

BRB No. 13-0401 BLA

EVELYN L. FRIEDLINE	)	
(Widow of ELWOOD L. FRIEDLINE)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THE FLORENCE MINING COMPANY	)	DATE ISSUED: 06/18/2014
	)	
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Margaret M. Scully (Thompson, Calkins & Sutter LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5467) of Administrative Law Judge Drew A. Swank rendered on a survivor's claim<sup>1</sup> filed on May 18, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited the miner with 12.5 years of coal mine employment. Because claimant failed to establish that the miner had at least fifteen years of coal mine employment, the administrative law judge found that claimant was not entitled to invocation of the rebuttable presumption of death due to

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<sup>1</sup> Claimant is the widow of the miner, Elwood L. Friedline, who died on March 18, 2011. Director's Exhibit 10.

pneumoconiosis at amended Section 411(c)(4) of the Act.<sup>2</sup> 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that claimant was not derivatively entitled to benefits at amended Section 422(l) of the Act,<sup>3</sup> 30 U.S.C. §932(l) (2012), as benefits were denied in the miner's claim.<sup>4</sup> The administrative law judge, therefore, adjudicated the claim under the regulations set forth at 20 C.F.R. Part 718. The administrative law judge found that claimant established that the miner had pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §718.202(a) and 718.203(b), and that pneumoconiosis was a substantially contributing cause of his death pursuant to 20 C.F.R. §718.205(b).<sup>5</sup> Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that death causation was established pursuant to Section 718.205(b). Neither claimant,

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<sup>2</sup> Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

<sup>3</sup> The amendments also revived Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012).

<sup>4</sup> The miner filed a claim for benefits on February 2, 1983, which was denied by Administrative Law Judge Daniel L. Leland in a Decision and Order issued on March 15, 1988. Judge Leland found that the miner failed to establish total respiratory disability. The Board affirmed the administrative law judge's denial of benefits. *Friedline v. Florence Mining Corp.*, BRB No. 88-1202 BLA (May 31, 1990) (unpub.).

<sup>5</sup> After the administrative law judge issued his decision, the Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The provisions that were applied by the administrative law judge at 20 C.F.R. §718.205(c) are now set forth at 20 C.F.R. §718.205(b). 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.205(b)).

nor the Director, Office of Workers' Compensation Programs, has filed a response to employer's appeal.<sup>6</sup>

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.<sup>7</sup> 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 survivor's benefits, unassisted by the amended Section 411(c)(4) presumption, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes any of the following facts: 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; the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(b)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of a miner's death also if it hastens the miner's death. 20 C.F.R. §718.205(b)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Relevant to the issue of death causation at Section 718.205(b), the record contains the miner's death certificate,<sup>8</sup> the medical reports of Drs. Rizkalla,<sup>9</sup> Perper,<sup>10</sup> Bush,<sup>11</sup>

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<sup>6</sup> We affirm, as unchallenged by the parties, the administrative law judge's decision to credit the miner with 12.5 years of coal mine employment and his finding that claimant established that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>7</sup> Because the miner was employed in coal mine employment in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibits 3, 6.

<sup>8</sup> The death certificate, signed by Walter Miller, Coroner, listed cardiorespiratory arrest, arteriosclerotic heart disease, chronic obstructive pulmonary disease, and coal workers' pneumoconiosis as the immediate causes of the miner's death. Decision and Order at 10; Director's Exhibit 10.

Oesterling<sup>12</sup> and Renn,<sup>13</sup> and the miner's hospital records and treatment notes. Considering the medical opinion evidence, the administrative law judge concluded:

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<sup>9</sup> Dr. Rizkalla, who is Board-certified in Anatomic and Clinical Pathology, conducted an autopsy on March 18, 2011 (Dr. Chen also signed the autopsy protocol) and also provided a supplemental letter dated April 5, 2012. Decision and Order at 14; Director's Exhibit 11; Claimant's Exhibit 1. Within the autopsy report, Dr. Rizkalla provided a "Final Anatomic Diagnoses" consisting of severe arteriosclerotic coronary artery disease; old myocardial infarct; cardiomegaly; cor pulmonale; acute bronchopneumonia; atelectasis; simple coal workers' pneumoconiosis, mild; and, pulmonary emphysema, centrilobular, mild. Director's Exhibit 11. In his supplemental letter, Dr. Rizkalla also noted structural changes in the miner's pulmonary artery branches, which he attributed to pulmonary hypertension and the emphysematous changes caused by the miner's coal workers' pneumoconiosis. Claimant's Exhibit 1. He further noted that the miner suffered from hypoxia, for which he was on supplemental oxygen prior to his death. He stated that the miner's hypoxia was partially secondary to his coronary artery disease and the emphysematous changes in his lungs due to coal workers' pneumoconiosis. *Id.* Finally, Dr. Rizkalla opined that the miner's coal workers' pneumoconiosis accelerated his death.

<sup>10</sup> Dr. Perper, who is Board-certified in Anatomical and Forensic Pathology, reviewed the autopsy report, lung tissue slides, the miner's medical records and the reports of Drs. Rizkalla, Renn, and Oesterling. Decision and Order at 14; Claimant's Exhibit 5. Dr. Perper diagnosed simple and complicated pneumoconiosis, as well as legal pneumoconiosis in the form of centrilobular emphysema. Claimant's Exhibit 5 at 45-53. Dr. Perper further opined that the pneumoconiosis was a substantial cause of the miner's pulmonary impairment and a substantial contributing and hastening cause of his death, as it aggravated his severe coronary arteriosclerotic heart disease. *Id.* at 54-55.

<sup>11</sup> Dr. Bush, who is Board-certified in Anatomic and Clinical Pathology and has a special competence in medical microbiology, reviewed the medical evidence and autopsy slides. Decision and Order at 15; Employer's Exhibit 9. Dr. Bush opined that the autopsy slides confirmed the presence of pneumoconiosis, but opined that the mild degree of simple coal workers' pneumoconiosis seen did not cause, contribute to, or hasten the miner's death. Employer's Exhibit 9. Additionally, Dr. Bush noted his disagreement with the opinions of Drs. Rizkalla and Perper. *Id.*

<sup>12</sup> Dr. Oesterling, who is Board-certified in Anatomical and Clinical Pathology and Nuclear Medicine, reviewed the autopsy report, lung tissue slides, and the miner's medical records. Decision and Order at 16-17; Employer's Exhibits 1, 10. Dr. Oesterling diagnosed mild coal workers' pneumoconiosis with limited structural change in the miner's lung. He opined that the structural change was too minimal to have resulted in

Taking all of the opinions together, it is apparent that the most likely cause of the miner's death was his extensive history of heart disease. While there is no persuasive evidence to support Dr. Perper's statement that coal workers' pneumoconiosis *caused* the miner's death ... there is a question as to whether it *hastened* his death. Quite understandably, [c]laimant's experts (Drs. Perper, Rizkalla) say it did, while [e]mployer's experts (Drs. Bush, Renn, and Oesterling) say it did not.

Decision and Order at 17. The administrative law judge then went on to discuss Dr. Renn's opinion. Decision and Order at 17. The administrative law judge "assume[d]," extrapolating from Dr. Renn's deposition testimony, that because "the deceased miner's lungs were already impaired ... 33%-50% by his heart disease[,] the "5% reduction or impairment of his lung functioning caused by coal workers' pneumoconiosis" would be "well over the 25% (or even 35%)" "Dr. Renn specified," as required to "compromise ...

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any alteration of pulmonary function. Therefore, Dr. Oesterling opined that the miner's simple pneumoconiosis was insufficient to have contributed to or hastened the miner's death. Employer's Exhibit 1. Rather, Dr. Oesterling opined that the changes in the miner's lungs were due to his failing heart and that the effects of the coal dust exposure are minimal and produced no significant structural damage. *Id.* Dr. Oesterling reiterated these findings in his deposition, dated December 6, 2012. Employer's Exhibit 10.

<sup>13</sup> Dr. Renn, who is Board-certified in Internal Medicine with a subspecialty in pulmonary disease and forensic medicine, prepared a report dated July 26, 2012, and testified by deposition on January 17, 2013. Decision and Order at 15-16; Employer's Exhibits 2, 11. Dr. Renn concluded, based on his review of medical records, that the probable cause of the miner's death was a "cataclysmic cardiovascular event incompatible with life," and not a respiratory death. He further stated, however, that an exact cause of the miner's death is not known, because no one was present with the miner at the time of his death and a full autopsy was not performed. Employer's Exhibit 2. Dr. Renn opined that pneumoconiosis was not a factor in the miner's death. *Id.* Dr. Renn also noted his disagreement with Dr. Rizkalla, that coal workers' pneumoconiosis hastened the miner's death, because a full autopsy was not performed to determine the exact cause of death. *Id.* In his deposition testimony, Dr. Renn reiterated his conclusion that pneumoconiosis did not contribute to, or accelerate, the miner's death. Employer's Exhibit 11. In addition, Dr. Renn discussed the effect that the miner's pleural effusions had on his lung capacity and the possible effect of any additional pulmonary conditions, such as the miner's coal workers' pneumoconiosis. *Id.* at 78-82.

lung function” and “negatively affect ... health.”<sup>14</sup> Decision and Order at 17; *see* Employer’s Exhibit 11. The administrative law judge concluded, therefore, that Dr. Renn’s opinion, that the miner’s coal workers’ pneumoconiosis did not *hasten* his death “[was] not supported by his own testimony[.]” Decision and Order at 17. Consequently, “based upon a preponderance of the evidence of a combination all of [sic] the experts’ opinions - especially of the evidence of [e]mployer’s own expert, [Dr. Renn],” the administrative law judge concluded that the miner’s coal workers’ pneumoconiosis hastened his death, and therefore found death causation was established pursuant to Section 718.205(b). Hence, he held that claimant was entitled to benefits.

Employer contends, however, that the administrative law judge erred in concluding that a preponderance of the medical opinion evidence supported a finding that the miner’s coal workers’ pneumoconiosis *hastened* his death. First, employer argues that because the administrative law judge did not evaluate each medical opinion and explain the weight he accorded it, the administrative law judge’s determination is not supported by substantial evidence. Specifically, employer asserts that the opinions of its experts were better reasoned than those of claimant’s experts. Second employer argues that the administrative law judge based his decision upon a mischaracterization of Dr. Renn’s deposition testimony as concluding that the doctor found that the miner’s coal workers’ pneumoconiosis compromised his lung function by 5%. Rather, employer contends that Dr. Renn testified only that the pathologists’ reports showed that 5% of the miner’s lung tissue exhibited evidence of coal workers’ pneumoconiosis. Employer’s Brief at 16; *see* Employer’s Exhibit 11 at 59.

At the outset, we agree with employer that the administrative law judge erred in finding that a preponderance of the medical opinion evidence established that the miner’s coal workers’ pneumoconiosis hastened his death at Section 718.205(b). The administrative law judge set forth a synopsis of the medical opinions, namely, the opinions of Drs. Rizkalla, Perper, Bush and Oesterling, but failed to discuss the credibility of each opinion and set forth the basis for his credibility determination, as required by the Administrative Procedure Act (APA),<sup>15</sup> 5 U.S.C. §554(c)(2), 557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 14-17. In

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<sup>14</sup> The administrative law judge also noted that “[t]he same is true even if we were to use the 1% - 2% of Dr. Oesterling.” Decision and Order at 17.

<sup>15</sup> The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefore on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §554(c)(2), 557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

particular, employer contends that Dr. Perper's opinion that pneumoconiosis hastened the miner's death should be considered in light of the fact that he was the only physician who diagnosed complicated pneumoconiosis, in addition to simple pneumoconiosis. Employer's Brief at 17-18; Claimant's Exhibit 5. Further, employer contends that the administrative law judge should consider that, although Dr. Rizkalla, the autopsy prosector, stated, in response to questions presented by claimant, that he reviewed "some additional records and history" ... he "does not note what the additional records or history were." Employer's Brief at 18. In addition, employer contends that the administrative law judge should consider the qualifications of the doctors in weighing their opinions. Employer's Brief at 19. On remand, therefore, in assessing the credibility of a medical opinion, the administrative law judge should consider the qualifications of the physician rendering the opinion, the detail of his analysis and whether his opinion is supported by underlying documentation. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *see also Milburn Colliery v. Hicks*, 21 BLR 2-323 (4th Cir. 1998).

Regarding Dr. Renn's deposition testimony, we also agree with employer that it must be more fully considered on remand. Employer correctly points out that Dr. Renn testified that the pathologists stated only that 5% of the miner's lung tissue was affected by coal workers' pneumoconiosis, not that coal workers' pneumoconiosis compromised the miner's lung function by 5%. *See Decision and Order at 17; Employer's Exhibit 11 at 70-71.* Subsequently, Dr. Renn was questioned on cross-examination about the effect of the miner's pneumoconiosis on the miner's lung/pulmonary reserve, which had already been compromised by his heart disease. Employer's Exhibit 11 at 77-81. On remand the administrative law judge must consider the totality of Dr. Renn's deposition testimony, resolve any inconsistencies he finds therein, and determine whether it supports, or undermines Dr. Renn's opinion that the miner's coal workers' pneumoconiosis did not hasten his death. Further, the administrative law judge must consider the credibility of Dr. Renn's opinion in light of the credibility determinations he makes regarding the opinions and deposition testimonies of the other physicians of record. *See Wojtowicz*, 12 BLR at 1-165.

Because the administrative law judge did not adequately discuss and properly evaluate all the medical opinion evidence of record, he failed to provide a rational basis for his finding that death causation was established. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Wojtowicz*, 12 BLR at 1-165. Consequently, we vacate the administrative law judge's finding that the evidence established that the miner's coal worker's pneumoconiosis *hastened* his death pursuant to 20 C.F.R. §718.205(b). On remand, the administrative law judge must assess the credibility of each medical opinion and fully explain his findings and the basis therefor. *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Consolidation Coal Co. v.*

*Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Balsavage v. Director*, OWCP, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge