

BRB No. 09-0620 BLA

BETTY M. SKINNER)	
(Widow of CLIFFORD SKINNER))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 05/26/2010
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision on Remand - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

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

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision on Remand - Awarding Benefits (2004-BLA-6518) of Administrative Law Judge Michael P. Lesniak (the administrative law judge), on a survivor's claim filed on September 3, 2002, pursuant to the provisions of the Black

Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended* by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ When this case was first before the administrative law judge, the administrative law judge found, as the parties stipulated, that claimant was an eligible survivor, that the miner worked for forty years in coal mine employment, that the miner suffered from simple pneumoconiosis arising out of his coal mine employment and that employer was the responsible operator.² The administrative law judge further found that a preponderance of the evidence supported a finding that the miner's pneumoconiosis hastened his death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

Pursuant to employer's appeal, the Board affirmed in part, vacated in part and remanded the case for further consideration. *B.S. [Skinner] v. Consolidation Coal Co.*, BRB No. 06-0890 BLA (Aug. 30, 2007)(unpub.). The Board held that the administrative law judge did not provide an adequate rationale for ignoring employer's designation of its affirmative case evidence, and in relying solely upon the order in which employer submitted its evidence, to identify the evidence admissible under 20 C.F.R. §725.414(a)(3)(i). The Board, therefore, vacated the administrative law judge's decision to exclude Dr. Renn's report and deposition testimony as excessive evidence, and remanded the case for the administrative law judge to consider the evidence specifically designated by employer as its affirmative case evidence on the issue of whether the miner's death was due to pneumoconiosis at Section 718.205(c). In light of this holding, the Board vacated the administrative law judge's Section 718.205(c) findings, as they were based on a consideration of evidence other than that designated by employer as part of its affirmative case evidence. The Board remanded the case for reconsideration of the evidence on the issue of death causation. Specifically, the Board held that "in order to avoid a repetition of error on remand, in weighing the evidence under Section 718.205(c), the administrative law judge must fully set forth his findings with respect to each relevant medical opinion in detail, including the underlying rationales, in accordance with the requirements of the APA."³ [*B.S.] Skinner*, BRB No. 06-0890 BLA at 6.

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, which was filed before January 1, 2005.

² Previously filed claims by the miner were denied, Director's Exhibit 1, and are not at issue on this appeal. The miner died on March 24, 2002. Director's Exhibit 9.

³ The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

On remand, the administrative law judge considered the evidence, including Dr. Renn's report,⁴ and found it sufficient to establish death due to pneumoconiosis at Section 718.205(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge failed to follow the Board's remand instruction to support his findings with detailed explanations of each relevant medical opinion, failed to adequately explain why he credited certain opinions and discredited others, and improperly substituted his own medical conclusion for those of medical experts. Employer also contends that the case should be remanded to another administrative law judge because the administrative law judge failed to follow the Board's instructions. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in response to employer's appeal.⁵

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, rational, and consistent with applicable law,⁶ they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

⁴ In its brief on remand, employer designated the reports of Drs. Renn and Tomaszewski as its affirmative medical report evidence, the report of Dr. Bush as its affirmative autopsy report, and the report of Dr. Naeye as its rebuttal autopsy report.

⁵ By Order issued on March 30, 2010, the Board permitted supplemental briefing to address the impact, if any, of the 2010 amendments in this claim. In response to this Order, employer and the Director, Office of Workers' Compensation Programs (the Director), argue that the 2010 amendments do not apply to this survivor's claim because it was filed before January 1, 2005. Employer also argues that the amendments are not valid. Claimant responds, arguing that the amendments have no impact on this claim. Employer and the Director are correct that the 2010 amendments are not applicable, as the claim was filed before January 1, 2005. Moreover, in light of the foregoing, we need not address employer's arguments regarding the validity of the amendments.

⁶ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in coal mine employment in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(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).

The evidence relevant to death causation at Section 718.205(c) consists of the following. Dr. Wedemeyer, the autopsy prosector, opined that, while the miner did not have coal workers' pneumoconiosis, at least some of the fibrosis seen in his lungs was due to coal dust exposure, and that he had severe panlobular and bullous emphysema due to both smoking and coal dust exposure. Dr. Wedemeyer also opined that this coal dust-induced fibrosis and emphysema contributed to the miner's severe lung disease, which hastened his death from pneumonia. Director's Exhibit 10. Dr. Abrahams, the miner's treating physician, opined that the miner had coal workers' pneumoconiosis with associated fibrosis, and emphysema (panlobular, bullous and centrilobular) due to smoking, which both contributed to his severe lung disease and hastened his death from pneumonia. Director's Exhibit 11. Dr. Bush opined that the miner had a minimal degree of simple coal workers' pneumoconiosis that was too mild to play any role in his death, and that his death from pneumonia, was hastened by the severe lung disease he had due to idiopathic fibrosis. Employer's Exhibit 7. Dr. Tomashefski also found the miner's minimal simple coal workers' pneumoconiosis too mild to have played a role in the miner's death, which was due to pneumonia and interstitial fibrosis unrelated to coal mine employment. Dr. Tomashefski further opined that emphysema seen in the miner's lung was not related to coal mine employment. Director's Exhibit 25. Dr. Naeye opined that the miner had a very mild, simple coal workers' pneumoconiosis that did not play a role in his death from pneumonia. Dr. Naeye also diagnosed centrilobular emphysema that was entirely due to smoking. Director's Exhibits 24, 28. Finally, Dr. Renn, although finding the presence of coal workers' pneumoconiosis and fibrosis, opined that the miner's emphysema, which was due to smoking alone, was an aggravating factor in the miner's death because it made him more susceptible to the pneumonia that caused his death. Employer's Exhibits 5, 10. In addition to these medical opinions, the record includes the miner's death certificate, which indicates that the miner's death was due to septic shock and pneumonia due to fibrosis and dementia, and the miner's treatment

records from March 14, 2002 until his death on March 24, 2002, listing, *inter alia*, a history of advanced Alzheimer's dementia, end stage black lung, and chronic obstructive pulmonary disease related to heavy cigarette smoking, and diagnosing, *inter alia*, acute respiratory failure, septic shock, bilateral pneumonia, pulmonary fibrosis, possible cardiac ischemia and renal insufficiency. Director's Exhibits 9, 11.

In evaluating this evidence at Section 718.205(c),⁷ the administrative law judge concluded that the opinions of Drs. Wedemeyer and Abrahams finding death causation, were "reasoned and rational" and were supported by the miner's treatment records and death certificate. Decision and Order on Remand at 6. Regarding the opinions of Drs. Bush, Tomashefski and Naeye, that coal workers' pneumoconiosis was not a factor in the miner's death, the administrative law judge did "not find their rationale persuasive in light of all other factors, including [the miner's] forty years of coal mine employment, his treatment records, his acknowledged coal workers' pneumoconiosis, and his conceded death due to lung disease." Decision and Order on Remand at 6. Regarding the opinion of Dr. Renn, that the miner's smoking-induced emphysema contributed to his pneumonia and thereby hastened his death, the administrative law judge found the opinion unpersuasive in light of the comments to the regulations, stating that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms and that pathological studies show that centrilobular emphysema is common in coal miners and is associated with coal dust deposits in the lungs. Decision and Order on Remand at 6. After considering these opinions, the administrative law judge concluded, based on the opinions of Drs. Wedemeyer and Abrahams, that the miner's death was hastened by coal workers' pneumoconiosis at Section 718.205(c). Decision and Order on Remand at 6.

We first address employer's contention that the administrative law judge erred in crediting the opinions of Drs. Wedemeyer and Abrahams, to find that pneumoconiosis hastened the miner's death at Section 718.205(c). The administrative law judge credited these opinions because he found them "reasoned and rational" and because they were supported by the miner's treatment records and his death certificate. Decision and Order on Remand at 5-6. Employer contends, however, that the administrative law judge did not follow the Board's remand instructions, to adequately explain why he credited the opinions of Dr. Wedemeyer, the autopsy prosecutor, and Dr. Abrahams, the miner's treating physician, to find that pneumoconiosis hastened the miner's death.

⁷ The administrative law judge did not summarize the opinions of Drs. Wedemeyer, Abrahams, Bush and Tomashefski on remand, but stated that he was incorporating the summaries of their medical opinions that he made in his first decision. Decision and Order on Remand at 3. The administrative law judge then summarized the findings of Drs. Naeye and Renn. Decision and Order on Remand at 3-4.

At the outset, we note that the administrative law judge, while referring to the opinion of Dr. Abrahams, the miner's treating physician, did not discuss and evaluate the opinion, in any detail on remand, as instructed. Likewise, although he stated that the opinion is supported by the miner's treatment records and death certificate, the administrative law judge did not discuss the treatment records and death certificate on remand, or explain how they supported Dr. Abrahams's opinion. Such failure requires that the case be remanded again for reconsideration, pursuant to the requirements of the APA. See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). In determining the weight to be accorded the opinion of Dr. Abrahams, the miner's treating physician, the administrative law judge must consider it pursuant to 20 C.F.R. §718.104(d)(1)-(5).

We next address the administrative law judge's consideration of Dr. Wedemeyer's opinion. Referring to the comments to the regulations, indicating that the Department recognizes that there is some empirical support for the proposition that a miner weakened by pneumoconiosis may expire more quickly from other disease processes, see 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000); Decision and Order on Remand at 5, the administrative law judge credited Dr. Wedemeyer's opinion because he opined that "when an individual with as severe a lung disease as was found in the [m]iner contracts pneumonia, [he dies] more quickly because of [his] diminished lung capacity." Decision and Order on Remand at 6. The administrative law judge did not explain, however, how Dr. Wedemeyer's opinion specifically supported a finding that *this* miner's pneumoconiosis hastened his death. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Sparks*, 213 F.3d at 190, 22 BLR at 2-259.

In sum, we conclude that the administrative law judge's failure to discuss the opinion of Dr. Abrahams and to sufficiently discuss the opinion of Dr. Wedemeyer, and how the miner's treatment records and death certificate support their opinions, require that the administrative law judge's findings regarding these opinions be vacated, and that the case be remanded for further consideration of these opinions.⁸ See *Sparks*, 213 F.3d at 190, 22 BLR at 2-259; *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

⁸ Contrary to employer's assertion, the administrative law judge did not give greater weight to the opinion of Dr. Wedemeyer because he is the autopsy prosector. If the administrative law judge does so on remand, he must explain why Dr. Wedemeyer's status as the autopsy prosector would entitle his opinion to greater weight. See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Additionally, claimant must explain how Dr. Wedemeyer's autopsy report supports a finding of death due to pneumoconiosis when it does not list pneumoconiosis as a diagnosis. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Employer next contends that the administrative law judge failed to comply with the Board's instructions to provide adequate reasoning and explanation for discrediting the opinions of Drs. Bush, Tomashefski and Naeye. Specifically, employer contends that the administrative law judge's reasons for rejecting the opinions of Drs. Bush, Tomashefski and Naeye, who acknowledged the presence of coal workers' pneumoconiosis and extensive fibrosis, but ruled out coal workers' pneumoconiosis as the cause of death and, instead, pointed to idiopathic pulmonary fibrosis, were not rational. The administrative law judge rejected the opinions of Drs. Bush, Tomashefski and Naeye, on the issue of death causation, in light of the miner's "forty years of coal mine employment, his treatment records, his acknowledged coal workers' pneumoconiosis, and his conceded death due to lung disease." Decision and Order on Remand at 6.

Employer contends, however, that Drs. Bush, Tomashefski and Naeye were aware of these factors, but still explained why the miner's death was not due to coal workers' pneumoconiosis. We agree with employer that the administrative law judge has failed to comply with the Board's remand instruction, to "fully set forth his findings with respect to each relevant medical opinion in detail," in considering the opinions of Drs. Bush, Tomashefski and Naeye. Decision and Order on Remand at 6. As employer asserts, the administrative law judge rejected, in a single, cursory paragraph, the opinions of Drs. Bush, Tomashefski and Naeye. Decision and Order on Remand at 6. As employer asserts, the mere presence of coal workers' pneumoconiosis does not, in and of itself, establish that the miner died due to pneumoconiosis. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Rather, the issue of whether the miner's death was due to pneumoconiosis at Section 718.205(c) is a separate and distinct element of entitlement, which claimant must establish in order to establish entitlement in a survivor's claim. *See Trumbo*, 17 BLR at 1-89-90. Likewise, as employer asserts, the fact that employer conceded that the miner died due to a lung disease, is not, along with the diagnosis of coal workers' pneumoconiosis and forty years of coal mine employment, sufficient, in and of itself, to carry claimant's burden of establishing death due to pneumoconiosis, where there is conflicting evidence as to whether the miner's death was due to pneumoconiosis or another lung disease, including idiopathic pulmonary fibrosis and smoking-induced emphysema. *See* 20 C.F.R. §718.205(c); *Trumbo*, 17 BLR at 1-89-90.

In this case, as employer asserts, Drs. Bush, Tomashefski and Naeye acknowledged the presence of coal workers' pneumoconiosis, but specifically explained why the miner's coal workers' pneumoconiosis did not play a role in the miner's death, given the minimal or mild simple coal workers' pneumoconiosis that the miner had. Because the administrative law judge makes no reference to these specific findings of Drs. Bush, Tomashefski and Naeye, he has failed to comply with the Board's remand instructions to discuss the specifics of each opinion and to explicitly set forth his findings regarding each opinion. Accordingly, we vacate the administrative law judge's findings

regarding the opinions of Drs. Bush, Tomaszewski and Naeye. On remand, the administrative law judge must reconsider these opinions and explicitly set forth in detail his findings. *See Sparks*, 213 F.3d at 190, 22 BLR at 2-259; *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Employer also contends that the administrative law judge erred in discrediting Dr. Renn's opinion, that the miner's death due to pneumonia was hastened by his smoking-induced emphysema. Employer argues that, in discrediting Dr. Renn's opinion, the administrative law judge impermissibly substituted his own conclusions for that of a medical expert, who provided a reasoned opinion.

The administrative law judge found Dr. Renn's opinion, that smoking-induced emphysema, not coal workers' pneumoconiosis and related fibrosis, hastened the miner's death, unpersuasive because it was contrary to the Department's acceptance of pathological studies demonstrating a relationship between centrilobular emphysema and coal dust, and medical literature that "support[s] the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." 65 Fed. Reg. 79,943 (Dec. 20, 2000).

Dr. Renn acknowledged the presence of coal workers' pneumoconiosis and fibrosis, but opined that the miner's fibrosis could be due to smoking, rather than coal dust exposure. Dr. Renn further opined that the miner's emphysema, which aggravated the pneumonia that caused his death, was entirely due to smoking, because coal dust exposure causes only focal emphysema, not the panlobular, bullous and centrilobular emphysema that the miner had. We reject employer's argument that the administrative law judge was substituting his opinion for that of a medical expert, when he cited to the comments to the regulations to reject the opinion of Dr. Renn, that the miner's emphysema, which hastened his death, was solely smoking-induced. The administrative law judge may cite to these comments as support for his finding. *See Anderson*, 12 BLR at 1-112. Thus, the administrative law judge could find Dr. Renn's opinion unpersuasive as it conflicted with the view accepted by the Department regarding the relationship between emphysema and coal mine employment. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Anderson*, 12 BLR at 1-112. However, the administrative law judge did not address the opinions of other physicians, on the relationship of the kind of emphysema the miner had to coal dust and/or smoking, and the impact their findings in this regard had on their opinions as to whether pneumoconiosis hastened the miner's death at Section 718.205(c). Accordingly, we vacate the administrative law judge's finding rejecting the opinion of Dr. Renn, and we remand the case for the administrative law judge to reconsider Dr. Renn's opinion on death causation, along with the other relevant medical opinions of record.

Finally, we address employer's contention that the case be reassigned to a different administrative law judge on remand, because of the administrative law judge's failure to follow the Board's instructions. While this case has only been remanded to the administrative law judge once, he provided the same cursory findings on remand, regarding the opinions of Drs. Wedemeyer, Abrahams, Bush, Tomashefski and Naeye, that he made in his first decision, despite the Board's instructions to fully discuss the evidence and explain his findings. See *B.S. [Skinner] v. Consolidation Coal Co.*, 2004-BLA-6518 (April 29, 2009) at 6 and *B.S. [Skinner] v. Consolidation Coal Co.*, 2004-BLA-6518 (August 4, 2006) at 12. Review of this case requires a fresh look at the evidence. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). With reluctance, but to ensure a review that meets the standards required, we direct that this case be reassigned to a new administrative law judge on remand.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is vacated and the case is remanded for further proceedings 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