

BRB No. 06-0619 BLA

ROSIE TUCKER)
(Widow of JERRY TUCKER))
)
 Claimant-Respondent)
)
 v.)
)
 T & T KENTUCKY COAL COMPANY)
)
 and)
)
 KENTUCKY COAL PRODUCERS SELF-) DATE ISSUED: 05/31/2007
 INSURANCE FUND)
)
 Employer/Carrier-)
 Petitioners)
)
 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 Survivor Benefits of Joseph E Kane, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Survivor Benefits (01-BLA-0149) of Administrative Law Judge Joseph E. Kane 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). This case is before the Board for a third time. The relevant procedural history of the case is as follows. The miner filed a claim for benefits on April 22, 1988. Director's Exhibit 1. Administrative Law Judge Thomas M. Burke issued a Decision and Order denying benefits on August 31, 1993, which was affirmed by the Board. Director's Exhibits 49, 57. The miner filed a request for modification on July 24, 1998, which was denied by the district director. Director's Exhibit 124. At the miner's request, the case was forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. Director's Exhibits 134, 143. While the case was pending with the OALJ, the miner died on February 5, 2000. Director's Exhibit 180. Upon notice of the miner's death, the OALJ remanded the miner's claim to the district director for consolidation with a survivor's claim that had been filed by the miner's widow (claimant) on March 7, 2000. Director's Exhibits 145, 165. The district director denied modification of the living miner's claim but awarded benefits in the survivor's claim. Director's Exhibits 192, 207. Both claimant and employer requested a hearing, which was held on August 29, 2001 before Administrative Law Judge Joseph E. Kane (the administrative law judge). On November 21, 2001, the administrative law judge issued a Decision and Order – Denying Living Miner's Benefits and Awarding Survivor's Benefits.

After consideration of claimant's appeal of the denial of the miner's claim, and employer's appeal of the award of the survivor's claim, the Board affirmed the administrative law judge's Decision and Order. *Tucker v. T&T Kentucky Coal Co.*, BRB Nos. 02-0261 BLA/A (Oct. 10, 2002) (unpub.). Employer subsequently filed a request for reconsideration, which was granted by the Board. After further deliberation, the Board modified its decision, vacated the award of benefits in the survivor's claim, and remanded the case for further consideration as to whether claimant had established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Tucker v. T&T Kentucky Coal Co.*, BRB Nos. 02-0261 BLA/A, slip. op. at 3 (Decision and Order On Motion For Reconsideration) (Aug. 27, 2003) (unpub.). The Board instructed the administrative law judge on remand to consider and weigh the miner's death certificate, along with the opinions of Drs. Fino and Branscomb relevant to whether the miner's death was hastened by pneumoconiosis. *Id.* The Board instructed the administrative law judge on remand to explain why the opinion of Dr. Dennis, the autopsy prosecutor, was entitled to greater weight than the opinions of employer's experts regarding the cause of the miner's death. *Tucker*, BRB Nos. 02-0261 BLA/A (Decision and Order On Motion For Reconsideration) (Aug. 27, 2003), slip op. at 4. Additionally, the Board instructed the administrative law judge to explain what specific language contained in the autopsy report he relied upon to support claimant's burden of proof under Section 718.205(c). *Id.* The Board further instructed the administrative law judge to explain why he considered Dr. Perper's opinion to be better reasoned and documented than the contrary opinions of Drs. Naeye, Caffrey, and Hansbarger regarding the cause of the miner's death. *Id.*

In his Decision and Order on Remand dated October 27, 2004, the administrative law judge determined that the opinions of Dr. Dennis and Dr. Perper were sufficient to establish that the miner's death was hastened by pneumoconiosis; and therefore, the administrative law judge awarded benefits under Section 718.205(c). Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits because the administrative law judge failed to consider all of the relevant evidence, and he failed to comply with the Board's remand instructions. *Tucker v. T & T Kentucky Coal Co.*, BRB No. 05-0196 BLA (Nov. 7, 2005) (unpub.). The Board once again remanded the case with specific instructions: the administrative law judge was to weigh Dr. Fino's December 20, 2000 report and Dr. Caffrey's July 18, 2000 report; he was to weigh the death certificate; he was directed to explain how the specific wording of Dr. Dennis's autopsy report supported claimant's burden of establishing that pneumoconiosis hastened the miner's death; and he was directed to assess the probative value of Dr. Perper's opinion, including whether it was reasoned and documented, in light of all of the conflicting medical opinion evidence relevant to whether pneumoconiosis hastened the miners' death. *Id.*

The administrative law judge's most recent Decision and Order on Remand dated April 20, 2006 is the subject of the instant appeal. In reviewing the evidence on remand, the administrative law judge credited Dr. Dennis's autopsy diagnosis of severe to moderate anthracosilicosis, and rejected the opinions of employer's experts that the miner's death was not hastened by pneumoconiosis because he found that their opinions did not account for Dr. Dennis's assessment of the degree of pneumoconiosis present in the miner's lungs. The administrative law judge, in turn, credited Dr. Perper's opinion that the miner's death was hastened by "significant" pneumoconiosis because he found that Dr. Perper's opinion was consistent with the autopsy findings. Accordingly, the administrative law judge awarded benefits on the survivor's claim.

Employer challenges the award of benefits, asserting that the administrative law judge failed to comply with the Board's directives on remand. Employer asserts that the administrative law judge failed to properly consider the death certificate. Employer's Brief in Support of Petition for Review at 11. Employer argues that the administrative law judge failed to adequately explain how Dr. Dennis's autopsy report was supportive of claimant's burden of proof; or in the alternative, even if Dr. Dennis's opinion were construed to be supportive of entitlement, why Dr. Dennis's opinion was given controlling weight as compared to the better reasoned and documented opinions of employer's experts. Employer's Brief in Support of Petition for Review at 13-15. In this regard, employer maintains that the administrative law judge gave invalid reasons for rejecting the opinions of Drs. Caffrey, Hansbarger, Naeye, Fino and Branscomb that the miner's death was not hastened by pneumoconiosis. *Id.* Employer further contends that the administrative law judge gave no credible explanation for why he considered Dr. Perper's opinion, attributing the miner's death to pneumoconiosis, to be better reasoned

and documented than the contrary opinions of employer's experts. Employer's Brief in Support of Petition for Review at 16-21. Employer requests that the Board either reverse the award of benefits or vacate the award and remand the case for a proper consideration of the medical evidence. Employer renews its request that the matter be reassigned to a new administrative law judge on remand, noting that "[f]urther review of the matter by Judge Kane appears to be futile." Employer's Brief at 26. Claimant responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief. Employer has also filed a reply brief.

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).

In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (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 or 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Initially, we reject employer's contention that the administrative law judge's award of benefits in the survivor's claim must be reversed based on the prior determination in the living miner's claim that the miner was *not* totally disabled due to pneumoconiosis. Contrary to employer's assertion, the relevant issue in a survivor's claim is whether pneumoconiosis hastened the miner's death, not whether the miner was totally disabled due to pneumoconiosis during his lifetime, *see* 20 C.F.R. §718.205(c); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 210, 22 BLR 2-467, 2-480 (3d Cir. 2002). Therefore, the administrative law judge properly considered claimant's entitlement to benefits under Section 718.205(c), separate and distinct from her entitlement based on the living miner's claim.

Employer contends that the administrative law judge erred in assigning less weight to the death certificate, which did not mention pneumoconiosis as a contributing cause of the miner's death. We disagree. A death certificate, in and of itself, is an unreliable report of the miner's condition when the record provides no indication that the individual

signing the death certificate possesses any personal knowledge of the miner from which to assess the cause of death. *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). In this case, the administrative law judge properly noted that the death certificate was prepared by a coroner, Dr. Morris, whose qualifications were not of record.¹ Decision and Order on Remand (April 20, 2006) at 4. Moreover, the administrative law judge properly assigned little probative weight to the death certificate, as the administrative law judge was unable to discern what evidence Dr. Morris relied upon in preparing his statement on the cause of miner's death or even whether Dr. Morris had any personal knowledge of the miner's condition at the time of death.² *Id.* Thus, we find no error in the administrative law judge's treatment of the death certificate.

Employer also asserts that the administrative law judge erred in assigning controlling weight to the opinion of Dr. Dennis based on his status as the autopsy prosector, over the medical reports of reviewing pathologists. We disagree. As we noted in our prior decision, "Review of portions of Dr. Dennis's report cited by the administrative law judge discloses evidence to support a finding that Dr. Dennis's review of the gross anatomy of the lungs played a role in his determination of the extent of pneumoconiosis that was present." *See Tucker*, BRB No. 05-0196 BLA at 4, citing Decision and Order on Remand (Nov. 2, 2004) at 13-14; Director's Exhibit 186 at 1, 3. Because the administrative law judge previously explained how Dr. Dennis's diagnosis of severe to moderate pneumoconiosis was based, in part, on his observation of the lung on gross examination, we find no error in the administrative law judge's decision to credit Dr. Dennis's finding.³ *See Urgolites v. BethEnergy Mines Inc.*, 17 BLR 1-20, 1-23 (1992).

¹ Contrary to employer's suggestion, the administrative law judge was not obligated to go outside of the record to ascertain the qualifications of the coroner, nor was he required to accept the statement of death simply because it was rendered by a "coroner."

² Employer attached copies of accident reports prepared by Dr. Morris at the request of the Department of Labor. The Board, however, will not consider evidence that was not a part of the record considered by the administrative law judge below. *See* 20 C.F.R. §802.301(b).

³ Employer also argues that the administrative law judge erred by failing to explain how Dr. Dennis's opinion specifically supported a finding that the miner's death was hastened by pneumoconiosis, as the Board directed him to do on remand. Contrary to employer's argument, insofar as the administrative law judge credited Dr. Dennis's opinion for the limited purpose of determining the extent of pneumoconiosis present in the miner's lungs, it was unnecessary for the administrative law judge to address what

Notwithstanding, we agree with employer's argument that the administrative law judge improperly relied on Dr. Dennis's opinion to discount the opinions of employer's experts. The administrative law judge stated in this regard: "Dr. Dennis's opinion forces me to discount the death due to pneumoconiosis opinions of [Drs. Fino, Caffrey, Hansbarger, Naeye and Branscomb] who all argued that pneumoconiosis could not have hastened the miner's death because he suffered from only *mild* pneumoconiosis [emphasis added]." Decision and Order on Remand (April 20, 2006) at 5. Contrary to the administrative law judge's finding, however, our review of the record reveals that Dr. Caffrey diagnosed mild to moderate pneumoconiosis, Director's Exhibit 187, while Dr. Hansbarger diagnosed moderate pneumoconiosis, Director's Exhibit 186. Dr. Naeye testified in his deposition that "overall the coal workers' pneumoconiosis on the slides themselves was mild to moderately severe." Director's Exhibit 205 at 28. Additionally, Dr. Fino did not diagnose mild pneumoconiosis as stated by the administrative law judge.⁴ Director's Exhibit 188. Because the administrative law judge mischaracterized the opinions of employer's experts as diagnosing only "mild" pneumoconiosis, his rationale for rejecting the opinions of employer's experts relevant to the issue of death causation is flawed. Consequently, we vacate the administrative law judge's finding at Section 718.205(c).

Furthermore, we are compelled to vacate the award of benefits in this case because, as employer contends, the administrative law judge failed to follow the Board's directive that he address whether Dr. Perper has offered a documented and reasoned opinion, regarding the cause of the miner's death, and whether it is sufficient to satisfy claimant's burden of proving that pneumoconiosis hastened the miner's death. *Tucker*, BRB No. 05-0196 BLA at 4. In discussing the credibility of Dr. Perper's opinion, the administrative law judge must consider whether Dr. Perper has accounted for the miner's history of lung cancer, brain cancer, and heart disease in rendering his opinion, and whether he has adequately explained the basis for his conclusions.

Thus, we remand the case for the administrative law judge to reconsider the opinions of employer's experts regarding the degree of pneumoconiosis present in the miner's lungs, as compared to the opinion of Dr. Dennis. We also direct the

specific statements contained in Dr. Dennis's report were supportive of a finding that pneumoconiosis hastened the miner's death. Our prior instruction, however, is still relevant if, on remand, the administrative law judge relies on Dr. Dennis's opinion to establish claimant's burden of proof under 20 C.F.R. §718.205(c). *See* discussion, *infra*.

⁴ Dr. Branscomb did specifically reject the findings on autopsy of severe to moderate pneumoconiosis, noting that such a degree of pneumoconiosis should have been readily visible on x-ray during the miner's lifetime. Employer's Exhibit 2.

administrative law judge to address whether Dr. Perper's opinion is sufficiently reasoned to support claimant's burden of establishing that the miner's death was hastened by pneumoconiosis, *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003),⁵ and to address the weight to accord Dr. Perper's opinion in light of all of the relevant evidence, *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). If the administrative law judge determines that Dr. Perper's opinion is reasoned and documented, he must set forth his basis for that finding, and further weigh Dr. Perper's opinion against the conflicting opinions of employer's experts, prior to deciding whether claimant is entitled to benefits.

Finally, employer argues that the case should be reassigned. We disagree. Our review of the administrative law judge's Decision and Order on Remand does not persuade us that the administrative law judge was recalcitrant, or that the case requires a "fresh look" at the evidence as alleged by employer. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). We therefore decline to remand this case for reassignment to a different administrative law judge.

⁵ The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has explained that pneumoconiosis only hastens the miner's death if it does so through a defined process that shortens the life by an estimable time. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

Accordingly, the Decision and Order on Remand – Awarding Survivor’s Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge