

BRB No. 99-1005 BLA

JANICE B. KEENE)	
(Widow of DENNIS KEENE))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
BUCAR COAL COMPANY)	
)	
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 on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen Chartered), Washington, D.C., 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 on Remand (91-BLA-1729) of Administrative Law Judge Clement J. Kichuck 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). The instant case involving a survivor's claim filed on March 1, 1990 is before the Board for the third time. In the initial Decision and Order, Administrative Law Judge Robert J. Shea, after crediting the miner with at least thirty years of coal mine employment, found the

evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, Judge Shea awarded benefits. By Decision and Order dated November 26, 1993, the Board affirmed Judge Shea's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). *Keene v. Bucar Coal Co.*, BRB No. 92-2307 BLA (Nov. 26, 1993) (unpublished). The Board, therefore, affirmed Judge Shea's award of benefits. *Id.*

Employer subsequently filed a motion for reconsideration. By Decision and Order on Reconsideration dated July 31, 1996, the Board noted that subsequent to the issuance of its Decision and Order, the United States Supreme Court invalidated the "true doubt" rule as contrary to the requirements of the Administrative Procedure Act (APA). *Keene v. Bucar Coal Co.*, BRB No. 92-2307 BLA (July 31, 1996) (unpublished); see 5 U.S.C. §556(d); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct 2251, 18 BLR 2A-1 (1994). Because Judge Shea's finding pursuant to 20 C.F.R. §718.205(c)(2) was based upon his utilization of the subsequently invalidated "true doubt" rule, the Board vacated Judge Shea's finding pursuant to 20 C.F.R. §718.205(c)(2), and remanded the case for further consideration. *Id.*

Due to Judge Shea's unavailability, Administrative Law Judge Clement J. Kichuk (the administrative law judge) reconsidered the claim on remand. The administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated September 4, 1998, the Board held that the administrative law judge's analysis of the evidence under 20 C.F.R. §718.205(c)(2) failed to comport with the requirements of the APA. *Keene v. Bucar Coal Co.*, BRB No. 97-1730 BLA (Sept. 4, 1998) (unpublished). The Board, therefore, vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c)(2) and remanded the case to the administrative law judge with instructions "to provide a more detailed explanation of the respective weight to be accorded the conflicting medical opinions of record."¹ *Id.*

¹The Board specifically instructed the administrative law judge to reconsider whether the opinions of Drs. Medina, Stefanini and Abrenio were sufficient to support a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). *Keene v. Bucar Coal Co.*, BRB No. 97-1730 BLA (Sept. 4, 1998)

(unpublished).

On remand, the administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Claimant² responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

²Claimant is the surviving spouse of the deceased miner who died on June 3, 1989. Director's Exhibit 9; Claimant's Exhibit 1.

Employer argues that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2).³ The administrative law judge found that the opinions of Drs. Stefanini, Medina, Abrenio and DeLara were sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Employer argues that the administrative law judge erred in failing to provide a basis for discrediting the opinions of Drs. Naeye, Caffrey, Fino, Chandler, Lane, Vuskovich and Anderson that pneumoconiosis did not hasten the miner's death. See Director's Exhibits 11, 19, 40; Employer's Exhibits 1, 2, 4-8. We agree. The administrative law judge's analysis does not comport with the 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). The administrative law judge's failure to provide a rationale for discrediting the opinions of Drs. Naeye, Caffrey, Fino, Chandler, Lane, Vuskovich and Anderson was error. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Employer, however, also asserts that the evidence is insufficient as a matter of law to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Employer argues that the evidence is too equivocal to carry claimant's burden of proof.

In order to overturn an administrative law judge's decision, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has recognized that the evidence must be such that no "reasonable mind" could interpret and credit a doctor's opinion as the administrative law judge did. See *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

In *United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384,

³Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under Section 718.205(c)(2), pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

21 BLR 1-639 (4th Cir. 1999), the Fourth Circuit reversed an administrative law judge's award of benefits in a survivor's claim. In reversing the award of benefits, the Fourth Circuit held that an administrative law judge, under Section 556(d) of the APA, has the affirmative duty to qualify evidence as "reliable probative, and substantial" before relying upon it to grant or deny a claim. See 5 U.S.C. §556(d).

In the instant case, Dr. Stefanini, the autopsy prosector, opined that:

The mechanism of death appeared related to sudden closure of the major pulmonary arterial trunk by a thrombus extending from a right ventricular cavity. This is essentially what is known as "serotonin death," with sudden reflex closure of pulmonary circulation. Agonal aspiration contributed to the terminal event.

Coal worker's pneumoconiosis of the micronodular type was present. In association to the COPD it contributed to reduction of respiratory surfaces. The cause of death was embolization. However, the ability to compensate for the problem of respiratory failure following pulmonary embolization was **possibly** decreased by the presence of COPD and coal worker's pneumoconiosis.

Director's Exhibits 10, 18 (emphasis added).

Dr. Stefanini's opinion that the miner's ability to compensate for his respiratory failure was "possibly" decreased by his COPD and coal workers' pneumoconiosis does not qualify as "reliable, probative, and substantial" evidence on which the administrative law judge could base an award of benefits. See *Jarrell, supra*.

Dr. Medina did not list pneumoconiosis as a cause of death on the miner's original death certificate which he completed on June 9, 1989. Director's Exhibit 9; Claimant's Exhibit 1. Dr. Medina also dictated the miner's "Death Summary" on June 11, 1989. Director's Exhibits 12, 18. Notably, Dr. Medina's final diagnoses did not include pneumoconiosis. *Id.* However, after reviewing Dr. Stefanini's autopsy report, Dr. Medina completed a "Supplemental Report of Death" dated July 26, 1990. Dr. Medina requested that the miner's death certificate be amended to include pulmonary embolus and coal workers' pneumoconiosis as other significant conditions contributing to the miner's death. Director's Exhibit 10. Dr. Medina noted that he had reviewed the miner's autopsy findings before completing his supplemental report. *Id.*

Although the amended death certificate indicates that Dr. Medina believed that pneumoconiosis contributed to the miner's death, Dr. Medina's failure to offer some

reasoning for his opinion renders his unexplained conclusion insufficient to support the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c)(2). See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186 (4th Cir. 2000)(A reference on a death certificate to pneumoconiosis as another condition contributing to death, without further explanation, does not constitute a reasoned medical opinion upon which to base an award of benefits under the Act.). Dr. Medina's reference to Dr. Stefanini's autopsy report does not cure the deficiency in the amended death certificate inasmuch as Dr. Stefanini's autopsy report itself does not support a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2).

In a report dated November 14, 1990, Dr. Abrenio opined that:

Pulmonary embolism with pulmonary hemorrhage could very well be the immediate cause of death in this patient. The presence of pneumoconiosis with significant COPD **could very well have contributed significantly**, in the presence of pulmonary embolism, to the patient's sudden demise.

Claimant's Exhibit 1 (emphasis added).

Dr. Abrenio's opinion, like that of Dr. Stefanini, is too speculative to support a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). See *Jarrell, supra*.

Dr. DeLara's opinion, however, supports a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Dr. DeLara reviewed the miner's autopsy slides. In a report dated September 17, 1990, Dr. DeLara opined that:

[The miner] had bronchogenic carcinoma of the right lung with metastasis to regional lymph nodes, skeleton, (by history) brain, and to the left lung. The immediate cause of death was due to pulmonary embolism. The pneumoconiosis was a contributory factor to the cause of death. The pneumoconiosis with COPD had compromised the lungs and when he had the pulmonary embolism the lung could not compensate for the respiration, thereby resulting in death.

Director's Exhibit 39; Claimant's Exhibit 1.

Employer asserts that Dr. DeLara failed to explain the basis for his conclusion that the miner's pneumoconiosis "was a contributory factor to the cause of death."

We disagree. Dr. DeLara provided a basis for his opinion, explaining that the miner's pneumoconiosis compromised his lungs, thereby contributing to his death from a pulmonary embolism.

In light of our holdings, we remand the case to the administrative law judge with instructions to address whether Dr. DeLara's opinion, when considered along with the contrary opinions of Drs. Anderson, Naeye, Fino, Caffrey, Lane, Vuskovich and Chandler,⁴ is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2).⁵

⁴The record also contains Dr. Buddington's opinion. In a report dated October 11, 1990, Dr. Buddington noted that although there was extensive coal workers' pneumoconiosis, it "probably was not a major contributor to the [miner's] demise." Director's Exhibit 39; Claimant's Exhibit 1.

⁵Employer argues that the administrative law judge erred in not considering Dr. Kleinerman's report. Employer's contention has no merit. The Board previously affirmed Judge Shea's denial of employer's motion to admit Dr. Kleinerman's report into the record. See *Keene v. Bucar Coal Co.*, BRB No. 92-2307 BLA (Nov. 26, 1993) (unpublished).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and the case is remanded for further consideration 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