

BRB No. 01-0772 BLA

MARY LESHINSKY	)	
(Widow of ROBERT LESHINSKY)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
CONSOLIDATION COAL 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 on Remand - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

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

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand - Awarding Benefits (99-BLA-0016) of Administrative Law Judge Michael P. Lesniak 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> In a previous Decision and Order, dated July 23, 1999, the

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<sup>1</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20

administrative law judge considered the instant survivor's claim,<sup>2</sup> which claimant<sup>3</sup> filed on July 22, 1997, pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). After crediting the miner with forty-two years of coal mine employment, the administrative law judge determined that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to employer's stipulations. The administrative law judge further found that claimant established that the miner's death was hastened by and, therefore, due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). Consequently, the administrative law judge awarded benefits.

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C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). On August 13, 2001, the Board rescinded its prior order requiring the parties to submit briefs on the issue of the impact of the amended regulations to this case.

<sup>2</sup>The miner filed a living miner's claim on April 19, 1990. Director's Exhibit 28. In a Decision and Order dated August 16, 1993, Administrative Law Judge Gerald M. Tierney credited the miner with forty-two years of coal mine employment and considered the miner's claim under the applicable regulations at 20 C.F.R. Part 718 (2000). Judge Tierney found the evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000) and, accordingly, denied benefits. The miner appealed. The Board affirmed Judge Tierney's decision denying benefits. *Leshinsky v. Consolidation Coal Co.*, BRB No. 93-2370 BLA (Mar. 29, 1995)(unpublished). No further action was taken in pursuit of benefits in the miner's claim.

<sup>3</sup>Claimant is the deceased spouse of the miner, who died on July 13, 1997. Director's Exhibit 8. The miner's death certificate listed a probable acute myocardial infarction and arteriosclerotic heart disease as the causes of death, and hypertension as another significant condition leading to death. *Id.*

Employer appealed. The Board vacated the administrative law judge's finding under Section 718.205(c)(2) (2000). *Leshinsky v. Consolidation Coal Co.*, BRB No. 99-1173 BLA (Oct. 31, 2000)(unpublished). The Board held that the administrative law judge improperly credited Dr. Wecht's opinion, that the miner's coal workers' pneumoconiosis was a substantially contributing factor in the miner's death, over the contrary opinions of Drs. Kleinerman, Oesterling, Naeye and Morgan. *Id.* Specifically, the Board held that the administrative law judge improperly relied upon Dr. Wecht's credentials without fairly considering the credentials of the other physicians, and irrationally found that Dr. Wecht's opinion was more consistent than were employer's physicians' opinions with the miner's coal dust exposure history, brief smoking history, and history of severe heart disease, cor pulmonale and coal workers' pneumoconiosis. *Id.* The Board further held that the administrative law judge did not provide an adequate explanation for his finding that Dr. Wecht's status as the autopsy prosector entitled his opinion to greater weight than the opinions of the physicians who merely reviewed the autopsy slides. *Id.* In his Decision and Order on Remand, the administrative law judge again credited the opinion of Dr. Wecht over the contrary opinions of Drs. Kleinerman, Oesterling, Naeye and Morgan, and found that claimant established that the miner's death was due to pneumoconiosis under Section 718.205(c). Consequently, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's weighing of the medical opinion evidence under Section 718.205(c). Claimant responds in support of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate 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'Keefe 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 where the miner's death was due to pneumoconiosis.<sup>4</sup> See 20 C.F.R. §§718.1, 718.205(c); *Neeley v.*

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<sup>4</sup>Section 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 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.

*Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, has held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) (2000) if the disease actually hastens his death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989); *see also* 20 C.F.R. §718.205(c)(2), (c)(5).

On appeal, employer first contends that the administrative law judge failed to adequately consider the conflicting credentials of all of the physicians of record, and irrationally accorded greatest weight to Dr. Wecht's opinion based upon the doctor's superior credentials. Employer argues that, in deferring to the credentials of Dr. Wecht, the administrative law judge failed to consider the specific qualifications of Drs. Morgan, Kleinerman, Oesterling and Naeye which employer asserts are more germane to the resolution of the issues in the instant case. We agree. In considering the physicians' qualifications in the instant case, the administrative law judge selectively analyzed the evidence, which necessitates that this case be remanded for further consideration. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 4-5. In considering the credentials of the pathologists of record, the administrative law judge found that although Drs. Kleinerman, Oesterling and Naeye have impressive credentials as pathologists, Dr. Wecht's credentials as a pathologist are superior because Dr. Wecht has an impressive curriculum vitae including a bibliography of three hundred and thirty-four publications, and is the only physician of record who is Board-certified not only in anatomic and clinical pathology, but also forensic pathology. Decision and Order at 4-5; Director's Exhibit 10; Employer's Exhibits 1, 3, 5, 7; Claimant's Exhibit 1. As employer contends, the administrative law judge did not discuss to what extent these publications are relevant to the issue in this case, *i.e.*, whether the miner's death was due to pneumoconiosis, and did not consider that Drs. Kleinerman, Oesterling and Naeye have published extensively on the pathology of respiratory diseases, including pneumoconiosis. Employer's Exhibits 1, 3, 5, 7. Employer also correctly contends that the administrative law judge did not consider that Dr.

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(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).

Morgan, a Board-certified pulmonary specialist, has published articles regarding pneumoconiosis. Employer's Exhibit 6. In addition, we agree with employer that the administrative law judge did not adequately explain why Dr. Wecht's board-certification in forensic pathology renders him better qualified to proffer an opinion as to the cause of the miner's death than Drs. Kleinerman, Oesterling and Naeye, especially since Drs. Kleinerman and Naeye served on a committee of pathologists that published the criteria for the diagnosis of pneumoconiosis. Employer's Exhibits 3, 5.

The administrative law judge also deferred to Dr. Wecht's opinion because Dr. Wecht still actively performs autopsies after thirty-six years of practice. Decision and Order at 5. The administrative law judge noted that, in contrast, Dr. Kleinerman still does consultations, but is otherwise retired from hospital practice, and Dr. Oesterling devotes a majority of his time in a different field of medicine, *i.e.*, nuclear medicine. *Id.* As employer contends, the administrative law judge did not adequately explain why these selected factors render Dr. Wecht more qualified than the other physicians. Dr. Wecht, for instance, testified at his deposition that an equally trained pathologist reading an autopsy report and looking at slides is capable of rendering an opinion as is a pathologist who performed the autopsy in any given case. Claimant's Exhibit 1 at 30-31. Furthermore, Dr. Oesterling testified that, in addition to serving as the director of nuclear medicine, he is chairman of the pathology department at his hospital, and sees "a lot of surgical pathology of the lung." Employer's Exhibit 1 at 7. In considering the qualifications of the physicians on remand, the administrative law judge should explain why Dr. Wecht's credentials are superior to those of the other physicians of record for purposes of determining the cause of the miner's death.

Employer further contends that it was improper for the administrative law judge to accord greatest weight to Dr. Wecht's opinion because it was consistent with the miner's lengthy coal mine employment history of forty-two years and relatively short smoking history of approximately eleven years.<sup>5</sup> Employer argues that the administrative law judge effectively created an improper presumption that the miner's lung disease and death must have been due to pneumoconiosis in light of the number of years the miner worked in coal mine employment. We agree. In according greater weight to Dr. Wecht's opinion on this basis, the administrative law judge improperly substituted his own medical conclusion for those of the physicians of record. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order at 6-8. Whether pneumoconiosis hastened the miner's death is a medical determination for the physicians, not the administrative law judge, to make. We, therefore,

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<sup>5</sup>The administrative law judge stated that he did not find the histories relied upon by Dr. Wecht were more accurate than the histories relied upon by the other physicians of record, who relied upon approximately identical histories, but stated that he found Dr. Wecht's medical conclusions to be more supported by a forty-two year coal mine employment history and only an eleven year smoking history. Decision and Order at 6.

vacate the administrative law judge's decision to credit Dr. Wecht's opinion on this basis.

We also agree with employer's contention that the administrative law judge failed to discuss adequately the opinions of Drs. Kleinerman, Oesterling, Naeye and Morgan and explain why these opinions were not as well-reasoned and documented as Dr. Wecht's opinion. While the administrative law judge correctly stated that Dr. Wecht opined that the miner's pneumoconiosis produced an additional impediment to the smooth, easy flow of blood through the miner's lungs, which added to the workload of his heart, and was a substantial contributing factor in his demise, Decision and Order at 7; Claimant's Exhibit 1 at 18-19, the administrative law judge did not discuss those aspects of the opinions of Drs. Kleinerman, Oesterling, Naeye and Morgan which indicate that the oxygenation of the miner's lungs was not adversely affected by his lung disease. Director's Exhibits 23, 24; Employer's Exhibits 3, 4, 6, 7. Instead, the administrative law judge credited Dr. Wecht's opinion simply upon finding, improperly as discussed *supra*, that Dr. Wecht possessed superior qualifications and that his opinion is most consistent with the miner's coal mine employment and smoking histories. On remand, the administrative law judge must consider the explanations of Drs. Kleinerman, Oesterling, Naeye and Morgan, and adequately discuss why or why not these opinions are well-reasoned and documented so as to resolve properly the conflict posed by the competing opinions.

Finally, employer argues that the administrative law judge improperly credited Dr. Wecht's opinion on the basis that he was the autopsy prosector. An administrative law judge may credit the opinion of the pathologist who performed the autopsy in appropriate cases, such as where the prosector's gross examination of the miner's lungs gave the prosector an advantage over a consulting physician who merely reviews lung tissue slides microscopically. See *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). In the instant case, the administrative law judge found that Dr. Wecht, as prosector, was in "a somewhat better position than the reviewing pathologists to make a determination herein, in light of the questions raised as to whether the tissue samples provided were representative, and whether the reported gross description by Dr. Wecht, which was based upon his actual viewing of the body, is accurate." Decision and Order at 9-10. The administrative law judge failed to explain adequately his basis for finding that Dr. Wecht's gross examination provided him with an advantage over the reviewing pathologists. On remand, the administrative law judge is instructed to reconsider whether Dr. Wecht's gross examination provided him with an advantage over the reviewing pathologists in determining the cause of the miner's death. See *Urgolites, supra*.

In light of the foregoing, we vacate the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and remand the case for further consideration.<sup>6</sup> See 20

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<sup>6</sup>Employer requests that the case be remanded to a different administrative law judge.

C.F.R. §718.205(c)(2), (c)(5); *Lukosevicz, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

I CONCUR:

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ROY P. SMITH  
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to vacate the administrative law judge's finding that the medical opinion evidence in the instant case is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Rather than remanding this case for further consideration, I would hold that the administrative law judge provided adequate grounds for crediting the opinion of Dr. Wecht over the contrary opinions of record. *See* 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With respect to the administrative law judge's decision to credit Dr. Wecht's opinion based upon Dr. Wecht's credentials, while I agree with employer's contention that Dr. Wecht's Board-certification in forensic pathology may be immaterial to the resolution of the

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Because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, this request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

specific issue in this case, I would hold that the administrative law judge ultimately acted within his discretion in concluding that Dr. Wecht's credentials are superior in light of the fact that Dr. Wecht still performs autopsies after thirty-six years of practice, while Dr. Kleinerman is retired from hospital practice and Dr. Oesterling devotes a majority of his time in a different field – nuclear medicine. Furthermore, the administrative law judge stated that this was only one of the factors which entitled Dr. Wecht's opinion to greater weight. Decision and Order at 5. I would hold that the administrative law judge also acted within his discretion by rationally concluding that even though Drs. Kleinerman, Oesterling, Naeye and Morgan considered accurate coal mine employment and cigarette smoking histories, the miner's forty-two year coal mine employment history and relatively short, remote smoking history of approximately eleven years, ending in 1986, "tend to add credence to Dr. Wecht's opinion, while undermining the opinions of [these] other physicians who attributed the miner's emphysema and breathing problems, at least in part, to cigarette smoking and not coal mine dust exposure." Decision and Order at 10. In my view, the administrative law judge also accurately characterized and adequately considered the competing opinions of Drs. Kleinerman, Oesterling, Naeye and Morgan, and properly concluded that Dr. Wecht's status as the autopsy prosector put him at an advantage to render an opinion in this case in light of the questions raised by Drs. Naeye and Kleinerman about the reliability of the autopsy slides. Accordingly, I would affirm the administrative law judge's award of benefits.

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BETTY JEAN HALL  
Administrative      Appeals      Judge