

BRB Nos. 05-0126 BLA
and 05-0126 BLA-A

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| LENA NIDIFFER o/b/o and |) | |
| Widow of ALFRED R. NIDIFFER |) | |
| |) | |
| Claimant-Respondent |) | |
| Cross-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| WESTMORELAND COAL COMPANY |) | |
| |) | DATE ISSUED: 09/30/2005 |
| Employer-Petitioner |) | |
| Cross-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 in the Miner’s Claim and Awarding Benefits in the Widow’s Claim of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order – Denying Benefits in the Miner’s Claim and Awarding Benefits in the Widow’s Claim (03-BLA-0205) of Administrative Law Judge Mollie W. Neal on a miner’s claim and 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 administrative law judge indicated that this case involves a request for modification of the denial of the miner's 1997 duplicate claim consolidated with a survivor's claim filed on October 26, 2001.¹ The administrative law judge accepted employer's stipulations of thirty-nine years of coal mine employment and the existence of coal workers' pneumoconiosis, and its concessions that employer is the responsible operator and that claimant is the miner's dependent and widow. Decision and Order at 3; Hearing Transcript at 15-17.

Addressing the request for modification in the miner's claim, the administrative law judge found that the evidence of record did not establish that there was a mistake in a determination of fact in Administrative Law Judge Richard T. Stansell-Gamm's 1999 decision denying benefits, which was affirmed by both the Board and the United States Court of Appeals for the Fourth Circuit. Decision and Order at 12; *see* 20 C.F.R. §725.310. The administrative law judge further found that the newly submitted evidence did not establish either the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and thus, did not establish a change in conditions. Decision and Order at 13-14. Consequently, the administrative law judge denied claimant's request for modification on

¹ The procedural history of these two consolidated claims is as follows: The miner's initial claim for benefits filed in August 1985 was denied by Administrative Law Judge G. Marvin Bober because the miner failed to establish a total respiratory disability. The miner sought modification, which Administrative Law Judge Fletcher E. Campbell, Jr. denied based on findings that the miner failed to establish either the existence of complicated pneumoconiosis or total disability. Director's Exhibit 1. The Board affirmed Judge Campbell's denial of benefits. *Nidiffer v. Westmoreland Coal Co.*, BRB No. 95-0472 BLA (Aug. 28, 1995)(unpub.); Director's Exhibit 1. The miner filed a second application for benefits on April 30, 1997, which was denied by Administrative Law Judge Richard T. Stansell-Gamm on August 30, 1999 because the newly submitted evidence did not establish a material change in conditions as required by 20 C.F.R. §725.309(d) (2000) in that it did not establish either the existence of complicated pneumoconiosis or total respiratory disability. Director's Exhibits 2, 57. Both the Board and the United States Court of Appeals for the Fourth Circuit affirmed the denial of benefits. *Nidiffer v. Westmoreland Coal Co.*, BRB No. 99-1312 BLA (Oct. 30, 2000)(unpub.); *Nidiffer v. Westmoreland Coal Co.*, No. 00-2479 (4th Cir. Apr 20, 2001)(unpub.); Director's Exhibits 64, 67. Following the miner's death in September 2001, claimant timely requested modification of the denial of the miner's claim and on October 26, 2001, she filed a survivor's claim. The district director denied benefits on both claims and claimant requested a hearing on each. Director's Exhibits (Survivor's Claim) 2, 38, 40. By Order dated February 19, 2004, Administrative Law Judge Mollie W. Neal consolidated the two claims for decision.

the deceased miner's claim, and ruled that the deceased miner's claim remains denied.

In the survivor's claim, the administrative law judge found that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to Section 718.205(c)(2). Accordingly, she awarded benefits in the survivor's claim.

On appeal, employer contends that the administrative law judge erred in her analysis of the medical evidence when she found that pneumoconiosis was a substantially contributing cause of the miner's death. Claimant responds, urging affirmance of the administrative law judge's award of survivor's benefits. Claimant also cross-appeals the denial of the deceased miner's claim, contending that the administrative law judge erred in her weighing of the medical evidence when she found that it did not establish the existence of complicated pneumoconiosis or that the miner was totally disabled by a respiratory or pulmonary impairment. Employer responds to claimant's cross-appeal, urging affirmance of the administrative law judge's denial of benefits on the deceased miner's claim. The Director, Office of Workers' Compensation Programs, has indicated that he will not respond on the merits of either employer's appeal or claimant's cross-appeal.²

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).

To be entitled to benefits on the miner's claim, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the

² The parties do not challenge the administrative law judge's decision to credit the miner with thirty-nine years of coal mine employment, her acceptance of employer's concession that it is the properly designated responsible operator, that Lena Nidiffer is the miner's dependent, and that simple coal workers' pneumoconiosis has been established, or her findings under 20 C.F.R. §718.204(b)(2)(i) and (ii). These findings are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). 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).

The administrative law judge denied claimant's request for modification on the miner's claim because she found no mistake of fact or change in conditions. Specifically, the administrative law judge determined that the medical evidence did not establish that the miner suffered from complicated pneumoconiosis, and thus did not entitle claimant to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. She also found that the medical evidence did not establish that the miner was totally disabled by a respiratory or pulmonary impairment to 20 C.F.R. §718.204(b)(2)(i)-(iv).

In claimant's cross-appeal, claimant generally challenges the administrative law judge's finding that the evidence of record did not support a grant of modification pursuant to Section 725.310. Claimant argues that the administrative law judge did not adequately consider the diagnoses of complicated pneumoconiosis and cor pulmonale contained in the hospital records, treatment notes, and summaries prepared by the miner's treating physicians. These contentions lack merit.

The administrative law judge considered the opinions of the miner's treating physicians that the miner suffered from complicated pneumoconiosis, and found them credible. Decision and Order at 13; Director's Exhibit 69. However, she reasonably found them outweighed by contrary, probative evidence of record. Decision and Order at 13; see *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). An administrative law judge must weigh together all relevant evidence of the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). Here, the administrative law judge found that the positive CT scans that the miner's treating physicians relied upon to diagnose complicated pneumoconiosis were reread as negative by Drs. Spitz and Wiot, who possess superior radiological qualifications as B readers and Board-certified radiologists. Decision and Order at 13; Director's Exhibits 69, 72; Employer's Exhibit 3; see *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). Additionally, the administrative law judge properly considered that, according to Dr. Gale, the autopsy prosector, and Drs.

Tomashefski, Caffrey, Oesterling, and Naeye, reviewing pathologists, the autopsy did not detect complicated pneumoconiosis. Decision and Order at 13; Director's Exhibits 70, 71, 72, 76, 81; Employer's Exhibits 1, 2, 5, 9; *Lester*, 993 F. 2d at 1145-46, 17 BLR at 1-117-18. Because the administrative law judge properly considered and weighed all of the relevant evidence, we affirm her finding that it did not establish the existence of complicated pneumoconiosis pursuant to Section 718.304. *Lester*, 993 F. 2d at 1145-46, 17 BLR at 1-117-18; *Gollie*, 22 BLR at 1-311.

Additionally, we affirm the administrative law judge's finding that the evidence of record did not establish the existence of cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(b)(2)(iii). Contrary to claimant's contention that the administrative law judge erred in not according greater weight to the opinions of the miner's treating physicians that the miner suffered from cor pulmonale, the administrative law judge reasonably found these opinions outweighed by contrary, probative evidence. Decision and Order at 14; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Held*, 314 F.3d 184, 22 BLR 2-564; *Grizzle*, 994 F.2d 1093, 17 BLR 2-123. Specifically, the administrative law judge reasonably accorded greater weight to the opinions of Drs. Tomashefski, Naeye, Morgan, and Castle, stating that the medical evidence did not indicate cor pulmonale, because the miner's right-sided heart failure was due to his severe left-sided heart failure, as shown by the fact that the medications prescribed for him were for the treatment of left-sided heart failure. Decision and Order at 14; Director's Exhibits 71, 76; Employer's Exhibits 2, 5, 9, 10. In addition, the administrative law judge found that the autopsy report, while not discussing the miner's cardiac condition, also did not include a diagnosis of cor pulmonale and, thus supported Dr. Tomashefski's findings that cor pulmonale was not present. Decision and Order at 14. Thus, the administrative law judge reasonably found that claimant did not establish that the miner was suffering from cor pulmonale with right-sided congestive heart failure. Decision and Order at 14; 20 C.F.R. §718.204(b)(2)(iii); see *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

Further, the administrative law judge permissibly found that the medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv). Specifically, the administrative law judge reasonably found that Dr. Smiddy's opinion, that the miner was totally disabled, was not credible because Dr. Smiddy did not explain his conclusion in light of the miner's non-qualifying objective studies. Decision and Order at 14; Director's Exhibit 69; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. In this context, the administrative law judge rationally credited the contrary medical opinions that the evidence does not support a finding of total respiratory disability based on non-qualifying pulmonary function and blood gas study evidence. Decision and Order at 14; *Id.* As claimant does not otherwise raise any specific

allegations of error and the Board is not empowered to reweigh the evidence or substitute its judgment for that of the administrative law judge, *Anderson*, 12 BLR at 1-113, we affirm the administrative law judge's finding that the medical opinion evidence did not establish that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv).

Based on the foregoing, we affirm the administrative law judge's findings that the evidence of record did not establish either the existence of complicated pneumoconiosis or that the miner was totally disabled by a respiratory or pulmonary impairment, and thus did not establish a basis for granting claimant's modification request pursuant to Section 725.310 (2000).

In the survivor's claim, the administrative law judge accorded determinative weight to the opinion of Dr. Gale, the autopsy prosector, that pneumoconiosis was a contributing cause of the miner's death, because Dr. Gale examined the miner's lung tissue not only microscopically, but also as part of his gross examination of the lungs at autopsy. Decision and Order at 16; Director's Exhibits (Survivor's Claim) 8, 29, 31. In addition, the administrative law judge found that the autopsy findings supported a notation on the miner's death certificate listing coal workers' pneumoconiosis as a cause of his death. Decision and Order at 15; Director's Exhibit (Survivor's Claim) 7.

Employer contends that the administrative law judge erred in mechanically crediting Dr. Gale'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. This contention has merit.

An administrative law judge may not credit the opinion of the autopsy prosector solely because the autopsy prosector was the only physician to conduct a gross examination of the body. *Sparks*, 213 F.3d at 191-92, 22 BLR at 2-262; *see also Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992)(holding that the administrative law judge did not explain how the autopsy prosector's ability to conduct a gross examination gave him an advantage over reviewing pathologists). In the case at bar, the administrative law judge has not adequately explained her conclusion that Dr. Gale's gross examination of the lung tissue provided him with an advantage in providing a more credible diagnosis than the physicians who reviewed the lung tissue slides provided by Dr. Gale and other documentation. Although the administrative law judge cited Dr. Gale's June 20, 2002 letter stating that the miner's pneumoconiosis was severe, she did not assess whether Dr. Gale identified the basis for his conclusion. Decision and Order at 16; Director's Exhibits (Survivor's Claim) 29, 31; *see Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Moreover, the administrative law judge has not adequately discussed the credibility of Dr. Gale's opinions with relation to the

contrary opinions of record. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. Consequently, we must vacate the administrative law judge's finding pursuant to Section 718.205(c) and remand the case for her to provide a more detailed explanation of her weighing of the evidence as to the cause of the miner's death.

On remand, the administrative law judge should also make a specific finding regarding the credibility of the death certificate signed by Dr. Tomski, which stated that the immediate cause of death was "acute respiratory failure" due to "chronic respiratory failure" due to "CWP/COPD." Director's Exhibit (Survivor's Claim) 7. Specifically, the administrative law judge must explain her credibility determination in light of her finding that "a medical opinion report setting forth Dr. Tomski's opinion is not included in the record." Decision and Order at 15; *see Sparks*, 213 F.3d 186, 22 BLR 2-251; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

In addition, as employer contends, it is not apparent from the administrative law judge's findings what weight, if any, she accorded the opinion of Dr. Morgan that the miner's coal dust exposure played no role in his death. Employer's Exhibit 4. While the administrative law judge set forth Dr. Morgan's opinion in her recitation of the evidence, she did not mention it in her weighing of the medical evidence. Consequently, on remand, the administrative law judge must consider and discuss all relevant evidence. *Underwood*, 105 F.3d 946, 21 BLR 2-23.

However, we reject employer's contention that the administrative law judge shifted the burden of proof to employer and thus applied an incorrect legal standard. Employer's Brief at 13-15. Contrary to employer's contention, the administrative law judge did not presume that because the miner suffered from simple pneumoconiosis it must have contributed to his death. Rather, she found that merely because employer's physicians attributed the miner's death to a cardiac condition, it did not necessarily follow that pneumoconiosis played no role in the miner's death. Decision and Order at 16; *see* 20 C.F.R. §718.205(c)(5)(providing for a finding of entitlement where pneumoconiosis hastens death). Nevertheless, on remand, the administrative law judge must fully discuss her weighing of the conflicting medical evidence and resolve the conflict between the medical opinions attributing the miner's death solely to cardiac causes and the medical opinions that the miner did not suffer a cardiac death, *e.g.*, Dr. Metzger's opinion. Director's Exhibits (Survivor's Claim) 10, 11, 33, 35; Director's Exhibits 71, 72, 76; Employer's Exhibits 1, 2, 4, 5, 9, 10.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits in the Miner's Claim and Awarding Benefits in the Widow's Claim is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration of the survivor's claim consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge