

BRB No. 09-0420 BLA

DOROTHY KIDD )  
(Widow of DONALD J. KIDD) )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 CONSOLIDATION COAL COMPANY )  
 ) DATE ISSUED: 03/17/2010  
 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 on Remand - Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Teresa Dewey Bacho (Law Offices of Teresa Dewey Bacho, LLC), Toledo, Ohio, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (2005-BLA-5033) of Administrative Law Judge Thomas F. Phalen, Jr., rendered 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).<sup>1</sup> This case is before the Board for a second time. In a Decision and Order issued on September 26, 2005, Administrative Law Judge Daniel J. Roketenetz accepted the parties' stipulation that the miner had at least seventeen years of coal mine employment and suffered from pneumoconiosis arising out of coal mine employment. After noting that the sole issue presented in the case was whether the miner's death was due to pneumoconiosis, Judge Roketenetz excluded from the record two medical reports, by Drs. Rosenberg and Bush, on the grounds that the reports were proffered by employer in excess of the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(ii). In considering the merits of entitlement, Judge Roketenetz credited the autopsy report and testimony of Dr. Booth, the autopsy prosector, as being sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Roketenetz awarded benefits. On November 30, 2005, Judge Roketenetz also issued an Order awarding attorney fees in the amount of \$6,640.00.

Employer appealed, and the Board affirmed Judge Roketenetz's decision to exclude Dr. Rosenberg's report since it did not fall within the rebuttal provision of 20 C.F.R. §725.414(a)(3)(ii) and could not be considered an affirmative case medical report, as employer had already reached its two-report limit, and good cause for the admission of Dr. Rosenberg's report in excess of the evidentiary limitations had not been demonstrated. *See Kidd v. Consolidation Coal Company*, BRB No. 06-0124 BLA, slip op. at 6 (Nov. 30, 2006) (unpub.). However, the Board held that Judge Roketenetz erred in summarily excluding Dr. Bush's entire autopsy rebuttal report pursuant to 20 C.F.R. §725.414(a)(3)(ii), on the ground that he had reviewed evidence outside of the scope of the autopsy, without first determining whether Dr. Bush's opinion "could be considered in part, to the extent that it was based on his review of the autopsy evidence." *Id.* at 5. Furthermore, the Board agreed with employer that Judge Roketenetz erred in failing to explain why Dr. Booth's ability to perform the autopsy gave him an advantage over either Dr. Tomashefski or Dr. Fino to determine whether pneumoconiosis hastened the miner's death. Thus, the Board vacated Judge Roketenetz's award of benefits and remanded the case for further consideration pursuant to 20 C.F.R. §718.205(c). Although the Board affirmed the fee award, the Board noted that it was not enforceable until the claim had been successfully prosecuted and all appeals exhausted.

On remand, because Judge Roketenetz had retired, the case was reassigned to Judge Phalen (the administrative law judge). With respect to Dr. Bush's autopsy rebuttal report, the administrative law judge found that the only portions of Dr. Bush's opinion that were

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<sup>1</sup> Claimant is the widow of the miner, Donald J. Kidd, who died June 23, 2003. Director's Exhibits 3, 9. Claimant filed a claim for survivor's benefits on September 9, 2003. *Id.*

not based on his review of inadmissible evidence were his conclusions that “the miner suffered from multiple pulmonary conditions, including [coal workers’ pneumoconiosis], and that his death was the result of liver and kidney failure.” Decision and Order on Remand at 3. The administrative law judge specifically excluded the remainder of Dr. Bush’s report, as it pertained to the issue of whether the miner’s death was due to pneumoconiosis. *Id.* In consideration of the merits of the survivor’s claim, the administrative law judge found that the evidence of complicated pneumoconiosis was inconclusive and that claimant was not entitled to the presumption, set forth at 20 C.F.R. §718.304, that the miner’s death was due to pneumoconiosis. Moreover, the administrative law judge found that there were no opinions sufficiently reasoned or documented to support a finding that the pneumoconiosis caused, substantially contributed to, or hastened, the miner’s death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied survivor’s benefits.

On appeal, claimant contends that the administrative law judge failed to follow the Board’s instructions and exceeded the scope of his review on remand by reweighing all of the evidence. Claimant also asserts that the administrative law judge erred in rejecting Dr. Booth’s opinion that the miner’s death was hastened by pneumoconiosis. Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs, has responded that he will not file a brief unless requested to do so by the Board.

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>2</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman and 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 employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *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 caused the miner’s death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, the miner’s death

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<sup>2</sup> The record indicates that the miner’s coal mine employment was in Ohio. Director’s Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 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); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Claimant first argues that the administrative law judge erred in failing to exclude Dr. Bush's entire medical opinion pursuant to 20 C.F.R. §725.414(a)(3)(ii), once the administrative law judge determined that Dr. Bush "did not offer an opinion based solely on the pathological findings." Claimant's Brief at 4-5. The administrative law judge specifically determined, however, that because Dr. Bush had "not offered an admissible opinion as to whether or not [the miner's] death was due to pneumoconiosis," his opinion was entitled "no weight" at 20 C.F.R. §718.205(c). Decision and Order on Remand at 5. Claimant, therefore, has not demonstrated any prejudice resulting from the administrative law judge's evidentiary ruling and consideration of the evidence of record. *See Larioni v. Director*, OWCP, 6 BLR 1-1276, 1-1278 (1984); Decision and Order on Remand at 9.

Claimant further argues that the administrative law judge exceeded the scope of his review on remand because he "entered into an impermissible re-weighing of the evidence to reach an entirely different result than [Judge] Roketenez." Claimant's Brief at 7. Claimant also contends that the administrative law judge failed to explain the basis for his credibility determinations and erred in relying on the opinions of Drs. Fino and Tomashefski to find that pneumoconiosis was not a contributing cause or factor in the miner's death. According to claimant, the administrative law judge should have limited his review of the evidence on remand to an explanation for his determination as to the weight to be accorded Dr. Booth's opinion on the cause of the miner's death, based upon the doctor's status as the autopsy prosector. Claimant's arguments are rejected as they are without merit.

Contrary to claimant's argument, the administrative law judge did not err in reevaluating the evidence on the miner's cause of death. The Board, in its prior decision, directed the administrative law judge on remand to reconsider the opinions and explain the rationale for his findings. On remand, this case was assigned to a different administrative law judge who had discretion to reweigh the evidence on remand and reach a different result. *See Youghioghny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999) (an appellate court's mandate forecloses a lower court or an agency from revisiting only those issues that the appellate court actually decided); *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985).

Claimant also contends that the administrative law judge improperly rejected Dr. Booth's opinion on the ground that it was "conclusory" and did not contain "a reasoned explanation as to why he believes pneumoconiosis caused or substantially contributed to

death.” Decision and Order on Remand at 5; *see* Claimant’s Brief at 5. According to claimant, the administrative law judge considered only Dr. Booth’s autopsy report, and not the detailed reasoning set forth by Dr. Booth during his deposition. Claimant’s Brief at 7-8. Contrary to claimant’s assertion, the administrative law judge indicated that he had considered all of the record evidence, including Dr. Booth’s deposition testimony,<sup>3</sup> in rendering his decision:

I incorporate by reference, as if fully set forth herein, the medical evidence contained in Judge Roketenetz’s September 26, 2005 decision and order awarding benefits. . . . With [the] exception of Dr. Bush’s report, Judge Roketenetz completely and thoroughly summarized the relevant medical evidence of record. Therefore, I will not disturb the factual descriptions of the original evidence, but will refer to them as necessary to resolve the survivor’s claim now before me.

Decision and Order on Remand at 2. Moreover, claimant has not specifically identified, within Dr. Booth’s deposition, the “detailed explanations” found lacking by the administrative law judge. Claimant’s Brief at 8; *see* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

We also hold that the administrative law judge permissibly accorded “little weight” to Dr. Booth’s opinion that pneumoconiosis contributed to the miner’s death because he found it a “conclusory opinion with insufficient objective support.”<sup>4</sup> Decision and Order at 5; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Evaluating the credibility of the medical experts is a matter within the sound discretion of the

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<sup>3</sup> Dr. Booth’s autopsy findings and deposition testimony were summarized by Administrative Law Judge Daniel J. Roketenetz. 2005 Decision and Order at 7-8.

<sup>4</sup> In his autopsy report, Dr. Booth stated that “pertinent findings attributable to the cause of [the miner’s] death were widespread pulmonary anthracosis and fibrosis, diffuse right-sided pleural adhesions, pulmonary congestion and edema, chronic obstructive pulmonary disease (COPD), diffuse micronodular cirrhosis and diabetic nephropathy with end-stage renal disease.” Director’s Exhibit 10. Dr. Booth stated that “the severe compromise to the [claimant’s] pulmonary function was most likely due to the combined effects of coal dust and smoking.” *Id.* In his March 19, 2004 deposition, he indicated that the miner died from multi-organ failure and respirable disease, but stated he was unable to distinguish which disease actually caused death, although he believed that pneumoconiosis was a contributing factor. Director’s Exhibit 28.

administrative law judge, and the Board will not reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*). Therefore, we affirm the administrative law judge's finding that Dr. Booth's opinion was not sufficiently reasoned to satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.205(c).

In addition, the administrative law judge acted within his discretion in finding that the opinions of Drs. Fino<sup>5</sup> and Tomashefski<sup>6</sup> were well-reasoned and documented and sufficient to establish that the miner's death was not due to pneumoconiosis. *See Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order on Remand at 5-6. The administrative law judge found that Dr. Fino "considered a substantial amount of medical evidence," and provided an opinion that was "adequately supported by the objective evidence he considered." Decision and Order on Remand at 6. Consequently, the administrative law judge's determination, that Dr. Fino's opinion was "bolstered by his advanced credentials" and therefore entitled to "substantial probative weight," regarding whether pneumoconiosis hastened the miner's death, is supported by substantial evidence. *Id.*; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Clark*, 12 BLR at 1-155.

Additionally, the administrative law judge permissibly credited Dr. Tomashefski's opinion, that pneumoconiosis did not contribute to the miner's death, because he found that Dr. Tomashefski "conducted [an] extensive medical evidence review," identified the

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<sup>5</sup> In a report dated March 29, 2005, Dr. Fino stated that he reviewed the miner's treatment records, hospitalization records, the results of chest x-rays, pulmonary function studies, CT scans, the autopsy report and deposition testimony of Dr. Booth, and the reports of Drs. Parmar and Tomashefski. Employer's Exhibit 2. He opined that, even if one assumed that the miner had pneumoconiosis, there was no evidence to suggest the miner's death was caused, contributed to, or hastened by the inhalation of coal dust. *Id.* He concluded that the miner died from severe liver disease from alcoholism. *Id.*

<sup>6</sup> In a report dated May 10, 2004, Dr. Tomashefski noted that he had reviewed the miner's treatment and hospitalization records, death certificate, prior x-rays, CT scans, chest ultrasounds, pulmonary function studies, arterial blood gas studies, the reports of Drs. Bush and Fino and autopsy slides. Director's Exhibit 32. He opined that the underlying cause of the miner's death was hepatic failure due to end-stage cirrhosis. *Id.* He further concluded that the miner's minimal simple coal workers' pneumoconiosis and mild interstitial fibrosis did not cause or contribute to his death. *Id.*

evidence he relied upon to reach his conclusion, and provided an opinion that was “adequately supported by the evidence he considered.” Decision and Order on Remand at 5-6; *see Clark*, 12 BLR at 1-155. We, therefore, affirm the administrative law judge’s credibility determinations with regard to Drs. Booth, Fino and Tomashefski, and his finding that pneumoconiosis did not hasten the miner’s death pursuant to 20 C.F.R. §718.205(c). *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 512; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because claimant did not satisfy her burden to establish that the miner’s death was due to pneumoconiosis, a requisite element of entitlement in this survivor’s claim, benefits are precluded. *See* 20 C.F.R. §718.205(c); *Trumbo*, 17 BLR at 1-87; *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).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge