

BRB No. 10-0480 BLA

MARY LOUISE LUSK	)	
(Widow of ROY DANIEL LUSK)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SLAB FORK COAL COMPANY	)	
	)	DATE ISSUED: 05/31/2011
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 Stephen L. Purcell, Chief Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, 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.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order On Remand – Denying Benefits (2005-BLA-06086) of Chief Administrative Law Judge Stephen L. Purcell (the administrative law judge), rendered on a survivor’s claim, filed on June 2, 2003, pursuant to 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).<sup>2</sup> This case is before the Board for a second time. In his initial Decision and Order, dated October 29, 2007, the administrative law judge found, pursuant to *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006), that employer was collaterally estopped from relitigating whether the miner had pneumoconiosis in the survivor’s claim, as the existence of the disease had been established in the miner’s successful claim for benefits. The administrative law judge further found that claimant established that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded on the survivor’s claim.

Employer appealed, and the Board affirmed the administrative law judge’s finding that the doctrine of collateral estoppel was applicable to the issue of the existence of pneumoconiosis. *See M.L.K. [Lusk] v. Slab Fork Coal Co.*, BRB No. 08-0248 BLA, slip op. at 5-6 (Dec. 23, 2008) (unpub.). The Board, however, agreed with employer that, because *Collins* was issued subsequent to both the formal hearing in this case and the close of the evidentiary record, due process required that the record be reopened in order to give employer the opportunity to address the change in the law. *Id.* at 6. Thus, the Board vacated the award of benefits and remanded the case for the administrative law judge to “reopen the record and to consider the parties’ newly designated evidence,” as to whether the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.*

On remand, employer withdrew the previously submitted medical reports and deposition testimony of Drs. Fino and Rosenberg, and submitted the reports and deposition testimony of Drs. Tuteur and Castle. Employer’s Exhibits 10-15. Claimant did not submit any additional evidence and continued to rely on the medical opinion of Dr. Bird to support her case. After the record closed, the administrative law judge issued

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<sup>1</sup> Claimant is the widow of the miner, Roy Daniel Lusk, who died on May 6, 2003. Director’s Exhibit 9. The miner was receiving benefits, pursuant to a claim filed on November 30, 1982, which was awarded on April 30, 1993. *See* Miner’s Claim Exhibits (attached to case file).

<sup>2</sup> On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The recent amendments do not apply to the instant case, as claimant filed her survivor’s claim prior to January 1, 2005. Director’s Exhibit 3.

his Decision and Order on Remand on May 6, 2010, which is the subject of this appeal. The administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis and, thus, denied benefits.

On appeal, claimant asserts that, based on application of the doctrine of collateral estoppel, employer's experts are entitled to no weight on the issue of whether the miner's death was due to pneumoconiosis, because they were not of the opinion that the miner was totally disabled due to pneumoconiosis. Claimant also contends that the administrative law judge erred in rejecting Dr. Bird'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 declined to file a substantive response, unless specifically 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>3</sup> 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).

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 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

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<sup>3</sup> The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Based on our review of the administrative law judge's Decision and Order on Remand, the evidence of record, and the arguments of the parties on appeal, we conclude that the administrative law judge permissibly denied benefits, as he found that claimant failed to present sufficient evidence to satisfy her burden to establish that pneumoconiosis was a substantially contributing cause of the miner's death.

In this case, the medical evidence relevant to the cause of the miner's death is as follows. There is a "Death Summary" issued by Charleston Area Medical Center, describing the course of the miner's treatment during his last hospitalization. Director's Exhibit 31. The summary states that the miner suffered a myocardial infarction and was admitted to the hospital on April 27, 2003, where he received an emergency right and left heart catheterization with stent placements, but later died on May 6, 2003. *Id.* Under the title "Comorbidities" were listed the following diagnoses: 1) Coronary artery disease; 2) Right ventricular infarct; 3) Diabetes Mellitus, type 2; 4) Renal insufficiency with acute renal failure; 5) Atrial fibrillation; 6) Patent foramen ovale; 7) Chronic obstructive pulmonary disease; 8) Limb ischemia; 9) Anasarca; 10) Possible gastrointestinal bleeding; and 11) Anemia multifactorial. *Id.* The miner's death certificate, signed by Dr. Lewis, listed the immediate cause of the miner's death as "Asystole" due to or as a consequence of cardiopulmonary arrest, severe cardiogenic shock and acute myocardial infarction. Director's Exhibit 9.

Dr. Bird, the miner's treating physician, completed a form addressing the cause of the miner's death.<sup>4</sup> Director's Exhibit 11. Dr. Bird opined that "the [m]iner suffered from pneumoconiosis, as evidenced by his history and the x-rays." *Id.* He answered "yes" to the question, "Do you believe pneumoconiosis contributed to or played a hastening role in the miner's death." *Id.*

Dr. Bird subsequently wrote a letter on behalf of claimant, on June 10, 2004, addressed, "To Whom It May Concern." Director's Exhibit 31. Dr. Bird indicated that he was aware that that the miner's federal black lung benefits had ceased shortly after his death, based on a "report stating that his cause of death was not related to his pneumoconiosis." *Id.* Dr. Bird opined that, while heart disease was the primary cause of the miner's death, pneumoconiosis had played a significant role in the development of the coronary artery disease leading to death, and explained:

Any time a person has a more sedentary lifestyle[,] certainly that is a risk factor for heart disease in itself. This has been well documented. On his discharge summary from the hospital back in April 2003[,] prior to his

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<sup>4</sup> The administrative law judge noted that Dr. Bird treated the miner from the "late 1980's until April of 2003." Decision and Order on Remand at 5.

transfer to Roanoke[,] it was documented that his exertional tolerance was very limited. He had chronic shortness of breath from his coal workers['] pneumoconiosis as well. The fact that he was not a smoker tells me that a lot of his shortness of breath that he had was certainly related to his pneumoconiosis and limited his activities quite severely. In addition to his [pneumoconiosis,] he also had hyperlipidemia, hypertension, hypothyroidism, and diabetes. Certainly the hyperlipidemia, hypertension and diabetes are additional risk factors but, again, I contend that[,] in addition to these[,] the pneumoconiosis did play a substantial role since [it] certainly limited his ability to exercise to help control some of these other problems.

*Id.*

In a report dated July 16, 2009, Dr. Castle noted that he had been asked to assume that the miner had clinical pneumoconiosis for the purpose of his review. Employer's Exhibit 10. He stated, "I totally disagree with Dr. Bird in his assessment that pneumoconiosis contributed to [the miner's] demise. I find nothing in the objective information that I reviewed to indicate that coal workers' pneumoconiosis played any role in this man's acute myocardial infarction with cardiogenic shock." *Id.*

Dr. Tuteur also reviewed the miner's medical records and prepared a report dated July 31, 2009. Employer's Exhibit 12. Dr. Tuteur agreed with Dr. Castle that coal workers' pneumoconiosis played no role in the miner's death from heart disease. *Id.*

In weighing the conflicting medical opinions pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that Dr. Bird did not adequately explain his opinion. Decision and Order On Remand at 19. The administrative law judge questioned why "Dr. Bird never addressed the role, if any, that the [m]iner's family history of heart disease played in his development of coronary artery disease." *Id.* The administrative law judge also found Dr. Bird's opinion, that "[a]nytime a person has a more sedentary lifestyle[,] certainly that is a risk factor for heart disease in itself,' is simply a generalized statement which does not address the miner's particular medical condition." *Id.* Thus, the administrative law judge found that Dr. Bird's opinion was not sufficiently reasoned and failed to satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.205(c). *Id.* at 19-20.

Claimant argues that the administrative law judge erred in assigning less weight to Dr. Bird's opinion because he did not deny that the miner had multiple medical conditions, but still attributed the miner's death to pneumoconiosis. Contrary to claimant's assertion, however, the administrative law judge reasonably found that Dr. Bird failed to explain, with specificity, how pneumoconiosis hastened the miner's death

from a heart attack, and that his opinion was based on generalities, rather than evidence pertaining to the miner's respiratory condition. Decision and Order on Remand at 19; *see Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *United States Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (*en banc*); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993), and the Board may not reweigh the evidence or substitute its own inferences on appeal, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because the administrative law judge permissibly exercised his discretion in finding that Dr. Bird's opinion was not persuasive, we affirm the administrative law judge's finding that claimant failed to satisfy her burden to produce evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>5</sup>

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<sup>5</sup> Based on our affirmance of the administrative law judge's credibility finding with respect to Dr. Bird, it is not necessary that we address claimant's argument that, based on application of the doctrine of collateral estoppel, the opinions of Drs. Tuteur and Castle are entitled to no weight on the issue of death causation at 20 C.F.R. §718.205(c). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

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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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge