

BRB No. 98-0271 BLA

IMAJEAN PRICE)	
(Widow of HALBERT D. PRICE))	
))	
Claimant-Respondent))	
))	
v.))	
))	
BETHENERGY MINES, INCORPORATED) DATE ISSUED:	
))	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

George P. Surmaitis (Crandall Pyles Haviland & Turner), Charleston, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0527 and 97-BLA-0528) of Administrative Law Judge Richard A. Morgan awarding benefits on a miner's claim and a survivor's claim. The miner's and survivor's claims were 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). The administrative law judge, applying the regulations at 20 C.F.R. Part 718, credited the miner with "at least" twenty-three years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20

C.F.R. §§718.202(a), 718.203(b). Decision and Order at 4, 33-37. The administrative law judge noted that the parties agreed that the miner was totally disabled at the time of his death, [1997] Hearing Transcript at 20, and found that this disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order at 37-39. The administrative law judge also found that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c). Decision and Order at 39-41. Accordingly, benefits were awarded on the miner's and survivor's claims.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis. Employer's Brief at 6-14. Employer also asserts that the administrative law judge mischaracterized the medical evidence, erroneously discredited several medical opinions, and failed to render findings that comport with the Administrative Procedure Act. Employer's Brief at 14-39. Claimant¹ responds, urging affirmance, and the Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant is Imajean Price, the miner's widow, who filed her claim for benefits on July 22, 1996. Survivor's Claim Director's Exhibit 1. The miner filed his claim for benefits on June 8, 1994 and died on January 27, 1996. Director's Exhibits 1, 50.

² We affirm the administrative law judge's findings regarding length of coal mine employment, responsible operator, onset date, and pursuant to Section 718.203(b) as they are unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge found the existence of pneumoconiosis established pursuant to 718.202(a)(2) by relying on the opinions of Dr. Plata, the autopsy prosector, and Dr. Green, a highly qualified board-certified pathologist. Decision and Order at 33. Regarding the contrary opinions, the administrative law judge permissibly accorded less weight to Dr. Naeye's opinion because he found it to be equivocal. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); see also *Griffith v. Director, OWCP [Myrtle]*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). The administrative law judge also permissibly discredited Dr. Kleinerman's finding of no pneumoconiosis because he found it to be inconsistent with his statement that judging from Dr. Plata's gross description, the extent of coal workers pneumoconiosis macules was mild, see *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. U.S. Steel Co.*, 7 BLR 1-12 (1984); *Surma v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-799 (1984), and found that Dr. Kleinerman did not explain why this case was not one of the "rare" instances where interstitial pulmonary fibrosis is a component of coal workers' pneumoconiosis, see *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Survivor's Claim Director's Exhibit 23. Additionally, the administrative law judge stated that Dr. Kleinerman's comment that simple coal workers' pneumoconiosis does not progress once a miner has left the mines suggests a hostility to the Act and "makes his overall conclusions somewhat suspect in light of case law defining the progressive nature of CWP." Decision and Order at 33; see *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-24 (4th Cir. 1997); *Labelle Processing Co. v. Swarroe*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); but see *Ziegler Coal Co. v. Kelley*, F.3d , 21 BLR 2-92 (7th Cir. 1997).

Employer asserts that the administrative law judge erred in referring to the opinions of Drs. Castle and Fino, finding no coal workers' pneumoconiosis, at Section 718.202(a)(2) inasmuch as neither physician reviewed the autopsy evidence. Employer's Brief at 7-8. We deem harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), any error the administrative law judge may have made in this regard inasmuch as he only cited to these opinions but did not rely on them in rendering his Section 718.202(a)(2) finding, see discussion, *supra*. Additionally, we deem harmless, see *Larioni*, *supra*, any error the administrative law judge may have made in finding Dr. Kleinerman's opinion to be hostile to the Act because he provided two valid alternative bases, see *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), on which to accord this opinion less weight, see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Oggero*, *supra*; see also *Fagg*, *supra*; *Hopton*, *supra*; *Surma*, *supra*.

Inasmuch as an administrative law judge has broad discretion in considering

the medical evidence to determine whether claimant has met her burden of proof, see *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); see *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), we affirm his finding of pneumoconiosis based on the opinion of Dr. Plata, see *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); cf. *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992), as supported by the opinion of Dr. Green, see *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Inasmuch as we affirm the administrative law judge's Section 718.202(a)(2) finding, we need not address employer's assertions regarding Section 718.202(a)(1), (4).³ See *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); see generally *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Drs. Kleinerman, Hutchins, Fino, Castle, Crisalli, and Naeye found that the miner's impairment was not due to coal workers pneumoconiosis whereas Drs. Garretson and Rasmussen found that it was. The administrative law judge found that claimant established that the miner was totally disabled due to pneumoconiosis by relying on the opinions of Drs. Garretson, the miner's treating physician, and Dr. Rasmussen. Decision and Order at 38. The administrative law judge gave "somewhat lesser credence" to the opinions of Drs. Castle, Kleinerman, and Hutchins because these physicians did not diagnose pneumoconiosis, citing *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Decision and Order at 38. The administrative law judge added that neither Dr. Kleinerman nor Dr. Hutchins discussed, the impact, if any, of the miner's smoking history on his impairment. *Id.*

We vacate the administrative law judge's Section 718.204(b) finding for the following reasons. First, the administrative law judge mischaracterized the opinions of Drs. Crisalli and Naeye by stating that these physicians did not address the total disability issue when both of these physicians rendered findings on this issue. See *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v.*

³ We deem harmless error, see *Larioni, supra*, the administrative law judge's finding that the x-ray evidence considered in conjunction with the autopsy evidence establishes pneumoconiosis, Decision and Order at 34-35; see *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); see generally *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); but see *Penn Allegheny Coal Co. v. Williams*, F.3d , 21 BLR 2-104 (3d Cir.1997), inasmuch as he also found pneumoconiosis based solely on the autopsy evidence, Decision and Order at 33-34.

Director, OWCP, 7 BLR 1-703 (1985). Second, while the administrative law judge cited to Dr. Fino's opinion at Section 718.204(b), he did not provide any rationale for implicitly discrediting it. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); see also *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987).

Third, while an administrative law judge may discredit an opinion regarding the cause of total disability where it is based on the erroneous premise that the miner did not have pneumoconiosis, see *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986), the administrative law judge's reliance on this principle here appears to be irrational with regard to the opinions of Dr. Kleinerman and Dr. Hutchins, see *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), because these physicians also stated even assuming the miner had simple coal workers' pneumoconiosis, it would not have contributed to any respiratory impairment. See *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Fourth, it is unclear why the administrative law judge finds the opinions of Drs. Kleinerman and Dr. Hutchins to be less reliable because they did not discuss the impact of the miner's smoking history inasmuch as such reasoning would be relevant when according less weight to the opinion of a physician finding total disability due to pneumoconiosis. See *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990), citing *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); cf. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1983). Accordingly, we remand this case for the administrative law judge to reconsider all the relevant evidence pursuant to Section 718.204(b). See *Hobbs, supra*, citing *Robinson, supra*.

Drs. Kleinerman, Hutchins, Fino, Castle, and Naeye found that coal workers' pneumoconiosis did not contribute to the miner's death whereas Drs. Fleer and Green found that it did. The administrative law judge found that claimant established that the miner's death was due to pneumoconiosis by relying on the opinions of Dr. Garretson, the miner's treating physician, Dr. Plata, the autopsy prosector, Dr. Fleer, who signed the death certificate, and Dr. Green. Decision and Order at 40-41.

Specifically, the administrative law judge stated that although Dr. Fleer's qualifications are not in the record and there is no evidence of his familiarity with the miner or with coal workers' pneumoconiosis, his conclusions are well-supported by the opinions of Drs. Plata and Green. However, Drs. Plata and Garretson stated even though the chronic lung changes and the heart hypertrophy most likely

contributed to some degree to the cause of death, the cause of death could not be specified due to the autopsy limitations. Director's Exhibit 50; Claimant's Exhibit 2. Therefore, the administrative law judge mischaracterized the opinions of Drs. Plata and Garretson, see *Beatty, supra*; *Tackett, supra*, and in doing so erroneously relied on these two opinions at Section 718.205(c), and erroneously credited Dr. Fleer's opinion as supported by Dr. Plata's opinion, see *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Additionally, it appears that the administrative law judge erroneously discredited the opinions of Dr. Fino and Dr. Hutchins because they did not diagnose interstitial pulmonary fibrosis due to coal mine employment inasmuch as both stated that their conclusions were valid even assuming pneumoconiosis was present. Survivor's Claim Director's Exhibit 23; Survivor's Claim Employer's Exhibit 2; see *Ballard, supra*; *Hobbs, supra*.

In light of the foregoing, we vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and remand this case for him to reconsider all the relevant evidence pursuant to this section. See *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), cert. denied, 113 S.Ct. 969 (1993); see also *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order awarding benefits on the miner's claim and the survivor's claim is affirmed in part and vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge