 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),(c)(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). 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In its last decision, the Board remanded this case for the administrative law judge to address whether Dr. Perper's death causation opinion was based on the specific circumstances of the miner's case, and to explain her credibility determinations under Section 718.205(c). *V.M. [Meade] v. Oliver Coal Co.*, BRB No. 08-0593 BLA, slip op. at 6-9 (May 21, 2009)(unpub.). Within her death causation analysis, on remand, the administrative law judge observed that the record contained evidence relevant to the existence of legal pneumoconiosis under Section 718.202(a)(4).⁶ Thus, the administrative law judge considered the opinions of Drs. Perper,⁷ Rasmussen,⁸ Dahhan,⁹ Castle,¹⁰ Tomaszewski,¹¹

⁶ As noted in footnote 2, *supra*, employer stipulated to only simple clinical pneumoconiosis. There had been no finding of legal pneumoconiosis.

⁷ Dr. Perper opined that the miner had moderate-to-severe centrilobular emphysema due to mixed silica-coal dust exposure. Claimant's Exhibit 1. In support of his opinion, Dr. Perper explained that the medical literature recognizes that chronic obstructive pulmonary disease (COPD) "and underlying centrilobular emphysema is [] a direct result of exposure to mixed coal dust containing silica," and that emphysema has been shown to progress after cessation of exposure to coal dust, "beyond any effect that may be attributed to smoking," "because of the entrapped and retained intrapulmonary fibrogenic crystalline silica." *Id.* at 31. Dr. Perper further explained that "[a]fter cessation of smoking, pulmonary symptoms do not worsen, while after cessation of occupational exposure to coal dust, the pulmonary damage and its manifestations continue because of retained coal dust containing toxic silica and silicates." *Id.* at 33. Further, Dr. Perper noted that the miner's thirty-three years of coal mine employment was "a much more than sufficient period of exposure to mixed coal dust, to account for the development of coal workers' pneumoconiosis," that silica and silicates were found in

and Crouch.¹² The administrative law judge found Dr. Perper's opinion, that the miner's emphysema was due, in part, to his exposure to mixed silica-coal dust, to be well-documented and reasoned, because Dr. Perper's opinion was supported by the medical literature that he referenced, and his pathology findings of emphysema, silica, and silicates in the miner's lung tissue.¹³ Decision and Order at 4; Claimant's Exhibit 1 at 31. Dr. Perper also explained that the fact that the miner's chronic obstructive pulmonary disease (COPD) worsened after he quit smoking supported his opinion. Claimant's Exhibit 1 at 31, 33. Thus, consistent with the Board's remand instructions, the

the miner's lung tissue, and that he had stopped smoking prior to the worsening of his COPD. *Id.* at 31-33.

⁸ Dr. Rasmussen opined that the miner had a slight, irreversible, obstructive ventilatory impairment and a marked impairment in oxygen transfer at rest, due to cigarette smoking and coal mine dust exposure. Claimant's Exhibit 2.

⁹ Dr. Dahhan opined that the miner's centrilobular emphysema was due solely to his lengthy smoking habit, and that the simple pneumoconiosis found on the pathology slides was too mild to have caused a significant pulmonary impairment. Employer's Exhibit 2; Director's Exhibit 26 (miner's claim).

¹⁰ Dr. Castle diagnosed tobacco-smoke induced COPD, and a moderate significantly reversible airway obstruction secondary to smoking. Employer's Exhibits 1, 3. Dr. Castle further opined that the miner's simple pneumoconiosis was too mild to have caused any respiratory impairment. Employer's Exhibit 3 at 6.

¹¹ Dr. Tomashefski diagnosed "[f]ocal emphysema associated with coal macules [that] minimally contributes to the overall emphysema," and opined that the miner's "centrilobular emphysema is mainly due to tobacco smoke and is not due to either simple coal workers' pneumoconiosis or coal dust exposure." Employer's Exhibit 9.

¹² Dr. Crouch opined that, because "there was no evidence of marked simple pneumoconiosis and no evidence of complicated pneumoconiosis," coal dust exposure could not have caused "any clinically significant degree of respiratory impairment or disability." Employer's Exhibit 7 at 1. She opined that "the major risk factor for [the miner's] emphysema is cigarette smoking rather than occupational dust exposure," because "there is no concordance between the extent and distribution of coal dust deposition and the distribution or severity of the observed emphysema." *Id.* at 2.

¹³ The administrative law judge found that Dr. Rasmussen's opinion supported Dr. Perper's opinion.

administrative law judge determined that Dr. Perper's opinion is sufficiently based on the specific circumstances of the miner's case. Decision and Order at 4. As her findings are supported by substantial evidence, the administrative law judge permissibly relied on Dr. Perper's opinion.¹⁴ See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998). Further, the administrative law judge validly explained her determination to credit Dr. Perper's opinion over the opinions of Drs. Castle, Dahhan, Crouch, and Tomashefski. As the administrative law judge stated, Dr. Castle's belief that coal mine dust does not contribute to smoking-related emphysema¹⁵ conflicts with Dr. Perper's well-reasoned opinion, and is inconsistent with the view accepted by the Department of Labor in the preamble to the revised regulations. See 65 Fed. Reg. 79920, 79939, 79944 (Dec. 20, 2000) (recognizing that the "term 'chronic obstructive pulmonary disease' (COPD) includes . . . chronic bronchitis, emphysema and asthma," and that the overwhelming scientific and medical evidence demonstrates that coal mine dust exposure can cause obstructive lung disease); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); Decision and Order at 10-11. Substantial evidence also supports the administrative law judge's findings that Drs. Dahhan, Castle, Crouch, and Tomashefski did not address whether mixed silica-coal dust affected the miner's emphysema. See *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 9, 11, 12, 14. Consequently, we reject employer's assertion that the administrative law judge impermissibly placed the burden on employer to establish that the miner's emphysema was not related to coal mine dust exposure, and we affirm her finding of legal pneumoconiosis under Section 718.202(a)(4). See *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993).

Employer additionally challenges the administrative law judge's determination to credit Dr. Perper's opinion over the contrary opinions of Drs. Dahhan, Castle, Tomashefski, and Crouch under Section 718.205(c). Specifically, employer asserts that

¹⁴ The three pathologists, who submitted medical opinions in this case, noted that the autopsy slides indicated that the miner had been exposed to silica and/or silicates. Claimant's Exhibit 1; Employer's Exhibits 7, 9. Consequently, we reject employer's assertion that the underlying record does not support Dr. Perper's opinion because it does not establish the presence of silicates. Employer's Brief at 19.

¹⁵ We disagree with employer that the administrative law judge mischaracterized Dr. Castle's opinion. As the administrative law judge found, Dr. Castle stated that coal mine dust "causes what is known as focal emphysema, which is part of the pathologic definition or description of coal workers' pneumoconiosis," and when asked whether it is possible for both coal mine dust inhalation and smoking to cause emphysema, Dr. Castle stated, "[n]o, not in my opinion." Employer's Exhibit 5 at 31, 33.

Dr. Perper's opinion is legally insufficient to support a finding of death causation. We disagree. As the administrative law judge found, Dr. Perper opined that the miner's "[c]oal workers' pneumoconiosis and the associated COPD, was a contributory cause of [the miner's] death . . . through pulmonary insufficiency," and explained that the pulmonary insufficiency hastened the miner's death "by direct and extensive replacement of normal lung tissue by non breathing pneumoconiotic lesions and associated centrilobular chronic emphysema." Claimant's Exhibit 1 at 33-34; Decision and Order at 4. As the administrative law judge further found, Dr. Nida's treatment records, stating two weeks before the miner's death that he had "end stage chronic obstructive pulmonary disease," and that his "overall prognosis is very, very poor," support Dr. Perper's conclusion that COPD contributed to the miner's respiratory death.¹⁶ Decision and Order at 6; *see Underwood*, 105 F.3d at 949, 21 BLR at 2-28. Further, because, as discussed *supra*, substantial evidence supports the administrative law judge's finding that, in attributing the etiology of the miner's emphysema to mixed silica-coal dust, Dr. Perper addressed the specifics of the miner's case, the administrative law judge permissibly relied on Dr. Perper's opinion under Section 718.205(c).

We additionally hold that the administrative law judge acted within her discretion in finding Dr. Perper's opinion more persuasive than those of employer's experts. With respect to Dr. Tomashefski's opinion, that "left ventricular cardiac failure is the immediate or a major contributory cause of death," Employer's Exhibit 9, substantial evidence supports the administrative law judge's findings that Dr. Perper reviewed the autopsy slides of the miner's heart and coronary arteries, while Dr. Tomashefski did not, and that "Dr. Perper relied on a broader base of medical evidence when fashioning his conclusions." Decision and Order at 14; *see Hicks*, 138 F.3d at 528, 21 BLR at 2-326. With respect to the opinions of Drs. Castle, Dahhan, Tomashefski, and Crouch, that pneumoconiosis did not hasten the miner's death, the administrative law judge permissibly found them less persuasive than Dr. Perper's opinion, because Drs. Castle, Dahhan, Tomashefski, and Crouch opined that the miner's emphysema was not related to coal dust exposure, an issue already resolved by the administrative law judge under Section 718.202(a)(4). *Id.* at 9, 11. Moreover, the United States Court of Appeals for the Fourth Circuit has held that where an administrative law judge has found pneumoconiosis established, the causation opinion of the physicians who did not diagnose pneumoconiosis "could carry little weight at the most." *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006), *quoting Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Because the administrative law judge validly explained her reliance on Dr. Perper's opinion, we affirm her finding under Section 718.205(c). As claimant has established that the miner's death was hastened by

¹⁶ Dr. Nida completed the miner's death certificate, stating that the immediate cause of the miner's death was "respiratory failure." Director's Exhibit 12.

legal pneumoconiosis, we affirm the award of benefits.¹⁷ *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹⁷ Because the administrative law judge validly explained her determination to credit Dr. Perper's opinion that legal pneumoconiosis hastened the miner's death, we decline to address employer's assertion that the administrative law judge failed to validly explain her determination to credit Dr. Perper's opinion, that the miner's clinical pneumoconiosis hastened his death, over the contrary opinions of Drs. Dahhan, Castle, Tomashefski, and Crouch, that the miner's clinical pneumoconiosis was too mild to have affected respiratory function. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 24-27.