

BRB No. 09-0217 BLA

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| B.J.S. |) | |
| (Widow of L.M.S.) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| DOMINION COAL CORPORATION |) | DATE ISSUED: 10/26/2009 |
| c/o ACORDIA EMPLOYERS SERVICE |) | |
| |) | |
| Employer-Respondent |) | |
| |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order – Denying Benefits on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Sparkle Bonds (The Virginia Black Lung Association), Richlands, Virginia, for claimant.

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denying Benefits on Remand (05-BLA-6286) of Administrative Law Judge Larry W. Price rendered on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

¹ Claimant is the widow of the deceased miner, who died on April 9, 2004. Director's Exhibit 10.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. Initially, the administrative law judge credited the miner with 20.88 years of coal mine employment,² and found that the autopsy and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). After finding that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge credited the opinion of Dr. Turjman, as supported by the opinion of Dr. Javed, over the opinions of Drs. Crouch and Tomashefski, to find 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.

In response to employer's appeal, the Board affirmed in part, and vacated in part, the administrative law judge's award of benefits. *B.J.S. v. Dominion Coal Corp.*, BRB No. 07-0387 BLA, slip op. at 10 (Feb. 28, 2008)(unpub.). Specifically, the Board affirmed, as unchallenged, the administrative law judge's finding that the evidence established the existence of pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The Board vacated, however, 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), holding that the administrative law judge erred in his evaluation of the medical opinion evidence.³ *B.J.S.*,

² The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibit 3. 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, 1-202 (1989)(*en banc*).

³ Pursuant to 20 C.F.R. §718.205(c), the Board held that the administrative law judge failed to provide any basis for finding that Dr. Turjman's opinion regarding the cause of the miner's death was sufficiently reasoned, and instructed the administrative law judge to address the equivocal nature of Dr. Turjman's opinion. *B.J.S. v. Dominion Coal Corp.*, BRB No. 07-0387 BLA, slip op. at 7 (Feb. 28, 2008)(unpub.). The Board also held that the administrative law judge erred in crediting Dr. Turjman's opinion as to the cause of the miner's death merely because he had the opportunity to conduct a gross examination of the miner's lungs. *B.J.S.*, slip op. at 8. The Board instructed the administrative law judge that, if, on remand, he credited Dr. Turjman's opinion based upon his status as the autopsy prosector, he must provide an adequate rationale for concluding that Dr. Turjman's additional gross examination provided him with an advantage over the reviewing physicians, under the particular facts of this case. *Id.* Additionally, the Board held that the administrative law judge mischaracterized Dr. Crouch's opinion when he stated that Dr. Crouch did not review Dr. Turjman's gross findings, and erred in according less weight to Dr. Crouch's findings because Dr. Crouch "had access to fewer slides than Dr. Turjman because a number of the slides had been

slip op. at 2 n.2, 10. The Board therefore remanded the case to the administrative law judge for further consideration.

On remand, the administrative law judge reconsidered the medical opinion evidence pursuant to 20 C.F.R. §718.205(c), as instructed, and concluded that claimant failed to meet her burden to establish that the miner's pneumoconiosis contributed to his death. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in admitting Dr. Crouch's report as employer's affirmative autopsy report pursuant to 20 C.F.R. §725.414(a)(3)(i). Claimant additionally challenges the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address claimant's evidentiary challenge to Dr. Crouch's report. Claimant asserts that the administrative law judge erred in admitting Dr. Crouch's report into the record as an autopsy report for employer, arguing that only the autopsy prosector's report, in this case, that of Dr. Turjman, can be considered an autopsy report for purposes of the evidentiary limitations at 20 C.F.R. §725.414. Claimant's Brief at 4. Contrary to claimant's contention, the Board has held that 20 C.F.R. §725.414 permits both claimant and employer to submit, as affirmative autopsy evidence pursuant to 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), a report by a pathologist who has reviewed the autopsy tissue slides. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237-38

broken during transport," without addressing Dr. Crouch's assessment that the broken slides "did not compromise [her] histologic evaluation." *B.J.S.*, slip op. at 8. In addition, the Board held that the administrative law judge mischaracterized Dr. Tomashefski's opinion, that the miner's pneumoconiosis neither caused nor contributed to his death, and instructed the administrative law judge to reconsider Dr. Tomashefski's opinion on remand. *B.J.S.*, slip op. at 9. Finally, the Board held that, having permissibly discredited Dr. Javed's opinion as not sufficiently reasoned, the administrative law judge erred in finding, without explanation, that Dr. Javed's opinion supported that of Dr. Turjman. *B.J.S.*, slip op. at 9-10.

(2006)(*en banc*). Therefore, the administrative law judge properly admitted and considered Dr. Crouch's report of her review of the miner's autopsy slides as employer's affirmative autopsy report pursuant to 20 C.F.R. §725.414(a)(3)(i). Decision and Order on Remand at 4; Decision and Order at 2.

Claimant challenges the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis where the irrebuttable presumption of death due to pneumoconiosis set forth at 20 C.F.R. §718.304 is applicable, or if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Reconsidering the medical opinion evidence on remand, the administrative law judge noted, correctly, that claimant relies on the opinions of Dr. Javed, the miner's treating physician, and Dr. Turjman, the autopsy prosector, to support her claim for benefits. Decision and Order on Remand at 2; Director's Exhibits 11, 12; Claimant's Exhibits 1, 2. The administrative law judge permissibly found, consistent with his prior opinion, that Dr. Javed's opinion, that the miner's "death was hastened by and contributed [to] by Coal Workers Pneumoconiosis complicated by Pneumonia," was not sufficiently reasoned, because Dr. Javed provided no rationale to support his conclusion. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 3; Claimant's Exhibit 2. As it is supported by substantial evidence and unchallenged on appeal, we affirm the administrative law judge's determination to discredit Dr. Javed's opinion. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge next considered the opinion of Dr. Turjman, that "coal workers' pneumoconiosis appears to be a major contributing factor to [the miner's] death." Decision and Order on Remand at 3-4; Director's Exhibits 11, 12. The

administrative law judge found that although he had previously credited Dr. Turjman's opinion as well-reasoned and well-documented, closer review of the physician's opinion revealed it to be inadequately supported, and equivocal. Decision and Order on Remand at 3-4. Contrary to claimant's arguments, the administrative law judge was not required to accord the greatest weight to Dr. Turjman's opinion based on his status as the autopsy prosector. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 191-92, 22 BLR 2-251, 2-262 (4th Cir. 2000); *see also Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992); Claimant's Brief at 2-3, 7. The administrative law judge acted within his discretion in finding that Dr. Turjman failed to explain or document how, or by what mechanism, pneumoconiosis acted to compromise the miner's respiratory status, beyond the physician's equivocal assertion that pneumoconiosis "appear[ed]" to be a major contributing factor in the miner's death. *See 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); *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order on Remand at 3-4; Director's Exhibits 11, 12. We therefore reject claimant's allegations of error with respect to the weight the administrative law judge accorded to Dr. Turjman's opinion.

As the administrative law judge properly analyzed the medical opinions and explained his reasons for discrediting the opinions of Drs. Javed and Turjman, the only physicians to opine that pneumoconiosis played any role in the miner's death, we affirm the administrative law judge's finding that claimant did not carry her burden to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 280-81, 18 BLR 2A-6-9 (1994); *Trumbo*, 17 BLR at 1-88-89 and n.4; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Trent*, 11 BLR at 1-27. Consequently, we decline to address, as moot, claimant's additional arguments regarding the administrative law judge's evaluation of the opinions of Drs. Crouch and Tomashefski, which were submitted by employer.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge