

BRB No. 07-0579 BLA

R.J.R.	)	
(Widow of R.R.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 03/21/2008
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 Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, Virginia, for employer.

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

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (06-BLA-5232) of Administrative Law Judge Daniel L. Leland on a survivor's 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). The administrative law judge credited the

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<sup>1</sup> Claimant is the widow of the miner, who died on December 3, 2002. Director's Exhibit 9. The miner filed an application for benefits on May 31, 1973, which was finally denied on September 3, 1980. Director's Exhibit 1. Claimant filed her survivor's claim on December 11, 2002. Director's Exhibit 3.

miner with forty-two years of coal mine employment<sup>2</sup> and noted that the instant case involved a petition for modification.<sup>3</sup> The administrative law judge stated that the only issue was the cause of the miner's death, and he found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1)-(3). Accordingly, the administrative law judge denied benefits.

Claimant asserts that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief 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).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.<sup>4</sup> See 20 C.F.R. §§718.1, 718.205(c);

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<sup>2</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 5, 6.

<sup>3</sup> Claimant's application for benefits was denied by the district director on March 23, 2004, because the evidence did not show that pneumoconiosis caused the miner's death. Director's Exhibit 30. In a letter to the district director dated November 12, 2004, claimant submitted a report written by Dr. Perper, and stated that "this evidence is to support my request for modification." Director's Exhibit 32.

<sup>4</sup> Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a

*Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Where pneumoconiosis is not the cause of death, 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), (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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Pursuant to Section 718.205(c), claimant asserts that the administrative law judge erred in weighing the physicians’ opinions, asserting that Dr. Perper is the most qualified physician of record and that the administrative law judge erred in finding his opinion poorly reasoned and entitled to little weight. Claimant also challenges the administrative law judge’s reliance on the opinions of Drs. Bush, Oesterling and Swedarsky. Claimant essentially seeks a reweighing of the evidence, which is beyond the Board’s scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

The administrative law judge considered the medical evidence addressing the cause of the miner’s death. The death certificate, signed by the certifying physician, whose signature is illegible, stated that the miner’s death was due to a cerebrovascular accident, due to diabetes mellitus type II, due to coronary artery disease. Director’s Exhibit 9. Dr. Swedarsky performed the miner’s autopsy and diagnosed severe atherosclerotic vascular disease, severe atherosclerotic coronary artery disease, status post 2-vessel bypass surgery, cardiomegaly, ischemic myocardial injury, chronic obstructive pulmonary disease, bilateral pulmonary congestion, simple coal workers’ pneumoconiosis, and bilateral knee replacement. Director’s Exhibit 11; Employer’s Exhibit 1. Dr. Swedarsky was deposed, and testified that the degree of pneumoconiosis present would not have affected the miner’s respiratory function, and that the miner’s respiratory disease did not play a significant role in the miner’s death due to a stroke. Employer’s Exhibit 1. Similarly, Drs. Bush, Oesterling, and Bellotte opined that the miner’s pneumoconiosis was too mild to have hastened his death due to a stroke. Dr. Bush, who is Board-certified in Anatomical and Clinical Pathology, reviewed the miner’s autopsy slides and medical records and opined that the miner’s death was “not caused by, contributed to, or hastened by any chronic dust disease arising out of coal mining

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medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(5) 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).

employment.” Director’s Exhibit 34; Employer’s Exhibits 3, 6. Dr. Oesterling, who is Board-certified in Clinical Pathology and Anatomical Pathology, reviewed the miner’s autopsy slides and medical records and stated that “[w]ithout functional change coalworkers’ pneumoconiosis was in no way a factor in hastening, precipitating, or causing this gentleman’s demise.” Director’s Exhibit 40; Employer’s Exhibit 7. Dr. Bellotte, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the miner’s medical records and opined that his death was not caused, contributed to, nor hastened by any chronic dust disease arising out of his coal mine employment. Employer’s Exhibit 4.

By contrast, Dr. Perper, who is Board-certified in Anatomical and Surgical Pathology and Forensic Pathology, reviewed the miner’s autopsy slides and medical records and opined that the miner’s coal workers’ pneumoconiosis “was a substantial contributory cause and a hastening factor in the miner’s death. . . .” Director’s Exhibit 32; Employer’s Exhibit 2.

The administrative law judge noted that the “overwhelming weight of the evidence indicates that the primary cause of the miner’s death was a cerebrovascular accident, also know as a stroke.” Decision and Order at 5. In evaluating the evidence, the administrative law judge stated:

Drs. Swedarsky, Bush, Oesterling, and Bellotte concluded that the miner’s pneumoconiosis was too mild to have contributed to his death. Dr. Perper is the only physician to conclude otherwise. However, Dr. Perper’s opinion is poorly reasoned and entitled to little weight. Dr. Perper described nodules of coal workers’ pneumoconiosis that were significantly larger than those described by the other pathologists, including Dr. Swedarsky, who made both a gross and microscopic examination of the miner’s lungs. Dr. Perper asserted that the miner’s pneumoconiosis caused hypoxemia which precipitated or aggravated a cardiac arrhythmia, but he failed to point to any evidence that the miner had hypoxemia or that his death was precipitated by a cardiac arrhythmia. None of the other physicians found the presence of hypoxemia or a cardiac arrhythmia. Finally, Dr. Perper asserted that the miner’s chronic obstructive pulmonary disease increased the risk for a stroke, but he provided little in the way of substantiation for his assertion. None of the other pathologists or Dr. Bellotte determined that the miner’s lung disease predisposed him to the development of a stroke.

Decision and Order at 5. The administrative law judge found that the miner’s pneumoconiosis did not cause, contribute to, or hasten the miner’s death.

The United States Court of Appeals for the Fourth Circuit has held that it is error for an administrative law judge to “uncritically accept” medical evidence. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). As the administrative law judge noted, Dr. Perper’s description of the size of the nodules of coal workers’ pneumoconiosis were significantly larger than those described by all of the other physicians. Similarly, the administrative law judge found that Dr. Perper stated that the miner’s pneumoconiosis caused hypoxemia and precipitated a cardiac arrhythmia, but that no other physician of record diagnosed either of these conditions. The administrative law judge may reasonably question the validity of a physician’s opinion, like Dr. Perper’s, which varies significantly from the remaining medical opinions of record. *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106, 1-107 (1986). In addition, the administrative law judge found that Dr. Perper’s opinion that the miner’s chronic obstructive pulmonary disease increased his risk of stroke conflicted with all of the other reports of record on this point. Consequently, the administrative law judge permissibly questioned Dr. Perper’s conclusion on this basis. *Snorton*, 9 BLR at 1-107; *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Further, the administrative law judge acted within his discretion to find that Dr. Perper did not adequately substantiate his opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

We, therefore, affirm the administrative law judge’s decision to accord less weight to Dr. Perper’s opinion and we hold that the administrative law judge reasonably found this opinion insufficient to carry claimant’s burden of establishing that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). Although claimant alleges that all of the contrary opinions are flawed in various respects, the Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Moreover, claimant’s argument that the administrative law judge erred by failing to accord Dr. Perper’s opinion greater weight based on Dr. Perper’s qualifications lacks merit, as the administrative law judge permissibly discredited Dr. Perper’s opinion based on the quality of its reasoning. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Therefore, we affirm the administrative law judge’s finding that claimant has not established that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge