

BRB No. 08-0134 BLA

N.W.)
(Widow of T.W.))
)
Claimant-Respondent)
)
v.)
)
NATIONAL MINES CORPORATION)
)
and)
)
INTERNATIONAL BUSINESS &) DATE ISSUED: 10/31/2008
MERCANTILE REASSURANCE)
COMPANY)
)
Employer/Carrier-)
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 – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, 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:

Employer appeals the Decision and Order On Remand – Awarding Benefits (2004-BLA-06531) 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).¹ This case is before the Board for a second time. Claimant filed her application for benefits in a survivor's claim on November 1, 2002. Director's Exhibit 1. The administrative law judge accepted the parties' stipulation that the miner had coal worker's pneumoconiosis and determined 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. Employer appealed and the Board held that the administrative law judge erred in failing to explain why he credited the opinion of the autopsy prosector, Dr. Wecht, that the miner's death was hastened by pneumoconiosis, over the contrary opinion of Dr. Oesterling, that the miner's death was unrelated to coal dust exposure. [*N.B.W*] v. *National Mines Corp.*, BRB No. 06-0173 BLA (Nov. 24, 2006) (unpub.) The Board specifically directed the administrative law judge to resolve whether the miner had cor pulmonale, a finding central to his consideration of the conflicting medical opinions at Section 718.205(c). *Id.* at 3.

On remand, the administrative law judge reweighed the evidence at Section 718.205(c) and gave controlling weight to Dr. Wecht's opinion that the miner's death was hastened by pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

Employer appeals, asserting that the administrative law judge erred in failing to follow the Board's remand instruction to resolve the conflict in the medical opinions as to whether the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c). Claimant responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this 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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant is the widow of the miner, who died on March 7, 2002. Claimant's Exhibit 5. The miner previously filed a claim for benefits on August 26, 1980, which was denied on November 5, 1980. Director's Exhibit 1. The miner also filed a duplicate claim on September 3, 1997, which was also denied by Administrative Law Judge Michael P. Lesniak on July 20, 1999. *Id.* No further action was taken with regard to this claim and the file was administratively closed.

To establish entitlement to survivors' benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered 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 irrebuttable presumption set forth at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(4). 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); see *Lango v. Director, OWCP*, 104 F.3d 73, 21 BLR 2-12 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).²

The crux of the medical issue presented in this case is whether the miner's death from cardiac and respiratory disease was caused or hastened by his coal dust exposure. Dr. Wecht diagnosed that the miner's severe respiratory disease, due in part to coal dust exposure, caused the miner to suffer from cor pulmonale, which hastened his death.. Conversely, Dr. Oesterling opined that the miner did not suffer from cor pulmonale. According to Dr. Oesterling, the miner died as a result of heart disease and severe age-related, and smoking-induced, emphysema. Although Dr. Oesterling agrees that the miner had pneumoconiosis, he opined that it did not cause or hasten the miner's death.

In accordance with the Board's remand instruction, the administrative law judge first discussed the weight he accorded the respective credentials of Drs. Wecht and Oesterling. The administrative law judge found that while each doctor is Board-certified in Anatomic and Clinical Pathology, Dr. Wecht's "practical experience lends credibility to his autopsy findings." Decision and Order at 2. The administrative law judge specifically credited Dr. Wecht's diagnosis of cor pulmonale over Dr. Oesterling's contrary opinion, that the miner's heart measurements were attributable to biventricular hypertrophy and not cor pulmonale. The administrative law judge also found Dr. Wecht's opinion to be sufficient to establish that the miner's cor pulmonale was caused by severe emphysema, due in part to coal dust exposure, which in turn hastened the miner's death.

Employer argues that the administrative law judge erred in crediting Dr. Wecht's opinion over Dr. Oesterling's opinion and that he failed to render proper findings of fact

² This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's last coal mine employment occurred in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

and conclusions of law in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). After consideration of the administrative law judge's Decision and Order on Remand, the briefs of the parties, and the evidence of record, we reject employer's arguments and conclude that substantial evidence supports the administrative law judge's award of benefits.

Contrary to employer's contention, the administrative law judge had discretion to assign more weight to Dr. Wecht's autopsy findings in this case because the administrative law judge determined that Dr. Wecht had more practical experience in conducting autopsies than Dr. Oesterling. The administrative law judge correctly noted that Dr. Wecht stated at deposition that he performs approximately 270 autopsies per year, while Dr. Oesterling testified that he performs only about 2-3 autopsies per year. Decision and Order at 2.

We also reject employer's contention that the administrative law judge failed to properly resolve, as instructed by the Board, the conflict in the medical opinions as to whether the miner's heart measurements were consistent with cor pulmonale. Employer's Brief at 14. Dr. Wecht reported on autopsy that the miner had cor pulmonale with a left ventricular wall measurement of 2 centimeters and a right ventricular wall measurement of 0.6 centimeters. Claimant's Exhibit 2. The Board instructed the administrative law judge to consider on remand whether the fact that the left wall was thicker than the right wall of the heart supported Dr. Oesterling's opinion that the miner's autopsy findings were consistent with bi-ventricular heart disease and not cor pulmonale. [N.B.W], slip op. at 3. Contrary to employer's contention, the administrative law judge rationally explained why he found Dr. Wecht's opinion to be more credible:

Dr. Wecht explained that the significance of the measurement is in comparison to a normal ventricular wall thickness. He noted that a normal left ventricular wall thickness is 1.8, which he calculated from the average thickness he noted in the numerous autopsies he has performed, and that the miner's left ventricular wall (at 2 cm) had thickened by about 11 [percent]. He then pointed out that the average right side wall thickness is 0.4 and that the miner's thickness of 0.6 showed a 50% increase in wall thickness. It was this disproportionate thickening of the right side that supported his finding of cor pulmonale.

Decision and Order on Remand at 3. In weighing Dr. Wecht's opinion against Dr. Oesterling's contrary opinion, the administrative law judge noted that "Dr. Oesterling did not offer any opinion on what the normal thickness of the ventricular walls should be, nor did he dispute Dr. Wecht's findings." *Id.* The administrative law judge also noted that "Dr. Oesterling acknowledge[s] that fibrosis, emphysema and right sided heart

enlargement are all related to cor pulmonale” and that the record established that the miner suffered from all of these conditions at the time of death. Furthermore, the administrative law judge reasonably questioned Dr. Oesterling’s statement that the miner’s respiratory symptoms were not severe enough to support a finding of cor pulmonale, since Dr. Oesterling had specifically described the miner’s emphysema as being severe. Thus, because the administrative law judge found that Dr. Wecht provided a reasoned and documented opinion that the miner had cor pulmonale, we affirm his credibility determination. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).³

Having established that the miner suffered from cor pulmonale, which contributed to his death, the administrative law judge considered whether claimant’s cor pulmonale was caused by a disabling respiratory impairment due to smoking. As noted by the administrative law judge “[b]oth Dr. Wecht and Dr. Oesterling found that the miner suffered from emphysema, and both acknowledge that the miner’s significant pulmonary disease contributed to the miner’s death,” although they disagree as to the cause of the miner’s emphysema. Decision and Order at 4. In weighing the conflicting opinions, the administrative law judge credited Dr. Wecht’s opinion, that the miner’s severe centrilobular to panlobular emphysema was primarily caused by coal dust exposure. The administrative law judge noted that while Dr. Oesterling opined that the miner’s emphysema was due entirely to smoking and age, Dr. Oesterling based his opinion, in part, on his erroneous belief that the miner had a smoking history of 24-35 pack years, as opposed to a smoking history of 11.5 pack years. Decision and Order at 4; *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985).

³ Employer argues that the administrative law judge erred in citing to an invalid 1997 post-exercise arterial blood gas study as support for rejecting Dr. Oesterling’s opinion that the miner did not suffer shortness of breath or hypoxemia until his actual terminal episode in March of 2002. Employer’s Brief at 11. However, we consider the administrative law judge’s error, if any to be harmless, as there is additional evidence in the record to support the administrative law judge’s conclusion that claimant suffered from hypoxemia during his lifetime. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Specifically, as noted by the administrative law judge in his original Decision and Order, the record establishes that from 1997 to 2002, the miner was given inhalers for shortness of breath, and a December 12, 2001 discharge summary confirms that claimant was diagnosed with hypoxemia. *See* 2005 Decision and Order at 7; Employer’s Exhibit 1.

We reject employer's assertion that the administrative law judge erred in relying on claimant's testimony to find that the miner had a smoking history of 11.5 pack years.⁴ Employer's Brief at 13. The weight to be assigned the evidence, and determinations concerning the credibility of medical experts and witnesses is within the discretion of the administrative law judge. See *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); see also *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Thus, we affirm the administrative law judge's finding as to the length of the miner's smoking history, and his determination to assign less weight to Dr. Oesterling's opinion as to the cause of the miner's emphysema, because Dr. Oesterling relied on a "significantly longer smoking history" than determined by the administrative law judge. Decision and Order on Remand at 5.

Finally, citing *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), employer alleges that Dr. Wecht's opinion is legally insufficient to establish that the miner's death was hastened by pneumoconiosis. We disagree. As noted by the administrative law judge, Dr. Wecht acknowledged that the mere presence of a disease is not sufficient to meet the contribution or hastening standard. However, Dr. Wecht specifically described how the miner's respiratory disease hastened his death:

If you have a continuing irreversible significant obstructive impediment in the lungs, the heart must work harder to get the job done. In this case such an impediment existed in the form of coal workers' pneumoconiosis. When you have a heart which is also compromised by virtue of primary disease, as in this case, an enlarged heart and a heart with bad coronary arteries, then that heart already is under significant stress. This added burden which produces a greater demand and adds to the pathophysiological phenomenon in place, then at any time can lead to a hypoxic insult to the heart. That can then produce a cardiac arrhythmia and death. In this case . . . [the miner] would not have died when he did if he did not have a separate independent primary lung disease which aggravated the cardiac situation...

⁴ Contrary to employer's assertion, the administrative law judge properly found that "there were conflicting reports of the miner's smoking history contained in the records" and "[b]ecause of Dr. Oesterling's heavy reliance on the miner's smoking history," it was necessary for him to render findings as to the length of the miner's smoking history. Decision and Order at 5. As noted by the administrative law judge, claimant testified that the miner started smoking at the age of 14 and stopped smoking in 1971. *Id.* Claimant explained that she knew the miner did not smoke more than seven cigarettes per day since she bought the cigarettes for him. *Id.*

Claimant's Exhibit 4 at 29. Thus, because Dr. Wecht explained the basis for his opinion that the miner's death was due, in part, to pneumoconiosis, we affirm the administrative law judge's finding that Dr. Wecht's opinion is reasoned and documented and legally sufficient to satisfy claimant's burden of proof at Section 718.205. *Clark*, 12 BLR at 1-155.

Employer's arguments on appeal amount to a request that the Board reweight the evidence, which we are not empowered to do. *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1998). We decline to vacate the administrative law judge's credibility determinations under Section 718.205(c) as they were within his discretion as the trier-of-fact. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 313, 20 BLR 2-76, 2-86 (3d Cir. 1995); *Kowalchick v. Director, OWCP*, 893 F.2d 615, 619, 13 BLR 2-226, 2-234 (3d Cir. 1990). Because Dr. Wecht's opinion constitutes substantial evidence in support of the administrative law judge's finding at Section 718.205(c), and because the administrative law judge has explained the basis for his findings in accordance with the APA, we affirm his conclusion that the miner's death was hastened by pneumoconiosis, and the award of benefits in the survivor's claim. *See Lango*, 104 F.3d at 73, 21 BLR at 2-12; *Lukosevich*, 888 F.2d at 1001, 13 BLR at 2-101; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

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

BETTY JEAN HALL
Administrative Appeals Judge