

BRB No. 09-0714 BLA

KATHRYN S. BARKER)	
(Widow of JAMES A. BARKER))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 07/29/2010
)	
PEABODY COAL COMPANY)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
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 and Order Granting Reconsideration of Stephen L. Purcell, Acting Chief Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand and Order Granting Reconsideration (05-BLA-5115) of Acting Chief Administrative Law Judge Stephen L. Purcell rendered on a survivor's claim filed on June 7, 2003, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act).¹ This case is before the Board for the second time.

In his initial decision, the administrative law judge credited the miner with at least ten years of coal mine employment,² and accepted employer's concession that the miner suffered from clinical pneumoconiosis.³ The administrative law judge found that claimant established that the miner also had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Upon review of employer's appeal, the Board held that the administrative law judge erred in ruling that Dr. Oesterling's report of his review of both autopsy and clinical evidence could not be designated as an autopsy or autopsy rebuttal report, but had to be designated as a medical report only, in order to be admitted into evidence. Accordingly, the Board remanded the case to the administrative law judge to allow employer to redesignate its evidence. *Barker v. Peabody Coal Co.*, BRB No. 06-0624

¹ The parties correctly state that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as claimant's claim was filed before January 1, 2005.

² The record indicates that the miner's coal mine employment was in Illinois. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ Clinical pneumoconiosis is defined as "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). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

BLA slip op. at 5-6 (Mar. 28, 2007)(unpub.). Based on its holding that the administrative law judge had to reconsider which evidence was admissible, the Board vacated his findings that the evidence established that the miner had legal pneumoconiosis and died due to pneumoconiosis.⁴ *Barker*, slip op. at 6.

On remand, the administrative law judge admitted Dr. Oesterling's redesignated report and post-hearing deposition as a combined affirmative-case medical report, affirmative-case autopsy report, and autopsy rebuttal report. Upon reconsideration of the merits of entitlement, the administrative law judge found that claimant established that the miner had legal pneumoconiosis, in the form of chronic obstructive pulmonary disease due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4), and established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.⁵

On appeal, employer challenges the administrative law judge's findings that the miner had legal pneumoconiosis pursuant to Section 718.202(a)(4), and that legal pneumoconiosis was a substantially contributing cause of his death pursuant to Section 718.205(c). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief. In a footnote, however, the Director urges the Board to reject employer's argument that the administrative law judge erred in considering the preamble to the revised regulations when he weighed the medical opinion evidence regarding the cause of the miner's obstructive lung disease. Director's Letter at 1 n.1. Employer filed a reply to the Director's response. Additionally, claimant's counsel filed a fee petition for work performed before the Board in the prior appeal. No objections to the fee petition were filed.

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

⁴ The Board affirmed, however, the administrative law judge's finding that claimant was not collaterally estopped from establishing the existence of legal pneumoconiosis based on the miner's failure to establish legal pneumoconiosis in his unsuccessful claim for benefits. *Barker v. Peabody Coal Co.*, BRB No. 06-0624 BLA slip op. at 6-8 (Mar. 28, 2007)(unpub.).

⁵ Pursuant to claimant's motion for reconsideration, the administrative law judge amended his Decision and Order on Remand to reflect that benefits were payable from January 22, 1999, the date of the miner's death.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor’s benefits, 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 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993). For survivors’ claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1),(3), or that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. 20 C.F.R. §718.205(c)(2), (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); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th 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).

With respect to the existence of legal pneumoconiosis, Dr. Green opined that the miner’s chronic obstructive pulmonary disease (COPD) was due to both smoking and coal mine dust exposure. Claimant’s Exhibit 1 at 4. Dr. Heidingsfelder stated that the causes of the miner’s emphysema and chronic bronchitis were “perhaps environmental exposure, perhaps smoking.” Director’s Exhibit 15 (Dr. Heidingsfelder’s deposition at 18-20). Dr. Heidingsfelder indicated further that he diagnosed the miner with coal workers’ pneumoconiosis because of “the presence of other chronic lung diseases of emphysema and bronchitis,” along with scarring and fibrosis, and “the presence of marked degrees of the carbon pigment deposits” in the lung tissue, and the presence of lesions of localized emphysema characteristic of simple coal workers’ pneumoconiosis. *Id.* at 31. Drs. Oesterling and Tuteur attributed the miner’s COPD solely to smoking. Employer’s Exhibits 9 at 7; 11 at 21, 86-87; 12 at 41-43, 103-106.

The administrative law judge discounted Dr. Oesterling’s opinion because he found that the doctor’s three main reasons for opining that the miner’s emphysema and chronic bronchitis were unrelated to coal mine dust, namely, (1) that the miner’s lung tissue slides did not show sufficient black pigment to cause the severe degree of emphysema from which the miner suffered; (2) that there was no evidence of centrilobular emphysema, the type usually found in coal miners; and, (3) that the miner’s smoking was lengthier than his coal mine dust exposure; were “neither well-reasoned nor well-founded.” Decision and Order on Remand at 21. The administrative law judge discounted Dr. Tuteur’s opinion because he found that Dr. Tuteur relied on an inflated smoking history, and because Dr. Tuteur disagreed with the medical literature cited by the Department of Labor (DOL) which concluded that COPD caused by smoking and coal dust exposure occur at an approximately equal rate. The administrative law judge

credited the opinions of Drs. Green and Heidingsfelder because he found that they were well-reasoned and documented, and consistent with the medical studies relied on by DOL when it amended the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment.

Employer argues, *inter alia*, that the administrative law judge selectively analyzed Dr. Oesterling's opinion. Employer's Brief at 14. Employer also argues that the administrative law judge erred in discounting Dr. Oesterling's opinion on the basis that it was internally inconsistent. Employer's Brief at 15-16. Employer alleges that the administrative law judge erred in discounting Dr. Tuteur's opinion as based on an inflated smoking history,⁶ or as contrary to medical literature relied upon by DOL regarding the relationship between coal mine dust exposure and COPD. Employer's Brief at 17-20. Additionally, employer argues that the administrative law judge erred in crediting the opinions of Drs. Green and Heidingsfelder on the basis that they were more consistent with the medical literature cited by DOL in amending its regulations, without considering the underlying reasoning and documentation of the opinions. Employer's Brief at 20-22. Employer further asserts that Dr. Heidingsfelder's opinion was too equivocal to be credited as evidence of legal pneumoconiosis. Employer's Brief at 20.

Employer's arguments regarding the administrative law judge's treatment of the opinion of Dr. Oesterling lack merit. The administrative law judge found that Dr. Oesterling based his opinion, in part, on the fact that the miner's smoking history was longer than his coal mine dust exposure. Employer's Exhibits 1 at 4; 12 at 77. Further, the administrative law judge found that Dr. Oesterling failed to explain how the miner's still significant coal mine dust exposure did not contribute at all to his obstructive lung disease. The administrative law judge noted that, by contrast, Dr. Green explained that the effects from inhaled coal mine dust progress after the cessation of coal mine employment, whereas the effects from smoking do not progress after the cessation of smoking, and thus, the fact that the miner quit smoking twenty years before he died implicated coal mine dust as a cause of his emphysema.⁷ Claimant's Exhibit 1 at 4. The

⁶ The administrative law judge found that all the relevant evidence established that the miner had a smoking history of one pack of cigarettes per day for twenty to twenty-one years, that ended in 1979. 2006 Decision and Order at 19 n.5. Since Dr. Tuteur indicated his belief that the miner smoked up to five packs per day, based on a notation in the record that the administrative law judge had discounted, the administrative law judge accorded less weight to Dr. Tuteur's opinion. Employer argues that this was error because Dr. Tuteur testified that he would reach the same conclusion as to the cause of the miner's lung disease even assuming that the miner smoked one pack of cigarettes per day. Employer's Brief at 17.

⁷ Specifically, Dr. Green stated in his report that:

administrative law judge acted within his discretion in finding that Dr. Green's opinion was well-reasoned and merited greater weight than Dr. Oesterling's opinion on this point, in view of DOL's finding that prevailing medical science demonstrates that pneumoconiosis may be latent and progressive.⁸ Decision and Order on Remand at 24, citing 65 Fed. Reg. 79968-72 (Dec. 20, 2000); see 20 C.F.R. §718.201(c); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490-91, 23 BLR 2-18, 2-26-27 (7th Cir. 2004); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

These [medical studies] show, in general, that one pack year of smoking contributes approximately the same amount to the emphysema score as does one year of underground mining. Using this rule of thumb, it would appear that smoking contributed slightly more to the development of his emphysema than did his exposure to coal mine dust. However, it should be borne in mind that he quit smoking in 1979 and thus for the last 20 years of his life smoking would not further contribute to the development of the emphysema. This would not be true for the relationship with coal mine dust exposure as the dust is retained in the lungs for the lifetime of the individual and continues to irritate the lungs, leading to progression of the emphysema. Taking this into account, I would estimate that smoking and coal mine dust exposure contributed approximately equally to [the miner's] emphysema.

Claimant's Exhibit 1 at 4.

⁸ Contrary to employer's additional contention, substantial evidence supports the administrative law judge's permissible determination that Dr. Oesterling's opinion, that the absence of centrilobular emphysema indicated that the miner did not have legal pneumoconiosis, was not consistent. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Specifically, the administrative law judge highlighted the doctor's statements that he did not see "much" centrilobular emphysema, that it was possible that centrilobular emphysema was present but had been destroyed by bullous emphysema or progressed to panlobular emphysema, and finally, that "I'm sure at some stage in his life he did have some centrilobular emphysema. He would have had some acute bronchitis during his more acute exposure to dust. So at those stages in his life, he would have had I guess a legal pneumoconiosis." Decision and Order on Remand at 22, quoting Employer's Exhibit 12 at 67.

Similarly, the administrative law judge acted within his discretion in according less weight to Dr. Tuteur's opinion because he "disagreed with the substantial medical literature cited by the [DOL] in connection with its revisions to the Black Lung regulations which concludes that exposure to coal mine dust may give rise to COPD at a rate nearly equal to that of smoking." Decision and Order on Remand at 23; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Shores*, 358 F.3d at 490-91, 23 BLR at 2-26-27; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7; *Obush*, 24 BLR at 1-125-26. Specifically, the administrative law judge found that Dr. Tuteur disagreed with the 1992 study by Attfield & Hodous, upon which DOL relied when it revised the definition of pneumoconiosis, and which concluded that COPD caused by smoking and COPD caused by coal mine employment occur at nearly equal rates. 65 Fed. Reg. 79940 (Dec. 20, 2000). The record reflects that Dr. Tuteur relied on his view of the greater probability that COPD would be caused by smoking than by coal mine dust exposure. Employer's Exhibit 11 at 26-28, 41. Because the administrative law judge provided a valid reason why he was not persuaded by the opinions of Drs. Oesterling and Tuteur, we reject employer's contention that the administrative law judge erred in discounting them. Therefore, we need not address employer's other arguments challenging the administrative law judge's weighing of these opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Likewise, employer's challenges to the administrative law judge's treatment of the opinions of Drs. Green and Heidingsfelder lack merit. Contrary to employer's argument, the administrative law judge addressed whether these opinions were documented and reasoned. The administrative law judge found that Dr. Green's opinion was well-reasoned and documented because it was based on an accurate smoking history, and was consistent with DOL's recognition that "the deposition of coal dust in a miner's lungs during his coal mine employment continues to cause harm well into the future." Decision and Order on Remand at 24. Substantial evidence supports these permissible credibility determinations. *See Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 890-91, 22 BLR 2-514, 2-528-29 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 670-71, 22 BLR 2-483, 2-490-91 (7th Cir. 2002). The administrative law judge found that Dr. Heidingsfelder's opinion was well-reasoned and documented "in that it is based upon, and consistent with, the macroscopic and microscopic findings set forth in his autopsy report," including his finding of "substantial amounts of carbon throughout the miner's lungs." *Id.* Moreover, contrary to employer's argument, given the administrative law judge's reliance on Dr. Green's opinion explicitly linking the miner's COPD to coal mine dust exposure, the administrative law judge was not precluded from relying, in part, on Dr. Heidingsfelder's opinion as consistent with Dr. Green's opinion. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *V.M. [Matney] v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-75 (2008).

As the administrative law judge properly analyzed the medical opinions and explained his reasons for crediting or discrediting each opinion, we affirm his finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), as it is supported by substantial evidence. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

Pursuant to Section 718.205(c), in finding that the miner's death was due to pneumoconiosis, the administrative law judge stated, "Inasmuch as I have found that the Miner's COPD constituted legal pneumoconiosis, and all the medical experts agree that COPD was a contributing factor in the Miner's death, I find that Claimant has satisfied her burden of proof with respect to this element" Decision and Order on Remand at 24. Employer argues that the administrative law judge applied an incorrect standard to find that the miner's death was due to pneumoconiosis. Employer's Brief at 22-24. Employer argues further that the administrative law judge misstated the evidence when he found that all the medical experts agree that the miner's COPD contributed to his death, and erred in relying on an unexplained death certificate to support his finding. *Id.* at 22-24.

Employer's arguments are rejected. The administrative law judge correctly inquired whether pneumoconiosis hastened the miner's death, consistent with both Section 718.205(c) and the legal standard set forth by the United States Court of Appeals for the Seventh Circuit in *Railey*, 972 F.2d at 183, 16 BLR at 2-128. Decision and Order on Remand at 24. Moreover, substantial evidence supports the administrative law judge's finding that the physicians of record agreed that COPD contributed to the miner's death; they disagreed only as to the etiology of the COPD.⁹

⁹ Dr. Oesterling opined that bullous emphysema due to smoking was a significant contributing cause of the miner's death. Employer's Exhibit 12 at 61. Dr. Oesterling was asked at his deposition, "If it were your opinion that [the miner's] emphysema and chronic bronchitis were, in fact, legal pneumoconiosis, if that were the case, then pneumoconiosis would be a significant cause of [the miner's] death, right?" Employer's Exhibit 12 at 113. Dr. Oesterling responded, "Hypothetically, that would be correct, yes, sir." *Id.* Dr. Tuteur opined that the miner's emphysema due to smoking "complicated" his death. Employer's Exhibit 9 at 4-5. Dr. Heidingsfelder stated that the miner's emphysema and chronic bronchitis were contributing factors in his death, which was caused primarily by a heart attack. Director's Exhibit 15 (Dr. Heidingsfelder's deposition at 22-23, 26, 54). Dr. Green stated that the miner's COPD due to both coal dust exposure and smoking contributed to and hastened the miner's death "by significantly reducing the oxygen supply to the ischemic heart muscle." Claimant's Exhibit 1 at 5.

Further, we disagree with employer that the administrative law judge relied on an unexplained death certificate to establish that the miner's death was due to pneumoconiosis. The administrative law judge noted that the miner's death certificate listed pneumoconiosis as a significant condition contributing to death from a myocardial infarction. Director's Exhibit 11. The administrative law judge based his determination, however, on his finding that "the Miner's COPD constituted legal pneumoconiosis, and all the medical experts agree that COPD was a contributing factor in the Miner's death." Decision and Order on Remand at 24. Consequently, we affirm the administrative law judge's finding that the miner's death was hastened by legal pneumoconiosis pursuant to Section 718.205(c), and we affirm the award of survivor's benefits.¹⁰ See *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 335-36, 22 BLR 2-581, 2-588-89 (7th Cir. 2002).

Finally, claimant's counsel has filed a complete, itemized statement, requesting a total fee of \$2,343.00, representing 10.65 hours of attorney services at an hourly rate of \$220.00 for work performed in the prior appeal. No objection to the fee petition was filed. Upon review of the fee petition, the Board finds the requested fee to be reasonable in light of the services performed and approves a fee of \$2,343.00, to be paid directly to claimant's counsel by employer. See 33 U.S.C. §928; 20 C.F.R. §802.203.

¹⁰ Employer contends that the administrative law judge did not follow the Board's remand instructions, and requests that we remand this case for reassignment to a different administrative law judge. Employer's Brief at 13. Because we have affirmed the award of survivor's benefits, employer's request to reassign this case is moot.

Accordingly, the administrative law judge's Decision and Order on Remand and Order Granting Reconsideration are affirmed, and claimant's counsel is awarded a fee of \$2,343.00.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge