

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 17-0571 BLA

PANSY AISTROP)	
(Widow of TOMMY AISTROP))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	
)	DATE ISSUED: 09/05/2018
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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-6114) of Administrative Law Judge Larry S. Merck awarding benefits on a claim filed pursuant to the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on February 28, 2011.¹

Because the administrative law judge credited the miner with less than fifteen years of coal mine employment,² he found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(4) of the Act.³ 30 U.S.C. §921(c)(4) (2012). Turning to whether claimant could establish entitlement under 20 C.F.R. Part 718, the administrative law judge found that the autopsy evidence established the existence of clinical pneumoconiosis⁴ pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge also found that the autopsy and medical opinion evidence established the existence of legal pneumoconiosis,⁵ in the form of chronic

¹ Claimant is the widow of the miner, who died on June 4, 2010. Director's Exhibit 11.

² The administrative law judge credited the miner with between twelve and thirteen years of coal mine employment. Decision and Order at 5.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where the evidence establishes fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(l) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012). Claimant cannot benefit from this provision, however, as the miner's lifetime claims for benefits were denied. Director's Exhibits 1, 2.

⁴ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

⁵ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

obstructive pulmonary disease (COPD)/emphysema due to coal mine dust exposure and cigarette smoking. 20 C.F.R. §718.202(a)(2), (4). The administrative law judge further found that the evidence established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer also contends that the administrative law judge erred in finding that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.⁶ 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).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause of the miner's death. Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6). Before any finding of entitlement can be made in a survivor's claim, however, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

Employer contends that the administrative law judge erred in finding that the autopsy and medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4).⁷ Dr. Perper diagnosed legal pneumoconiosis in

⁶ The miner's last coal mine employment was in Virginia. Director's Exhibits 1, 2. Accordingly, the Board will apply the law 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).

⁷ Because employer does not allege any specific error in regard to the administrative law judge's finding that the autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). However, no physician opined that clinical pneumoconiosis contributed to the miner's death. Even claimant's expert, Dr.

the form of COPD/emphysema due to coal mine dust exposure and cigarette smoking. Claimant's Exhibit 3. Although Drs. Caffrey, Oesterling, and Zaldivar also diagnosed emphysema, the doctors did not attribute the disease to coal mine exposure. While Drs. Caffrey and Oesterling attributed the disease to cigarette smoking, Employer's Exhibits 3, 5, 13, Dr. Zaldivar attributed it to both cigarette smoking and asthma. Employer's Exhibits 4, 12.

In evaluating the conflicting evidence, the administrative law judge discounted the opinions of Drs. Caffrey and Zaldivar because he found that each was premised on an assumption that was contrary to the scientific views endorsed by the Department of Labor in the preamble to the revised 2001 regulations. Decision and Order at 16-17. The administrative law judge further found that Dr. Perper's diagnosis of legal pneumoconiosis was well-reasoned. *Id.* at 17-18. The administrative law judge therefore found that the autopsy and medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4).

Employer argues that the administrative law judge erred in the weight that he accorded to Dr. Oesterling's opinion. Employer's Brief at 22. In fact, the administrative law judge entirely failed to address Dr. Oesterling's opinion that the miner's COPD/emphysema was caused by smoking and not attributable to his coal mine dust exposure.⁸ An administrative law judge is required to consider all relevant evidence in the

Perper, opined that the miner's clinical pneumoconiosis was "too mild to have resulted . . . in any significant pulmonary impairment." Claimant's Exhibit 3 at 30. Therefore, the sole issue is whether the evidence established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

⁸ Dr. Oesterling, a Board-certified pathologist, reviewed the autopsy slides, as well as the medical evidence. Dr. Oesterling opined that the slides revealed "little or no interstitial black pigment except for the very minor areas of perivascular and peribronchiolar anthracotic cuffing." Employer's Exhibit 5 (May 11, 2016 report) at 4. Dr. Oesterling explained that the anthracotic cuffing "was quite minimal and did not produce any structural change in the interstitium of [the miner's] lungs." *Id.* Dr. Oesterling therefore opined that the "[c]oal dust present was insufficient to alter the structure of [the miner's] lungs. *Id.* Instead, Dr. Oesterling noted that the lumen of the alveoli contain "prominent macrophages with a finely stippled cytoplasm." *Id.* at 3. He identified these as "smokers' macrophages." *Id.* Dr. Oesterling therefore attributed the miner's emphysema to his cigarette smoking. *Id.* at 3-4.

record. *See* 30 U.S.C. §923(b). The administrative law judge therefore erred in failing to consider and weigh this evidence.

We also agree with employer that the administrative law judge erred in his consideration of the opinions of Drs. Caffrey and Zaldivar. The administrative law judge accorded less weight to their opinions because he found that they were based on an assumption that coal mine dust exposure does not contribute to COPD/emphysema in the absence of clinical pneumoconiosis, contrary to the regulations. Decision and Order at 16-17. Contrary to the administrative law judge's characterization, Drs. Caffrey and Zaldivar did not base their opinions that the miner's COPD/emphysema was not caused by coal mine dust exposure on the absence of clinical pneumoconiosis. Instead, they based their opinions on the lack of significant coal dust present in the miner's lungs.⁹ Consequently, the administrative law judge's basis for discrediting the opinions of Drs. Caffrey and Zaldivar cannot stand. *See generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer also contends that the administrative law judge erred in finding that Dr. Perper's diagnosis of legal pneumoconiosis was well-reasoned. Employer's Brief at 21. We agree. In so finding, the administrative law judge erred in not addressing the specific reasons advanced by Dr. Perper for attributing the miner's COPD/emphysema to coal mine dust exposure, or the opinions of other physicians criticizing his opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

⁹ Based upon his review of the autopsy slides, Dr. Caffrey opined that "coal dust in the mild amount that [the miner] had would not have caused him any discernible pulmonary disability." Employer's Exhibit 3 at 4. Dr. Caffrey noted that he did not see any emphysema associated with the anthracotic pigment that was present. Employer's Exhibit 13 at 15-16. Dr. Caffrey therefore attributed the miner's emphysema to cigarette smoking. *Id.* at 24.

Based upon his review of the autopsy report and other medical evidence, Dr. Zaldivar opined that there was pathological evidence of "very early clinical pneumoconiosis." Employer's Exhibit 4 at 13. Dr. Zaldivar also noted that even individuals with "very little radiographic profusion" may have legal pneumoconiosis. *Id.* at 11. However, in this case, Dr. Zaldivar noted that, even at autopsy, there was "little dust" found in the lungs. *Id.* Dr. Zaldivar explained that there was only "a very small amount" of coal dust "next to the lining of the lung" that did not cause any of the emphysema. Employer's Exhibit 12 at 43. Dr. Zaldivar therefore attributed the miner's emphysema to his cigarette smoking and asthma. Employer's Exhibit 4 at 13.

In light of the above-referenced errors, we must vacate the administrative law judge's finding that the autopsy and medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), and remand this case for further consideration. On remand, when considering whether claimant has satisfied her burden to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

In light of our decision to vacate the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), we also vacate his finding that the evidence established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and instruct him to reconsider this issue, if necessary, on remand.¹⁰

¹⁰ In addressing whether the miner's death was due to legal pneumoconiosis, the administrative law judge considered the miner's death certificate and the medical opinions of Drs. Zaldivar and Perper. Decision and Order at 18-19. Drs. Caffrey and Oesterling, however, also addressed the cause of the miner's death. Employer's Exhibits 3, 5, 13. If the administrative law judge reaches the question of death causation, the administrative law judge should address this relevant evidence at 20 C.F.R. §718.205(b). *See* 30 U.S.C. §923(b).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge