

BRB No. 05-0607 BLA

JUSTINA KOHAN)	
(Widow of PETER A. KOHAN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BETHENERGY MINES, INCORPORATED)	DATE ISSUED: 02/16/2006
)	
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant¹ appeals the Decision and Order (03-BLA-5233) of Administrative Law

¹Claimant is the widow of the miner, Peter A. Kohan. The miner filed a claim for benefits on March 11, 1987. Director's Exhibit 1. This claim was denied by the Department of Labor (DOL) on September 2, 1987 because the evidence did not show that the miner had pneumoconiosis, that the disease was caused at least in part by coal mine work, and that the miner was totally disabled by the disease. *Id.* In a letter dated September 24, 1987, the miner

Judge Daniel L. Leland (the administrative law judge) denying 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. In a Decision and Order dated November 17, 2003, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.² The administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

In response to claimant's appeal, the Board vacated the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remanded the case for further consideration of the evidence therein. *Kohan v. Bethenergy Mines, Inc.*, BRB No. 04-0249 BLA (Dec. 14, 2004)(unpub.). On remand, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge again denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Worker's Compensation Programs, has declined to participate in this appeal.

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).

Because 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.

requested a hearing before the Office of Administrative Law Judges (OALJs). *Id.* However, while review of the case was pending before the OALJs, the miner filed a request for withdrawal of his claim on February 15, 1989. *Id.* On February 24, 1989, Administrative Law Judge Thomas M. Burke issued an Order, remanding the claim to the deputy commissioner for appropriate action. *Id.* The miner died on May 23, 2000. Director's Exhibits 1, 6. Claimant filed a survivor's claim on June 27, 2001. Director's Exhibit 1.

²Employer conceded that the miner worked forty years in coal mine employment and had pneumoconiosis arising out of coal mine employment. 2003 Decision and Order at 2.

§718.205(c). See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); see *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Specifically, claimant asserts that the administrative law judge erred in failing to follow the Board's remand instructions to explain why he found that Dr. Bush's opinion is entitled to greater weight than the contrary opinion of Dr. Perper. We disagree. The record consists of a death certificate signed by Dennis Kwiatkowski, a coroner, as well as an autopsy protocol by Drs. Goldblatt and Zhang, and the reports of Drs. Bush, Goldblatt, Hurwitz, and Perper. On the death certificate, the coroner listed cardiac arrhythmia as the immediate cause of the miner's death. Director's Exhibit 6. The coroner also listed severe coronary artery disease, coal workers' pneumoconiosis, and colonic adenocarcinoma as other significant conditions that contributed to the miner's death. *Id.* In the autopsy protocol, Drs. Goldblatt and Zhang opined that the immediate cause of the miner's death was possible cardiac arrhythmia. Director's Exhibit 7. Although Drs. Goldblatt and Zhang diagnosed simple coal workers' pneumoconiosis, they did not opine that this condition contributed to the miner's death. *Id.* Regarding the medical reports, Drs. Bush³ and Hurwitz⁴ opined that

³Dr. Bush, in a June 4, 2001 report, opined that the miner's death was caused by complications of coronary artery disease. Director's Exhibit 16. Dr. Bush further opined that coal workers' pneumoconiosis did not hasten or contribute to the miner's death. *Id.* In a subsequent June 14, 2001 report, Dr. Bush again opined that the miner's death was caused by his cardiovascular disease. *Id.* Dr. Bush also stated that "[t]he amount of coal mine dust in the lungs of [the miner] is so minimal that it could not have produced changes that would have contributed to death." *Id.* During a July 11, 2003 deposition, Dr. Bush reiterated his opinion that the miner's occupational pulmonary disease did not cause the miner's death. Employer's Exhibit 5.

⁴In a July 3, 2001 report, Dr. Hurwitz opined that "[the miner] died of progressive heart failure in the setting of severe coronary artery disease and recent acute myocardial infarction." Director's Exhibit 16. Dr. Hurwitz also opined that the miner's occupationally acquired pulmonary disease played no role in mediating his death. *Id.* During a July 10, 2003 deposition, Dr. Hurwitz reiterated his opinion that the miner's occupationally acquired pulmonary disease played no role in mediating his death. Employer's Exhibit 4.

pneumoconiosis did not contribute to the miner's death, Director's Exhibit 16; Employer's Exhibits 4, 5, while Drs. Goldblatt⁵ and Perper⁶ opined that pneumoconiosis contributed to the miner's death, Director's Exhibits 8, 9; Claimant's Exhibits 1, 2. In considering the conflicting medical opinions, the administrative law judge found that the opinions of Drs. Bush and Hurwitz outweighed the contrary opinions of Drs. Goldblatt and Perper. 2005 Decision and Order at 2.

In his November 17, 2003 Decision and Order, the administrative law judge found that the opinions of Drs. Bush and Hurwitz regarding the cause of the miner's death were entitled to greater weight than the contrary opinions of Drs. Goldblatt and Perper. 2003 Decision and Order at 5. The administrative law judge specifically stated, "I find that Dr. Bush's opinion is...entitled to great weight." *Id.* The administrative law judge also accorded greater weight to Dr. Hurwitz's opinion than to Dr. Perper's opinion because he found that Dr. Hurwitz's opinion was better reasoned.⁷ *Id.* In addition, the administrative law judge discredited the

⁵In an October 25, 2001 report, Dr. Goldblatt stated that "[t]he presence of severe coronary artery disease in the heart was a primary factor in producing [the miner's] demise." Director's Exhibit 9. Dr. Goldblatt further opined that "significant chronic lung disease[,] which in this case is due in large part to coal workers' pneumoconiosis, played a significant role in accelerating the death of [the miner]." *Id.* Dr. Goldblatt noted that "[c]hronic lung disease decreases the oxygen supplied to the heart muscle enhancing significant myocardial ischemia." *Id.* During an August 12, 2003 deposition, Dr. Goldblatt reiterated his opinion that coal workers' pneumoconiosis was a significant contributing factor in hastening the miner's death. Claimant's Exhibit 2.

⁶In a March 20, 2001 report, Dr. Perper opined that "[t]he mechanism of death was hypoxia related to the [miner's] simple coal workers (sic) pneumoconiosis and associated emphysema, that triggered a terminal arrhythmia in an individual with severe coronary artery disease." Director's Exhibit 8. During an April 14, 2003 deposition, Dr. Perper reiterated his opinion that simple coal workers' pneumoconiosis and associated centrilobular emphysema related to coal dust exposure contributed to and hastened the miner's death. Claimant's Exhibit 1.

⁷The administrative law judge stated that "[Dr. Hurwitz] described in detail how the miner's cardiac disease resulted in his death and why he believed that pneumoconiosis did not play a role in his death." 2003 Decision and Order at 5. In contrast, the administrative law judge stated that "Dr. Perper does not explain how he could determine that the miner's centrilobular emphysema was caused by his forty years of coal dust exposure rather than by his former heavy cigarette smoking history." *Id.* The administrative law judge additionally stated that "[Dr. Perper] was the only pathologist to find significant emphysema." *Id.* The administrative law judge also stated that "Dr. Perper attributed the miner's death to a fatal

opinion in Dr. Goldblatt's report on the basis that it is inconsistent with the opinion in his autopsy protocol.⁸ *Id.* at 5. Lastly, the administrative law judge discredited the death certificate on the grounds that the coroner who authored it is not a physician, and it is not reasoned. *Id.* at 6.

In its December 14, 2004 Decision and Order, the Board affirmed the administrative law judge's prior finding that the death certificate signed by the coroner does not constitute a reasoned medical opinion. *Kohan*, BRB No. 04-0249 BLA, slip op. at 5 n.5. The Board also affirmed the administrative law judge's prior finding that Dr. Goldblatt's opinion lacks credibility on the basis that the administrative law judge reasonably questioned the prosecutor's change in opinion regarding the cause of the miner's death. *Kohan*, BRB No. 04-0249 BLA, slip op. at 4. Further, the Board affirmed the administrative law judge's finding that Dr. Hurwitz's opinion is credible and entitled to greater weight as the administrative law judge reasonably determined that this opinion is well documented and reasoned. *Id.* In addition, the Board stated that "it was permissible for the administrative law judge to favorably note that Dr. Hurwitz is a Board-certified cardiologist, given the relevance of his credentials to his opinion, which focuses on the miner's cardiac condition." *Id.* However, the Board vacated the administrative law judge's finding that Dr. Bush's opinion is entitled to great weight because the administrative law judge did not provide any explanation for this finding. *Id.* The Board also vacated the administrative law judge's findings regarding Dr. Perper's opinion because the administrative law judge did not consider the entirety of Dr. Perper's opinion. *Id.* at 4-5. Moreover, the Board held that the administrative law judge mischaracterized portions of the record by stating that Dr. Perper is the only pathologist to find significant emphysema.⁹ *Id.* at 5.

cardiac arrhythmia brought about by hypoxia, although there is little evidence of hypoxia during the miner's lifetime and the hypoxia reported on the date of his death was almost surely related to his severe cardiac disease." *Id.*

⁸The administrative law judge stated that "[w]hen called upon to perform the autopsy, Dr. Goldblatt reached one set of conclusions; when the case was in litigation he reached a different and contradictory set of conclusions." 2003 Decision and Order at 5. Thus, the administrative law judge concluded, "I do not find it credible that his review of the miner's lifetime medical records would account for his change of opinion, and therefore I consider his finding that pneumoconiosis contributed to the [miner's] death highly suspect." *Id.*

⁹The Board stated that "Dr. Goldblatt, who, like Dr. Perper, is a pathologist, stated that the miner's coal workers' pneumoconiosis 'was an important factor in producing *significant pulmonary emphysema.*' Director's Exhibit 9 (emphasis added)." *Kohan v. Bethenergy Mines, Inc.*, BRB No. 04-0249 BLA, slip op. at 5 (Dec. 14, 2004)(unpub.).

On remand, in his March 28, 2005 Decision and Order, the administrative law judge properly accorded greater weight to Dr. Bush's opinion than to Dr. Perper's contrary opinion, based on the administrative law judge's finding that Dr. Bush's opinion regarding the cause of the miner's death is supported by Dr. Hurwitz's opinion.¹⁰ *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in failing to explain why he found that Dr. Bush's opinion is entitled to greater weight than the contrary opinion of Dr. Perper. Claimant essentially requests that the Board reweigh the evidence. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718, *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we affirm the administrative law judge's denial of benefits.

¹⁰In his March 28, 2005 Decision and Order, the administrative law judge stated that "[Dr. Bush's] opinion is in accord with the opinion of Dr. Hurwitz, the only cardiologist of record." 2005 Decision and Order at 2. In addition, the administrative law judge discredited Dr. Perper's opinion because "[it] is in disagreement with Dr. Hurwitz's opinion on almost every crucial question in this case." *Id.* As discussed *supra*, the Board previously held that "it was permissible for the alj to favorably note that Dr. Hurwitz is a Board-certified cardiologist, given the relevance of his credentials to his opinion, which focuses on the miner's cardiac condition." *Kohan*, BRB No. 04-0249 BLA, slip op. at 4.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's denial of benefits. I would vacate the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) and remand the case for further consideration of all the evidence. The administrative law judge did not adequately explain why he found that Dr. Bush's opinion is better reasoned and documented than Dr. Perper's contrary opinion. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Rather the administrative law judge merely found that Dr. Bush's opinion on the cause of the miner's death parallels Dr. Hurwitz's opinion, while Dr. Perper's findings on this issue are in direct contrast to Dr. Hurwitz's findings. 2005 Decision and Order at 2.

Although the Board previously affirmed the administrative law judge's finding that Dr. Hurwitz's opinion is entitled to greater weight on the basis that it is well documented and reasoned, the Board also questioned the administrative law judge's decision to accord less weight to Dr. Perper's opinion on the basis that the administrative law judge did not consider the entirety of Dr. Perper's opinion. *Kohan*, BRB No. 04-0249 BLA, slip op. at 4 (emphasis added). Thus, in view of the Board's prior disposition of Dr. Perper's opinion, I would hold that the Board should not have affirmed the administrative law judge's finding that Dr. Hurwitz's opinion is entitled to greater weight than Dr. Perper's opinion on the basis that Dr. Hurwitz's opinion is better reasoned and documented.

In addition, I would hold that the administrative law judge erred in relying on Dr. Hurwitz's credentials as a Board-certified cardiologist in weighing the conflicting medical opinions at 20 C.F.R. §718.205(c). The record reveals that while Dr. Hurwitz is Board-certified in Internal Medicine and Cardiovascular Disease, Director's Exhibit 16; Employer's Exhibit 4, Dr. Bush is Board-certified in Anatomic and Clinical Pathology and Medical Microbiology, Director's Exhibit 16; Employer's Exhibit 5, and Dr. Perper is Board-certified in Anatomic, Surgical and Forensic Pathology, Director's Exhibit 8; Claimant's Exhibit 1. The administrative law judge did not explain why Dr. Hurwitz's credentials as a Board-certified cardiologist are superior to the credentials of Drs. Bush and Perper as Board-certified pathologists. *Wojtowicz*, 12 BLR at 1-165.

Based on the foregoing, I would vacate the administrative law judge's denial of benefits and remand the case for further consideration of all the evidence in accordance with the Administrative Procedure Act. *See* 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).

BETTY JEAN HALL
Administrative Appeals Judge