BRB No. 11-0222 BLA

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| PATRICIA FLETCHER<br>(Widow of DONALD FLETCHER) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| HARMAN MINING COMPANY | ) | |
| and | ) | |
| | ) | DATE ISSUED: 11/29/2011 |
| OLD REPUBLIC INSURANCE COMPANY | ) | |
| Employer/Carrier-<br>Petitioners | ) | |
| 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 Pamela Jane Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (06-BLA-5812) of Administrative Law Judge Pamela Jane Lakes awarding benefits on a claim filed 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). This case, involving a survivor's claim filed on June 6, 2005, is before the Board for the second time.

In the initial Decision and Order, the administrative law judge credited the miner with eighteen years of coal mine employment,[1] and found that the x-ray, autopsy and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2), and (4). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Weighing all of the evidence together pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that the evidence established the existence of both clinical and legal pneumoconiosis. After finding that claimant[2] was entitled to the presumption that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that the miner's death was due to clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the x-ray and autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2). *P.F.* [*Fletcher*] *v. Harman Mining Co.*, BRB No. 09-0304 BLA (Oct. 26, 2009) (unpub.). However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remanded the case for further consideration. *Id.* In light of this holding, the Board also vacated 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). *Id.*

While this case was on remand, Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of qualifying coal mine employment, and that he had a totally disabling respiratory

[1] The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibits 3, 4. 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 (1989) (*en banc*).

[2] Claimant is the surviving spouse of the miner, who died on April 20, 2005. Director's Exhibit 9.

impairment, there will be a rebuttable presumption that his death was due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption.[4] 30 U.S.C. §921(c)(4).

On remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also reincorporated her previous finding 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.[5] The administrative law judge also awarded claimant's counsel a total fee of $9,350.00 for legal services performed in pursuit of the claim.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also 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). Employer further contends that the administrative law judge's attorney's fee award is excessive. Claimant responds in support of the administrative law judge's award of benefits, and the administrative law judge's attorney fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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[3] Section 1556 of Public Law No. 111-148 also reinstated Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. However, claimant cannot benefit from this provision, as the miner's claim for benefits was denied. Unmarked Exhibit.

[4] In an April 6, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit position statements. Claimant, employer and the Director, Office of Workers' Compensation Programs, submitted position statements.

[5] Because the administrative law judge was able to award benefits without applying the Section 411(c)(4) presumption, she did not address whether claimant would be entitled to the rebuttable presumption. Decision and Order on Remand at 2.

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).

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

**Legal Pneumoconiosis**

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis[6] pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge, on remand, reconsidered the conflicting opinions of Drs. Perper and Tuteur. Dr. Perper diagnosed legal pneumoconiosis, in the form of emphysema/chronic obstructive pulmonary disease (COPD) due to both cigarette smoking and coal mine dust exposure. Claimant's Exhibit 7. Although Dr. Tuteur also diagnosed emphysema/COPD, he opined that the disease was due solely to cigarette smoking. Employer's Exhibits 2, 4.

In her consideration of the conflicting evidence, the administrative law judge found that Dr. Tuteur's opinion, that the miner's emphysema/COPD was not due to coal mine dust exposure, was entitled to less weight, because Dr. Tuteur relied upon an inflated smoking history, and because Dr. Tuteur's opinion was contrary to the regulations. Decision and Order on Remand at 4-5. The administrative law judge stated that she "continue[d] to find that Dr. Perper's opinion [was] reasoned and documented." *Id.* at 6. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[6] "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).

Employer contends that the administrative law judge erred in according less weight to Dr. Tuteur's opinion. We disagree. The administrative law judge noted that Dr. Tuteur, in eliminating the miner's coal mine dust exposure as a cause of his emphysema/COPD, relied upon the following reasoning:

> Since 20% or so of never mining men who smoked in a similar fashion to [the miner] will develop clinically significant chronic obstructive pulmonary disease and only 1% or so of never smoking coal miners develop the condition, in [the miner], with reasonable medical certainty, his chronic obstructive pulmonary disease . . . was due to the inhalation of cigarette smoke, not coal mine dust.

Employer's Exhibit 4.

The administrative law judge found that Dr. Tuteur's opinion was inconsistent with the Department's recognition that "the incidence of nonsmoking coal miners with intermediate dust exposure developing moderate obstruction . . . is roughly equal to the incidence of moderate obstruction in smokers with no mining exposure . . . ." Decision and Order on Remand at 5 n.4, *quoting* 65 Fed. Reg. 79,940 (Dec. 20, 2000). The administrative law judge permissibly accorded less weight to Dr. Tuteur's opinion, because the doctor's opinion, that the miner's condition had to be caused by smoking, because miners rarely have clinically significant obstruction from coal mine dust exposure, was contrary to the Department's position regarding the medical science.[7] *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

[7] In *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008), the court stated that Dr. Tuteur's view that the miner's condition "had to be caused by cigarette smoking because miners rarely have clinically significant obstruction from coal dust" would "lead to the logical conclusion" that Dr. Tutuer "categorically excludes obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust." *Beeler*, 521 F.3d at 726, 24 BLR at 2-103.

Because the administrative law judge provided a valid basis for according less weight to Dr. Tuteur's opinion, the administrative law judge's error, if any, in according less weight to his opinion for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to Dr. Tuteur's opinion.

Employer next contends that the administrative law judge erred in not adequately addressing whether Dr. Perper's opinion, that the miner's emphysema/COPD was due to both coal mine dust exposure and cigarette smoking, is adequately reasoned. We agree. On remand, the administrative law judge rejected employer's contention that Dr. Perper's analysis was not based upon the facts of this case, and stated that she "continue[d] to find Dr. Perper's opinion to be reasoned and documented." Decision and Order on Remand at 6. However, in her initial decision, the administrative law judge's only articulated basis for finding that Dr. Perper's opinion, regarding the cause of the miner's emphysema/COPD, was reasoned was the fact that Dr. Tuteur's analysis was "illogical." 2008 Decision and Order at 16. The fact that Dr. Tuteur's analysis is illogical does not render Dr. Perper's opinion reasoned. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

On remand, when considering whether the medical opinion evidence establishes the existence of legal pneumoconiosis, the administrative law judge should address Dr. Perper's explanation for his conclusion, the documentation underlying his medical judgment, and the sophistication of, and bases for, his diagnosis. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). On remand, should the administrative law judge find that the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), she should determine whether all of the relevant evidence, when weighed together, establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000).

**Death Due to Pneumoconiosis**

Employer next 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). The miner's death certificate lists the miner's cause of death as cryptococcal pneumonia caused by chronic obstructive pulmonary disease and "black lung." Director's Exhibit 9. Dr. Adelson, the autopsy prosector, opined that the miner died due to "respiratory insufficiency secondary to severe cryptococcal pneumonia." Director's Exhibit 10. Drs. Perper, Crouch, and Tuteur also addressed the cause of the miner's death. While these physicians agreed that the miner's death was due to pneumonia, they disagreed as to whether the miner's coal workers' pneumoconiosis and coal mine dust exposure contributed to his death. Dr. Perper opined that "exposure to mixed coal dust and simple coal workers' pneumoconiosis were a significant contributor both directly and through reduction of immune process favoring the fungal fatal infection." Claimant's Exhibit 7. Dr. Crouch, however, opined that "occupational dust exposure could not have caused, contributed to or otherwise hastened [the miner's]

death." Employer's Exhibit 1. Dr. Tuteur similarly opined that neither coal workers' pneumoconiosis, nor any other coal mine dust-related disease process, played any role in the miner's death. Employer's Exhibit 4.

On remand, the administrative law judge incorporated her initial findings, set forth in her 2008 Decision and Order, that the evidence established that the miner's death was due to both clinical and legal pneumoconiosis. Decision and Order on Remand at 6. Specifically, the administrative law judge previously found that the miner's death certificate was not entitled to significant weight due to its conclusory nature. 2008 Decision and Order at 18. The administrative law judge also accurately noted that, although Dr. Adelson diagnosed coal workers' pneumoconiosis and emphysematous change, the doctor did not comment upon whether these conditions contributed to, or hastened, the miner's death. *Id.* Finally, the administrative law judge resolved the conflict in the medical opinions of Drs. Perper, Crouch, and Tuteur, stating:

> I find Dr. Perper's opinion to be most persuasive as it is the most comprehensive and complete, and is the best reasoned and documented. In doing so, I have considered the criticism by Drs. Tuteur and Crouch but find them to be insignificant or tangential. Based upon a careful review of all of the evidence discussed above, and specifically Dr. Perper's comprehensive discussion, I find that the Miner's clinical and legal pneumoconiosis contributed to and hastened his death, by affecting his breathing, thereby directly contributing to this respiratory death, and by making him more susceptible to the pneumonia that was the major force leading to his death.

2008 Decision and Order at 19.

The administrative law judge further found that Dr. Perper's opinion was entitled to greater weight based upon his additional Board-certification in Forensic Pathology. *Id.* at 19-20. 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).

We agree with employer that the administrative law judge's conclusory analysis that the medical evidence is sufficient to establish that the miner's death was due to pneumoconiosis does not comply with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.* , 12 BLR 1-162 (1989). In this case, the administrative law judge failed to explain her basis for finding

that Dr. Perper's opinion was the "most comprehensive and complete," or why she found the criticisms of Dr. Perper's opinion proffered by Drs. Crouch and Tuteur to be "insignificant or tangential." Consequently, we vacate the administrative law judge's finding that the medical evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). On remand, when reconsidering whether the relevant evidence establishes that the miner's death was due to, or hastened by, clinical pneumoconiosis,[8] the administrative law judge should address the comparative credentials of the respective physicians,[9] the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

**Application of the Recent Amendments**

On remand, should the administrative law judge determine that the evidence does not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), she must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The Section 411(c)(4) presumption requires a determination of whether the miner was totally disabled due to a pulmonary or respiratory impairment, an issue that was not relevant to this survivor's claim before the recent amendments. In addition, if the presumption is invoked, the burden of proof shifts to employer to establish rebuttal of the presumption. If the administrative law judge determines that the presumption is applicable to this claim, he must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Finally, because we have vacated the administrative law judge's award of benefits, there has not been a successful prosecution of this claim. 33 U.S.C. §928(a), as

[8] On remand, should the administrative law judge find that the evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), she should also consider whether the evidence establishes that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

[9] We find no error in the administrative law judge's decision to accord greater weight to Dr. Perper's opinion, based upon his additional certification in Forensic Pathology. The administrative law judge adequately explained her preference for Dr. Perper's opinion based on his additional credential as a forensic pathologist which, she explained, is relevant in a legal proceeding where there is a dispute as to the cause of the miner's death. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); 2008 Decision and Order at 20.

incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). Therefore, the administrative law judge's award of attorney's fees is not final and enforceable at this time. Consequently, we decline to address, as premature, employer's contentions with respect to the administrative law judge's award of attorney's fees.

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

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