

BRB No. 12-0539 BLA

INES GRACHEN)
(Widow of GEORGE GRACHEN))
)
 Claimant-Respondent)
)
 v.)
)
 SHANNOPIN MINING COMPANY)
) DATE ISSUED: 05/24/2013
 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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

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

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (07-BLA-5117) of Administrative Law Judge Michael P. Lesniak awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp.

2011) (the Act). This case, involving a survivor's claim filed on November 10, 2005, is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with forty-three years of coal mine employment,¹ and found that the evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and remanded the case for further consideration. *Grachen v. Shannopin Mining Co.*, BRB No. 09-0675 BLA (June 30, 2010) (unpub.). The Board also instructed the administrative law judge, on remand, to consider whether claimant could establish invocation of the amended Section 411(c)(4) presumption.² 30 U.S.C. §921(c)(4).

On remand, the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Moreover, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant could not invoke the amended Section 411(c)(4) presumption. However, the administrative law judge noted that the parties stipulated that the miner suffered from clinical pneumoconiosis arising out of his coal mine employment. The administrative law judge further found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

¹ The miner's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

² Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

On appeal, employer argues that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, asserting that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 718.205(c)

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if 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)-(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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Employer argues that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In this case, five physicians, Drs. Komen, Omalu, Oesterling, Renn and Perper, addressed the cause of the miner's death.

Summary of the Medical Opinion Evidence

Dr. Komen, the miner's treating physician, completed the miner's death certificate, listing the immediate cause of death as "probable acute coronary syndrome." Director's Exhibit 6. Dr. Komen did not list coal workers' pneumoconiosis as a significant contributing cause of the miner's death. *Id.* In a subsequent medical report, Dr. Komen stated that:

It does not appear that pneumoconiosis was a substantial contributing factor in the miner's death. In my opinion [the miner] most likely died from acute coronary syndrome and related complications secondary to his longstanding

severe ischemic cardiomyopathy as well as methicillin resistant staphylococci, trachea bronchitis and aspiration pneumonia. The other major contributing factor appears to be the hepatoma with metastasis and hepatic insufficiency and encephalopathy.

Employer's Exhibit 4.

Dr. Omalu performed the miner's autopsy. In his autopsy report, Dr. Omalu included coal workers' pneumoconiosis among his final pathological diagnoses. Dr. Omalu, however, did not address the cause of the miner's death in his autopsy report. Director's Exhibit 7. During a subsequent deposition, Dr. Omalu noted that the miner suffered from one of the most advanced cases of pneumoconiosis that he had ever seen.³ Claimant's Exhibit 16. Dr. Omalu opined that the underlying cause of the miner's death was pneumoconiosis, explaining that it "caused cor pulmonale causing heart disease." *Id.* at 28. Dr. Omalu opined that liver cancer and heart disease also contributed to the miner's death. *Id.* at 29.

After reviewing the miner's autopsy slides and the medical evidence, Dr. Oesterling prepared a medical report dated March 17, 2007. Although Dr. Oesterling opined that the miner suffered from "moderate micronodular coal workers' pneumoconiosis," he opined that "the level of the disease . . . is insufficient to have altered [the miner's] pulmonary function." Employer's Exhibit 1. Dr. Oesterling opined that the primary cause of the miner's death was probably acute coronary syndrome due to ischemic cardiomyopathy. *Id.* Dr. Oesterling opined that the miner's coal workers' pneumoconiosis did not cause, contribute to, or hasten the miner's death. *Id.* Dr. Oesterling reiterated his opinions during two subsequent depositions. Employer's Exhibits 9, 13.

Dr. Renn reviewed the medical evidence. In a medical report dated February 14, 2008, Dr. Renn opined that the miner's death was the "result of chronic ischemic cardiomyopathy upon which was superimposed recent and progressive myocardial injury resulting in chronic left ventricular failure, pulmonary fluid congestion and terminal bronchopneumonia." Employer's Exhibit 3. Although Dr. Renn diagnosed coal workers' pneumoconiosis, he opined that the disease did not cause, contribute to, or hasten the miner's death. *Id.* Dr. Renn reiterated his opinions during a subsequent deposition. Employer's Exhibit 12.

³ Dr. Omalu stated that the miner's lungs "were completely destroyed and completely decompensated by the pneumoconiosis." Claimant's Exhibit 16. Dr. Omalu stated that he saw "large deposits from coal dust" and "multiple anthracosilicotic nodules" in the miner's lungs. *Id.*

After reviewing the miner's autopsy slides and the medical evidence, Dr. Perper prepared a medical report dated July 24, 2007. Dr. Perper diagnosed both simple and complicated pneumoconiosis. Claimant's Exhibit 3. Dr. Perper opined that the miner's pneumoconiosis "was a substantial cause of his pulmonary impairment and disability and ultimately was a significant and substantial contributory cause of death . . ." *Id.* During a subsequent deposition, Dr. Perper explained that he based his opinion, that pneumoconiosis was a substantial contributing factor in the miner's death, on symptoms of shortness of breath, a progressive worsening of the miner's breathing, and the severe nature of the miner's pneumoconiosis. Claimant's Exhibit 4 at 47. Dr. Perper explained that the miner's pneumoconiosis scarred his lungs, preventing them from participating in the oxygen exchange process. *Id.* at 33. Dr. Perper opined that the miner's severe coal workers' pneumoconiosis indirectly and directly affected the supply of oxygen to the heart, contributing to the miner's death. *Id.* at 67-68. Dr. Perper also opined that the miner's coal workers' pneumoconiosis contributed to the miner's death by suppressing his immune system. *Id.* at 91.

The Administrative Law Judge's Finding

In considering whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge found that Dr. Perper's opinion, that the miner's severe pneumoconiosis harmed his lung tissue and heart function, thereby interfering with the oxygen exchange process and causing his death, was well-reasoned and, therefore, entitled to significant weight. Decision and Order on Remand at 12-13. The administrative law judge accorded less weight to the opinions of Drs. Oesterling and Renn, that pneumoconiosis did not cause, contribute to, or hasten the miner's death, because the doctors based their respective opinions on an inaccurate understanding of the extent of the miner's pneumoconiosis. *Id.* at 14. The administrative law judge accorded Dr. Komen's opinion little weight because the doctor did not address whether pneumoconiosis affected the miner's heart. *Id.* The administrative law judge, therefore, found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Discussion

As an initial matter, we reject employer's assertion that the administrative law judge should have applied the United States Court of Appeals for the Sixth Circuit's standard in determining whether pneumoconiosis hastened the miner's death, because this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. Unlike the Sixth Circuit, which has required the medical evidence to establish the conditions under which pneumoconiosis has hastened death, i.e., through a specifically defined process that reduces the miner's life by an estimable period of time, *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir.

2003), the Third Circuit has not adopted this standard. Rather, the Third Circuit has indicated that a condition that actually hastens the miner's death in any way is a substantially contributing cause of death for purposes of 20 C.F.R. §718.205. *Lukosevic*, 888 F.2d at 1006, 13 BLR at 2-108. Accordingly, the administrative law judge did not err in applying the "hastening death" standard adopted by the Third Circuit when considering the issue of death causation in this case.

Employer next argues that the administrative law judge erred by not addressing the fact that Dr. Perper based his diagnosis of severe pneumoconiosis on the existence of complicated pneumoconiosis, a finding that conflicted with the administrative law judge's own determination. We disagree. Dr. Perper explained that his diagnosis of severe simple pneumoconiosis was not dependent on his diagnosis of complicated pneumoconiosis. Dr. Perper testified that the miner's complicated pneumoconiosis co-existed "on the background" of his simple pneumoconiosis, which Dr. Perper described as severe. Claimant's Exhibit 4 at 36-37. Dr. Perper further testified that "the severity of the simple pneumoconiosis, after theoretically excluding the lesions in excess of [one] centimeter, would have been more than sufficient to kill him, to contribute to the death or to hasten his death." *Id.* at 38.

Employer also contends that the administrative law judge should have accorded less weight to Dr. Perper's opinion because the administrative law judge rejected one of the doctor's two theories regarding how the miner's severe pneumoconiosis contributed to his death. We disagree. The administrative law judge was aware that Dr. Perper provided two different theories as to how the miner's severe pneumoconiosis contributed to his death, namely (1) by affecting the supply of oxygen to the heart; and (2) by suppressing the miner's immune system. Claimant's Exhibit 4 at 67-68, 91. Although the administrative law judge found that Dr. Perper's opinion, that the miner's pneumoconiosis suppressed his immune system, was entitled to little weight, Decision and Order on Remand at 13 n.23, the administrative law judge found that Dr. Perper's opinion, that the miner's pneumoconiosis contributed to his death by affecting the supply of oxygen to the heart, was well-reasoned. *Id.* at 12-13. Contrary to employer's contention, the administrative law judge permissibly credited one of Dr. Perper's theories regarding the effect of pneumoconiosis on death, while rejecting the other. *See Luketich v. Director, OWCP*, 8 BLR 1-477, 1-480 n.3 (1986); *see also Drummond Coal Co. v. Freeman*, 17 F.3d 361, 366 (11th Cir. 1994) ("An [administrative law judge] need not find that a medical opinion is either wholly reliable or wholly unreliable.").

We also reject employer's contention that Dr. Perper's opinion, regarding the contribution of pneumoconiosis to the miner's death, was not sufficiently reasoned because it was not based upon accepted medical principles. In regard to Dr. Perper's opinion, that the miner's severe coal workers' pneumoconiosis affected the supply of oxygen to the heart, thereby contributing to his death, the administrative law judge

accurately noted that the Third Circuit has credited similar medical theories, and found them sufficient to support a finding that pneumoconiosis contributed to a miner's death. Decision and Order on Remand at 13 n.22, citing *Hill v. Director, OWCP*, 562 F.3d 264, 270-72, 24 BLR 2-177, 2-189-91 (3d Cir. 2009) (observing that "if the heart and lungs do not have a sufficient supply of oxygen to function properly, the result could surely include organ failure as well as other complications."). Moreover, the administrative law judge found that Dr. Perper's opinion was supported by the opinions of Drs. Renn and Oesterling.⁴ Decision and Order on Remand at 13. Because it is based on substantial evidence, we affirm the administrative law judge's finding that Dr. Perper's opinion, that the miner's pneumoconiosis contributed to his death, is well-reasoned. See *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Employer next contends that the administrative law judge erred in relying on Dr. Omalu's opinion to support a finding that the miner's pneumoconiosis contributed to his death. Contrary to employer's contention, the administrative law judge did not rely on Dr. Omalu's opinion to support a finding that the miner's death was due to pneumoconiosis.⁵ Rather, the administrative law judge credited Dr. Omalu's opinion that the miner's pneumoconiosis was "severe," thereby supporting Dr. Renn's assessment of the severity of the miner's pneumoconiosis. Decision and Order on Remand at 13.

⁴ The administrative law judge noted that:

Firstly, the other physicians agreed that [the] miner's lung and heart function were interconnected. Specifically, Dr. Renn explained that the heart and lungs comprise a "circular system," whose malfunction may interfere with gas exchange. (EX 12 at 4). Similarly, Dr. Oesterling explained that [the] miner's pulmonary conditions and heart failure both contributed to his hypoxia, again underscoring the interplay between these disease processes. (EX 9 at 74-75). Secondly, although Dr. Renn did not attribute [the] miner's gas exchange impairment to CWP, he suggested that, in some cases, severe pneumoconiosis may interfere with gas exchange, and he agreed that "severe pneumoconiosis can result in abnormal blood gas studies." (EX 12 at 65, 75). Additionally, he agreed that [the] miner's gas exchange problem contributed to his death.

Decision and Order on Remand at 13 (footnote omitted).

⁵ The administrative law judge found that Dr. Omalu's opinion regarding the cause of the miner's death was entitled to "little weight" because it was equivocal and inconsistent. Decision and Order on Remand at 13 n.23.

Employer also argues that the administrative law judge erred in his consideration of Dr. Komen's opinion. Dr. Komen opined that the miner most likely died from acute coronary syndrome and related complications. Employer's Exhibit 4. Although the administrative law judge noted that Dr. Komen opined that it "does not appear that . . . pneumoconiosis was a substantial contributing factor in [the miner's] death," the administrative law judge permissibly accorded less weight to the doctor's opinion because he did not address whether the miner's pneumoconiosis adversely affected his cardiac condition. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 14.

The administrative law judge accorded little weight to the opinions of Drs. Oesterling and Renn, because their respective opinions were based upon an incorrect premise, namely, that the miner's pneumoconiosis was not severe. Decision and Order on Remand at 14. Because employer does not challenge the administrative law judge's basis for discrediting their opinions, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). As it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁶

⁶ In light of our affirmance of the administrative law judge's award of benefits, we need not address the arguments of the Director, Office of Workers' Compensation Programs, that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge