

BRB No. 12-0461 BLA

WANDA STEWART)	
(Widow of HARRY STEWART))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PEABODY COAL COMPANY)	DATE ISSUED: 05/30/2013
)	
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 Denying Benefits on Second Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits on Second Remand (2004-BLA-05814) of Administrative Law Judge Joseph E. Kane rendered on a

¹ Claimant is the surviving spouse of the miner, who died on January 24, 1997. Director's Exhibit 7. Claimant filed her claim for survivor's benefits on December 4, 2002. Director's Exhibit 3. The miner had filed a lifetime claim on June 10, 1982, that was finally denied on April 20, 1988. *Stewart v. Peabody Coal Co.*, BRB No. 85-2137 BLA (Apr. 20, 1988)(unpub.); Director's Exhibit 1.

survivor's claim filed on December 4, 2002 pursuant to the provisions of Title IV of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The procedural history of this case is as follows: On May 22, 2006, the administrative law judge issued a Decision and Order awarding benefits, based on his findings that claimant established the existence of both clinical pneumoconiosis arising out of coal mine employment² and legal pneumoconiosis, and that the miner's death was due to both clinical and legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), and 718.205(c). Pursuant to an appeal from employer, the Board vacated the award and remanded the case for further consideration of the evidence relevant to these issues. On January 30, 2009, the administrative law judge issued a Decision and Order denying benefits, finding that while claimant established the existence of clinical pneumoconiosis arising out of coal mine employment, he failed to establish the existence of legal pneumoconiosis.³ The administrative law judge further found that claimant failed to establish that the miner's death was due to his clinical pneumoconiosis and denied benefits. Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding that clinical pneumoconiosis arising out of coal mine employment was established, but vacated the administrative law judge's finding that legal pneumoconiosis and death due to clinical pneumoconiosis were not established. The Board instructed the administrative law judge to reconsider these issues on remand and also to consider whether, if he found legal pneumoconiosis established, the miner's death was caused by legal pneumoconiosis.⁴

² The parties have stipulated that the miner worked for thirty-two years in underground coal mine employment. Decision and Order at 4; Hearing Transcript at 35.

³ Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁴ In particular, the Board held that the administrative law judge erred: in restricting his consideration of Dr. Perper's autopsy report to Dr. Perper's pathological findings without taking into account the doctor's consideration of basic background information, such as the miner's smoking and coal mine employment histories; in discrediting Dr. Oesterling's negative legal pneumoconiosis opinion based on his finding that Dr. Oesterling conflated legal and clinical pneumoconiosis; and in failing to resolve the conflict between the well-reasoned opinions of Drs. Naeye and Oesterling, that the miner's death was not due to pneumoconiosis, and the well-reasoned opinion of Dr. Perper, that the miner's death was due to pneumoconiosis. The Board, therefore,

Stewart v. Peabody Coal Co., BRB No. 09-0395 BLA (Jan. 28, 2010)(unpub.). Pursuant to the Board's second remand, the administrative law judge again found that the existence of legal pneumoconiosis and death due to clinical pneumoconiosis were not established. The administrative law judge, therefore, denied benefits.

On appeal, claimant challenges the administrative law judge's findings that legal pneumoconiosis and death causation were not established. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in response to the 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.⁵ 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).

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 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (3), or that pneumoconiosis 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

specifically instructed the administrative law judge to: reweigh the opinions of Drs. Oesterling and Perper to determine if claimant established that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4); reconsider his determination that claimant failed to establish death due to legal pneumoconiosis, if he finds that claimant has established legal pneumoconiosis; and resolve the conflict among the opinions of Drs. Naeye, Oesterling, and Perper regarding death due to clinical pneumoconiosis, taking into account the physicians' respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses.

⁵ The record indicates that the miner's coal mine employment was in Kentucky and Ohio. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Legal Pneumoconiosis - Section 718.202(a)(4)

The administrative law judge reconsidered the opinions of Drs. Perper and Oesterling on the issue of legal pneumoconiosis, as instructed by the Board. The administrative law judge noted that Dr. Perper found that “coal dust inhalation was a factor in the development of the miner’s centrilobular emphysema,” while Dr. Oesterling found that “the [m]iner’s centrilobular emphysema was not caused by coal dust.” Decision and Order at 13-14. The administrative law judge concluded that both opinions were well-reasoned and well-documented and that the physicians were equally qualified. The administrative law judge, however, found that Dr. Oesterling’s opinion was better explained on the issue of legal pneumoconiosis. Specifically, the administrative law judge noted:

Dr. Oesterling offered a specific medical reason based on the autopsy slides why the miner’s centrilobular emphysema was not caused by coal dust, that is, the absence of coal dust deposits in the areas of emphysema. The Board held that this is not a reason to discredit Dr. Oesterling. Dr. Perper, on the other hand, appears to be saying that because the medical literature establishes the relationship between emphysema and coal mining, claimant’s emphysema must have been at least partially caused by coal dust. However, not every coal miner who has emphysema has legal pneumoconiosis. Unlike Dr. Oesterling, Dr. Perper did not explain how the autopsy slides substantiated his diagnosis. Accordingly, because Dr. Oesterling’s opinion is better explained in terms of the underlying medical evidence, that is, the autopsy slides, I credit Dr. Oesterling’s opinion over that of Dr. Perper.

Decision and Order at 15. Consequently, the administrative law judge concluded that, on weighing the opinions of Drs. Perper and Oesterling, the medical opinion evidence failed to establish the existence of legal pneumoconiosis.

Claimant contends, however, that the administrative law judge did not properly evaluate the opinions of Drs. Oesterling and Perper in finding that legal pneumoconiosis was not established. Specifically, claimant contends that the administrative law judge erred in crediting the opinion of Dr. Oesterling, that the miner’s emphysema was not related to his coal mine employment, because the doctor failed to provide a sufficient basis for his opinion.

We disagree with claimant's contention that Dr. Oesterling's opinion consists of nothing more than his observation, personal views and unsupported conclusions. As the administrative law judge found, Dr. Oesterling based his opinion on the miner's smoking and coal mine employment histories and the underlying objective medical documentation when he opined that claimant's emphysema was not due to coal dust inhalation. Decision and Order at 13. Further, as the administrative law judge noted, Dr. Oesterling explained that he did not see significant deposits of coal mine dust in the areas of the miner's lung where he saw emphysema, and that there was not enough dust present in the miner's lungs to have caused his emphysema. Decision and Order at 13; Employer's Exhibit 9. Additionally, the administrative law judge noted that Dr. Oesterling explained how the miner's forty-to-eighty pack-year smoking history and advanced age caused his emphysema. Decision and Order at 13; Employer's Exhibit 19. Accordingly, contrary to claimant's contention, the administrative law judge properly found that Dr. Oesterling's opinion was supported by its underlying documentation and that the doctor's reasoning was fully explained. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

The administrative law judge also properly accorded less weight to the opinion of Dr. Perper. Contrary to claimant's contention, the administrative law judge could properly conclude that Dr. Perper's opinion was entitled to less weight because he relied on generalities to find that the miner's emphysema was due to coal mine employment, rather than determining that this particular miner's emphysema was caused by coal mine employment.⁶ *See* 65 Fed. Reg. 79,923 (Dec. 20, 2000). The administrative law judge properly accorded less weight to Dr. Perper's opinion because Dr. Perper, unlike Dr. Oesterling, did not explain how the miner's autopsy slides substantiated his diagnosis that the miner's emphysema was due to coal mine employment. *See Clark*, 12 BLR at 1-155. The administrative law judge, therefore, properly found that Dr. Perper's opinion was not as well explained as that of Dr. Oesterling. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Accordingly, we affirm the administrative law judge's decision to credit the opinion of Dr. Oesterling over the opinion of Dr. Perper and

⁶ Specifically, the administrative law judge noted that:

Dr. Perper...appears to be saying that because the medical literature establishes the relationship between emphysema and coal mining, [c]laimant's emphysema must have been at least partially caused by coal dust. However, not every coal miner who has emphysema has legal pneumoconiosis.

Decision and Order at 15.

to find that the medical opinion evidence failed to establish the existence of legal pneumoconiosis.⁷

Death Causation - 20 C.F.R. §718.205(c)

In finding that death causation was not established, the administrative law judge noted that the opinions of Drs. Naeye and Perper were well-reasoned and well-documented. Drs. Naeye and Oesterling opined that clinical pneumoconiosis did not cause or contribute to the miner's death, while Dr. Perper opined that it did. Specifically, the administrative law judge stated:

In weighing the three physicians' opinions according to the Board's instructions on remand, I find that Drs. Naeye, Oesterling, and Perper are equally qualified Board-certified pathologists and that they relied on the same medical evidence in forming their conclusions. I find, however, that Dr. Oesterling's opinion is the best explained of the three death causation opinions, and therefore accord his opinion the most weight. Dr. Oesterling went into great detail explaining how, because of their location in the pleura, the pneumoconiosis lesions could not have affected the [m]iner's lung function or contributed to his death. Dr. Perper's report was silent as to whether the lesions were located in the pleura or the interstitium. Additionally, Dr. Oesterling's opinion is bolstered by Dr. Naeye, who also found that the extent of the [m]iner's clinical pneumoconiosis was too mild to have caused measurable abnormalities in lung function. Accordingly, on the issue of death causation, I give the most weight to the well-reasoned, well-documented, and thoroughly explained opinion of Dr. Oesterling that the [m]iner's clinical pneumoconiosis did not cause or contribute to the [m]iner's death. Therefore, Claimant has failed to demonstrate that the [m]iner's death was "due to pneumoconiosis" under the Act and regulations, and benefits must be denied.

Decision and Order at 18.

⁷ As the administrative law judge noted, the Board previously found no error in the administrative law judge's admission of Dr. Naeye's report as an autopsy rebuttal report; in his discrediting of the positive legal pneumoconiosis opinions of Drs. Haggenjo and Kander as inadequately explained; in his discrediting of Dr. Naeye's negative legal pneumoconiosis opinion as inconsistent with medical studies credited by the Department of Labor, and little more than a generalization; and in his rejection of Dr. Rosenberg's negative legal pneumoconiosis opinion on various grounds. Decision and Order at 3; Board's 2010 Decision and Order.

Contrary to claimant's contention, the administrative law judge reasonably credited the opinion of Dr. Oesterling on the issue of death causation, because it was supported by the opinion of Dr. Naeye as to the size and location of the lesions seen and the insignificance of coal mine dust exposure to the cause of death. *See Anderson*, 12 BLR at 1-112; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge properly found that Dr. Perper's opinion, that pneumoconiosis contributed to the miner's death, was not as credible as Dr. Oesterling's opinion, because it conflicted with the findings of both Drs. Oesterling and Naeye as to the size and location of the lesions seen and their significance in the miner's death. *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-400 (1982). Consequently, as the administrative law judge has properly considered "the physicians' respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnosis," *see* Board's 2010 Decision and Order, we affirm his finding that claimant has failed to establish that clinical pneumoconiosis caused the miner's death.⁸ *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

⁸ The Board previously affirmed the administrative law judge's crediting of the death causation opinions of Drs. Haggenjo and Kander as unexplained and affirmed his finding that Dr. Rosenberg's death causation opinion was not an independent opinion. Board's 2010 Decision and Order.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Second Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge