

BRB No. 98-0852 BLA

JUDITH A. PRICE (Executrix of the)
Estate of BONNA LYNN MALOTT,)
Deceased Widow of RICHARD MALOTT))
)
Claimant-Respondent)
)
v.)
)
EASTERN ASSOCIATED COAL) DATE ISSUED:
COMPANY)
)
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Gregory C. Hook (Hook & Hook), Waynesburg, Pennsylvania, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Fairmont, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0369) of Administrative Law Judge Michael P. Lesniak awarding benefits 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 instant case involves a survivor's claim filed on April 16, 1996. After crediting the miner with thirty-one

years of coal mine employment, the administrative law judge noted that the parties stipulated that the miner suffered from pneumoconiosis arising out of his coal mine employment. The administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Claimant¹ responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.²

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

¹The miner's widow, Bonna Lynn Malott, filed a survivor's claim on April 16, 1996. Director's Exhibit 1. Bonna Lynn Malott subsequently died on February 11, 1998, the day that the administrative law judge issued his Decision and Order awarding benefits. The claimant is Judith A. Price, the designated executrix of Bonna Lynn Malott's estate.

²Inasmuch as no party challenges the administrative law judge's length of coal mine employment finding or his finding of pneumoconiosis arising out of coal mine employment, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).³ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Six physicians addressed the cause of the miner's death. Dr. Shureiqi completed the miner's death certificate. Director's Exhibit 8. Dr. Shureiqi attributed the miner's death to anoxia due to right lower lobe pneumonia and severe coal workers' pneumoconiosis. *Id.* In an autopsy report dated February 7, 1994, Dr. Franyutti, the autopsy prosector, opined that the miner's death was due to right lower lobe pneumonia. Director's Exhibit 9. In a subsequent letter dated January 21, 1997, Dr. Franyutti opined that coal workers' pneumoconiosis was a contributing factor in the miner's death. Claimant's Exhibit 1. Dr. Goldblatt, after reviewing the miner's autopsy slides and medical evidence, opined that the miner "died of respiratory failure due to the combined effects of complicated coal workers' pneumoconiosis, bronchopneumonia, focal dust emphysema and centrilobular emphysema complicating recurrent adenocarcinoma of the stomach." Claimant's Exhibit 2.

Drs. Crouch and Kleinerman also reviewed the miner's autopsy slides and medical evidence. Drs. Crouch and Kleinerman each opined that the miner's pneumoconiosis did not cause or hasten his death. Director's Exhibit 10; Employer's

³Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, 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.

20 C.F.R. §718.205(c).

Exhibit 2. Dr. Weiss, based upon a review of the medical evidence of record, similarly opined that the miner's pneumoconiosis did not contribute in any way to his death. Employer's Exhibit 3.

The administrative law judge initially noted that the miner's death certificate, in and of itself, was insufficient to establish that the miner's death was due to pneumoconiosis. Decision and Order at 7-8. The administrative law judge, however, credited Dr. Franyutti's opinion that the miner's death was due to pneumoconiosis over the contrary opinions of Drs. Crouch, Kleinerman and Weiss based upon Dr. Franyutti's status as the autopsy prosector. *Id.* at 8. The administrative law judge further noted that Dr. Goldblatt's opinion was entitled to more weight because it corroborated Dr. Franyutti's opinion. *Id.* The administrative law judge, therefore, found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). *Id.*

Employer argues that the administrative law judge erred in crediting Dr. Franyutti's opinion based upon his status as the autopsy prosector. We agree. When evaluating the pathology-related evidence relevant to the cause of the miner's death, the administrative law judge erred by not first determining the credibility and weight of the reviewing pathologists' contrary opinions before giving complete deference to Dr. Franyutti's opinion based upon his status as the autopsy prosector.

See generally Urgolites v. Bethenergy Mines, Inc., 17 BLR 1-20 (1992). In the instant case, the administrative law judge did not provide a rationale for concluding that Dr. Franyutti's status as autopsy prosector provided him with any advantage over the reviewing physicians, Drs. Crouch and Kleinerman.⁴ Decision and Order at 8.

Employer also contends that the administrative law judge erred in his consideration of Dr. Goldblatt's opinion. The administrative law judge found that Dr. Goldblatt's opinion was well reasoned and documented and entitled to additional weight because it was "corroborative of the findings of the autopsy prosector."

⁴Dr. Crouch is Board-certified in Anatomic Pathology. Director's Exhibit 10. Dr. Kleinerman is Board-certified in Anatomic and Clinical Pathology. Employer's Exhibit 2. Dr. Franyutti's curriculum vitae does not reveal Board-certification in any specialty. Claimant's Exhibit 1.

Dr. Weiss is Board-certified in Internal Medicine and Oncology. Employer's Exhibit 3.

Decision and Order at 8. The administrative law judge, however, questioned Dr. Goldblatt's diagnosis of complicated pneumoconiosis because it was not found by Dr. Franyutti, the autopsy prosector. Decision and Order at 8 n.4. The administrative law judge failed to reconcile these inconsistent statements.

In light of the administrative law judge's errors in his consideration of the evidence, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c)(2) and remand the case for further consideration.⁵

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

SO ORDERED.

⁵At the November 18, 1997 hearing, the administrative law judge allowed the parties additional time in which to submit post-hearing evidence. Specifically, employer sought to submit the miner's hospital records while the miner's widow sought to submit Dr. Goldblatt's deposition testimony. Employer submitted the miner's medical records from Fairmont General Hospital on November 24, 1997. The miner's widow submitted Dr. Goldblatt's December 30, 1997 deposition testimony on January 8, 1998. Although the administrative law judge referenced the miner's hospital records and Dr. Goldblatt's deposition testimony in his decision, see Decision and Order at 4, 6, it does not appear that the administrative law judge ever formally admitted this evidence into the record. Consequently, the administrative law judge, on remand, should clarify whether this evidence has been admitted into the record.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge