

BRB No. 97-1310 BLA

GERALDINE WENTZ)	
(Widow of HERBERT L. WENTZ))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	Date Issued:
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.

Robert J. Bilonick (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand (95-BLA-81) of Administrative Law Judge Michael P. Lesniak 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 the second time. In his initial Decision and Order, the administrative law judge denied the miner's claim but found that claimant established death due to pneumoconiosis at 20 C.F.R. §718.205(c)(2) and awarded benefits on the survivor's claim. Employer

appealed, and in *Wentz v. Island Creek Coal Co*, BRB No. 95-2234 BLA (Aug. 26, 1996)(unpub.), the Board affirmed the denial of the miner's claim but vacated and remanded the administrative law judge's Decision and Order pursuant to Section 718.205(c)(2) on the survivor's claim. On remand, the administrative law judge again found that claimant established death due to pneumoconiosis at Section 718.205(c)(2) and awarded benefits. Employer appeals, contending that the administrative law judge erred in his consideration of the medical evidence. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In a survivor's claim filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); 20 C.F.R. §§718.202, 718.203, 718.205(c). The United States Court of Appeals for the Third Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death. See *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

Employer contends that the administrative law judge erred in relying upon the medical opinion of Dr. Comas dated January 14, 1993 in finding that claimant established death due to pneumoconiosis at Section 718.205(c). The administrative law judge properly found that Dr. Comas stated that pneumoconiosis contributed to the miner's death. Director's Exhibit 50. However, in relying upon Dr. Comas's opinion, the administrative law judge failed to consider that the death certificate signed by Dr. Comas on December 11, 1992 did not state that pneumoconiosis played any part in the miner's death. Director's Exhibit 45.¹ We therefore vacate the administrative law judge's finding at Section 718.205(c) and remand the case for the administrative law judge to determine what effect, if any, Dr. Comas's failure to

¹ The death certificate lists the immediate cause of death as cardiopulmonary arrest due to acute myocardial infarction. Cirrhosis is listed as another significant condition contributing to death. Director's Exhibit 45.

list pneumoconiosis on the death certificate has on the weight to be assigned Dr. Comas's January 14, 1993 opinion that pneumoconiosis contributed to the miner's death.

Employer also contends that the administrative law judge unfairly characterized Dr. Naeye's opinion as equivocal. We previously held that Dr. Naeye unequivocally opined that none of the miner's lung diseases hastened his death. See Board's Decision and Order at 5; Director's Exhibits 47, 53; Employer's Exhibit 2. In spite of our holding, the administrative law judge found the opinion equivocal because Dr. Naeye stated, at least hypothetically, that minor lesions might shorten the miner's life by two or three seconds. He did not say that it did so in this case. Our previous holding constitutes the law of the case, and as neither the administrative law judge nor employer has demonstrated that an exception to this doctrine is applicable, we reaffirm our finding that Dr. Naeye unequivocally opined that none of the miner's lung diseases hastened his death. See *Sammons v. Wolf Creek Collieries*, 19 BLR 1-24 (1994); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Therefore, the administrative law judge erred in finding Dr. Naeye's opinion equivocal, and erred in discrediting his opinion on that basis.

Employer further contends that the administrative law judge improperly discredited Dr. Kleinerman's opinion because he failed to diagnose emphysema. However, as employer notes, in diagnosing coal workers' pneumoconiosis, Dr. Kleinerman acknowledged the presence of focal emphysema. Employer's Exhibit 1 at 43-44. Moreover, employer correctly asserts that the administrative law judge then inconsistently credited Dr. Benschhoff's initial report, which found that coal workers' pneumoconiosis contributed to the miner's death, though it did not include a diagnosis of emphysema Director's Exhibit 46. In addition, employer notes that the administrative law judge credited Dr. Perper's opinion, which diagnosed slight chronic centrilobular emphysema. Director's Exhibits 72, 77, a diagnosis, employer contends, which is not inconsistent with Dr. Kleinerman's analysis. We therefore vacate the administrative law judge's decision to discredit Dr. Kleinerman's opinion and remand for the administrative law judge to reconsider his opinion in light of employer's contentions.

Employer further contends that the administrative law judge erred in discrediting Dr. Fino's opinion as imprecise, and failed to adequately analyze Dr. Perper's opinion. We disagree. The administrative law judge did not discredit Dr. Fino's opinion, but merely found his opinion outweighed by the preponderance of the evidence, which is within his discretion as trier of fact. Decision and Order on Remand at 10. Additionally, the Board previously affirmed the administrative law

judge's crediting of Dr. Perper's opinion as well reasoned, and our prior holding constitutes the law of the case. See *Sammons, supra; Bridges, supra, Brinkley, supra*. We therefore affirm the administrative law judge's weighing of the opinions of Drs. Fino and Perper as rational and supported by substantial evidence.

Employer also contends that the Board should revisit its decision to affirm the administrative law judge's consideration of the supplemental report of Dr. Benshoff and the medical conclusion of Dr. Pickerill. Dr. Benshoff's supplemental report stated that simple pneumoconiosis was not a causal factor in the miner's death, and Dr. Pickerill made a similar finding. Director's Exhibits 50, 62. We previously affirmed the administrative law judge's finding that Dr. Pickerill did not specifically address whether the disease hastened death, and also affirmed the administrative law judge's decision to credit Dr. Benshoff's original autopsy report. See Board's August 26, 1996 Decision and Order at 4. Our decision constitutes the law of the case, and as employer has not demonstrated any exception to this doctrine, we decline to revisit these contentions in this appeal. See *Sammons, supra; Brinkley, supra; Bridges, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge