

BRB No. 98-1592 BLA

ESTATE of CHARLOTTE KELLER )  
(Deceased Widow of ROBERT KELLER) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
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 ZEIGLER COAL COMPANY )  
 )  
 Employer-Petitioner ) DATE ISSUED: 10/25/99  
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 )  
 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 D. Mills, Administrative Law Judge,  
United States Department of Labor.

Harold B. Culley, Jr. (Culley and Wissore), Raleigh, Illinois, for claimant.

Mark E. Solomons and Laura Metcoff Klaus (Arter & Hadden LLP), Washington,  
D.C., for employer.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate  
Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and  
Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice),  
Washington, D.C., for the Director, Office of Workers' Compensation Programs,  
United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting  
Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (92-BLA-0635) of Administrative Law

Judge Richard D. Mills awarding benefits 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. Initially, the administrative law judge credited the miner with thirty years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 11. Decision and Order at 3. Applying the regulations at 20 C.F.R. Part 718, the administrative law judge 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)(1), (a)(2), and 718.203(b). Decision and Order at 4-5. The administrative law judge also found the evidence sufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Decision and Order at 6. Additionally, the administrative law judge found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 8. Accordingly, benefits were awarded on both the miner's and survivor's claims, commencing April 1989. Decision and Order at 8.

On appeal, the Board affirmed the administrative law judge's findings at 20 C.F.R. §718.204(c)(1), (c)(2), as they were unchallenged on appeal. *See Keller v. Zeigler Coal Co.*, BRB No. 93-1180 BLA (May 31, 1994)(unpub.). The Board also affirmed the administrative law judge's finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(2), total respiratory disability pursuant to Section 718.204(c)(3), and death due to pneumoconiosis pursuant to Section 718.205(c). *See Keller, supra*. However, the Board vacated the administrative law judge's findings at Sections 718.204(c)(4), 718.204(c), and 718.204(b) and remanded this case for him to reconsider the relevant medical evidence. *Id.* Accordingly, the Board vacated the administrative law judge's award of benefits on the miner's claim and affirmed the award of benefits on the survivor's claim.

Employer filed a motion for reconsideration. On reconsideration, the Board vacated the administrative law judge's Section 718.202(a)(2) and Section 718.205(c) findings and remanded the case for further consideration of the evidence. *See Keller v. Zeigler Coal Co.*, BRB No. 93-1180 BLA (Jan. 6, 1998)(unpub.)(Order on Recon.)(*Keller II*). The Board also considered the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1), which had not been previously addressed. In doing so, the Board vacated the administrative law judge's Section 718.202(a)(1) finding and instructed the administrative law judge to reconsider the x-ray evidence and render a finding that comports with the Administrative Procedure Act, *see* 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). *See Keller, supra*.

On remand, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(1) and (a)(2). Decision and Order on Remand at 4, 5. However, the administrative law judge found the evidence was insufficient to establish total respiratory disability due to pneumoconiosis pursuant to Section

718.204. Decision and Order on Remand at 7. Regarding the survivor's claim, the administrative law judge found the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Decision and Order on Remand at 9. Accordingly, benefits were denied on the miner's claim and awarded on the survivor's claim, commencing the month of the miner's death. Decision and Order on Remand at 9.

Employer appealed the award of benefits on the survivor's claim to the Board. Subsequently, employer filed a Motion to Dismiss Claim for Lack of a Party in Interest or, in the Alternative, to Remand. In its motion, employer first asserted that because Charlotte Keller, the miner's widow, passed away on September 9, 1996, and no one representing her estate notified the United States Department of Labor or provided a showing that there was any party authorized to pursue this claim pursuant to 20 C.F.R. §725.360, this claim must be dismissed for lack of a party in interest. Employer's Motion to Dismiss at 1. Second, employer alleged that the settlement agreement on the miner's occupational disease claim, filed with the State of Illinois Industrial Commission and entered into by the executor of Charlotte Keller's estate, provides further support that there is no such party in interest. Employer noted that in the settlement contract the executor:

agree[d] not to pursue any other claim for benefits under the Workers' Compensation Act or the Occupational Diseases Act or any other law or act with respect to any injury or condition from an occupational disease arising out of Robert G. Keller's employment with [Zeigler Coal Company], to which Charlotte Keller may have been entitled.

Settlement Contract at 3. Based on the language in this agreement, employer alleged that the executor forfeited his right to pursue the widow's federal claim in return for a lump sum settlement from Zeigler Coal Company. Employer's Motion to Dismiss at 2. Alternatively, employer asserted that this case should be remanded "to determine the full impact of the settlement agreement on the disposition of the case." *Id.* Both claimant and the Director responded to employer's Motion to Dismiss by stating that employer's motion must be denied. By Order dated January 7, 1999, the Board addressed employer's motion, stating that "there are still parties who may have an interest in a decision on the administrative law judge's ruling that claimant was, in fact, eligible for benefits. . . ." Order at 1. These parties include the decedent's estate, her attorney, and the Director. *Id.* Therefore, the Board denied employer's Motion to Dismiss.

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'Keefe*

*v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In its Petition for Review and brief on appeal, employer renews its request that this claim be dismissed because of the settlement agreement, noting that the Board did not address whether the settlement agreement dismisses this claim. Employer's Brief at 4. Alternatively, employer notes its objection in order to preserve it. Employer's Brief at 4-5. Regarding the merits, employer asserts that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) and (a)(2). Employer's Brief at 15-19. Employer also asserts that the administrative law judge erred again in relying on the opinion of Dr. Parks, the autopsy prosector, in finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Employer's Brief at 20-22. Claimant<sup>1</sup> responds, urging affirmance of the award of benefits on the survivor's claim. The Director, Office of Workers' Compensation Programs, responds by stating that employer's motion to dismiss is without merit. Employer has filed a reply brief.

Initially, we reject employer's assertion that claimant entered into a *de facto* settlement agreement of a federal black lung claim inasmuch as federal black lung claims cannot be settled. *See* 30 U.S.C. §932(a)(excluding the settlement provisions of 33 U.S.C. §908(i) from those provisions of the Longshore and Harbor Workers' Compensation Act incorporated into the Black Lung Benefits Act); *Ladigan v. Central Penn Industries, Inc.*, 7 BLR 1-192(1984). Furthermore, as the Director asserts, in cases such as this where the Black Lung Disability Trust Fund has paid interim benefits, Director's Exhibit 52, the claim cannot be withdrawn or dismissed without the Director's consent. *See* 20 C.F.R. §§725.306, 725.465(d). The Director has stated that he does not consent to such withdrawal or dismissal in this case. *See* Director's Response to Employer's Motion to Dismiss at 2. Accordingly, we again deny employer's request that this claim be dismissed.

Regarding the merits, employer asserts that the administrative law judge again erred in finding the existence of pneumoconiosis pursuant to Section 718.202(a)(2) based on Dr. Parks' opinion and on his status as autopsy prosector. Employer's Brief at 17-19. Specifically, employer contends that there is no evidence in the record to support the

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<sup>1</sup>Charlotte Keller is the widow of the miner, Robert Keller, who filed her survivor's claim on April 15, 1991 and died on September 9, 1996. Director's Exhibit 32. Robert Lachler, son of the miner's widow and executor of her estate, is pursuing his mother's claim on behalf of her estate.

administrative law judge's statement that Dr. Parks' gross examination of the body provided him with an advantage over Drs. Crouch, Hansbarger, or Selby, who reviewed the autopsy slides. Employer's Brief at 18-19.

On reconsideration, the Board vacated its previous affirmance of the administrative law judge's finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(2). *See Keller II, supra*. The Board held that the administrative law judge relied on the opinion of Dr. Parks, because he performed the autopsy, over the opinions of Drs. Hansbarger and Crouch pursuant to Section 718.202(a)(2) and, in doing so, "failed to include adequate findings or to state a rationale for his conclusion that the autopsy prosector was in the best position to make a judgement regarding the existence of pneumoconiosis. . . ." *Id.*

On remand, the administrative law judge again considered the opinions of Drs. Hansbarger and Crouch, pathologists who reviewed the autopsy slides, and correctly noted that both these physicians found "the slides showed findings of anthracotic pigmentation of the lung, but not of a sufficient degree to warrant the diagnosis of pneumoconiosis. . . ." Decision and Order on Remand at 3. The administrative law judge stated that Dr. Parks, in his autopsy report, concluded that the miner had coal workers' pneumoconiosis based on his "finding of large amounts of anthracotic pigment associated with fine fibrotic nodules throughout both lungs" and his finding "that there was not only a great deal of anthracotic pigment scattered about the lung, but it was gathered together into small fibrotic nodules consistent with Coal Workers' pneumoconiosis." *Id.*; Claimant's Exhibit 2.

The administrative law judge found Dr. Parks' opinion to be more persuasive than those of Drs. Hansbarger and Crouch. Decision and Order on Remand at 4. The administrative law judge based his determination according "substantially more weight" to Dr. Parks' opinion on the fact that he, "as autopsy prosector, had the opportunity to view not only the whole body of the deceased, but the whole of the heart and lungs." *Id.* The administrative law judge stated that he found this fact to be decisive because, according to Dr. Parks' report, "the anthracotic pigment found in the lung was scattered about the lung and gathered together into small fibrotic nodules," and, therefore, "not all of lung tissue showed clear evidence of pneumoconiosis" but "a view of the whole of the lungs" did show pneumoconiosis. *Id.* Accordingly, the administrative law judge concluded that Dr. Parks was at an advantage, in this case, to base his findings "on the totality of the lungs rather than merely on the basis of a small segment of the lung, as was represented in the slides." *Id.* Further, the administrative law judge noted that "Dr. Parks was also able to grossly observe the heart, liver, and spleen, which was relevant to his finding of cor pulmonale, a typical finding in cases of pneumoconiosis," and the opportunity to view these organs was not afforded any other physician in this case. *Id.*

Contrary to employer's contentions,<sup>2</sup> we affirm the administrative law judge's finding

of the existence of pneumoconiosis pursuant to Section 718.202(a)(2) based on Dr. Parks' opinion.<sup>3</sup> In rendering his finding, the administrative law judge not only considered the contrary opinions of the reviewing physicians,<sup>4</sup> but provided an adequate rationale for his conclusion that Dr. Parks' performance of the gross examination and his access to the miner's body enhanced the accuracy of his diagnosis based on the autopsy evidence. *See Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 16 BLR 2-57 (7th Cir. 1992); *see also Peabody Coal Co. v. Director, OWCP* [Railey], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Therefore, the administrative law judge did not mechanically accord greater weight to Dr. Parks' opinion based only on his status as autopsy prosector. Rather, the administrative law judge considered the credibility of the contrary opinions and rationally, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), accorded Dr. Parks' opinion more weight. *See Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *cf. Urgolites, supra*.

Pursuant to Section 718.205(c), employer also contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis based on Dr. Parks' opinion. Employer's Brief at 20-22. In its decision on reconsideration, the Board vacated its previous affirmance of the administrative law judge's Section 718.205(c) finding, and remanded this case to the administrative law judge for him to provide a rationale for his conclusion that the autopsy prosector was in the best position to make a judgement regarding the cause of the miner's death and to consider the opinions of Drs. Selby and Tuteur. *See Keller II, supra*.

On remand, the administrative law judge properly noted that Dr. Tuteur did not render an opinion regarding the cause of the miner's death and that Dr. Selby found that pneumoconiosis did not contribute to the miner's death. Decision and Order on Remand at 8. The administrative law judge further noted that Dr. Parks found the cause of the miner's death to be cardiovascular failure with congestion of the lungs, liver, and spleen which was due to coronary artery disease and "cor pulmonale related to anthracofibrosis of the lungs (coal workers' pneumoconiosis)," Director's Exhibit 35. Decision and Order on Remand at 8. The administrative law judge stated that in coming to this conclusion:

Dr. Parks found that the spleen was acutely congested consistent with chronic right sided heart failure, that there was pathological change in the lung sufficient to cause right sided heart failure, there was extensive areas of fibrosis associated with anthracotic pigment in the lungs, and that the heart was enlarged with both the right and left ventricles being thickened, and with the coronary arteries showing moderate calcific coronary artery disease.

Decision and Order on Remand at 9. The administrative law judge stated again that no other physician but Dr. Parks “viewed the liver, the spleen, the heart, and the whole lungs of Claimant.” Thus, the administrative law judge concluded that Dr. Parks’ findings regarding the cause of death, pneumoconiosis, and cor pulmonale, “were based on far more than merely slides of lung tissue.” *Id.* Therefore, the administrative law judge again credited the findings of Dr. Parks pursuant to Section 718.205(a) as they were “based upon viewing all relevant organs and tissues only available to him.” *Id.*

In light of the foregoing and contrary to employer’s contention, the administrative law judge did provide evidence which rationally shows that Dr. Parks’ gross examination of the miner’s body provided him with an advantage over Drs. Crouch, Hansbarger, and Selby. *See Railey, supra; Stone, supra; Shonk, supra; Urgolites, supra.* Employer also asserts that Dr. Parks did not possess the qualifications needed to render an opinion regarding the role pneumoconiosis played in the miner’s death. Employer’s Brief at 21. However, contrary to this assertion, Dr. Parks is Board-certified in Pathological Anatomy, Clinical Pathology, and Nuclear Medicine. Claimant’s Exhibit 3. Moreover, employer asserts that Dr. Parks’ opinion “is directly discredited by the miner’s personal physician for over twenty-three years,” Dr. Stotlar. Employer’s Brief at 21. In fact, Dr. Stotlar, the miner’s treating physician, agrees with Dr. Parks’ findings of pneumoconiosis and cor pulmonale and notes that the autopsy substantiates his previous diagnoses of chronic pulmonary lung disease and chronic heart disease. Claimant’s Exhibit 4. Therefore, we reject employer’s assertions and affirm the administrative law judge’s Section 718.205(c) finding. *Railey, supra; see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Lukosevich 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 survivor's claim is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge