

BRB No. 10-0233 BLA

LORNA VARNEY)	
(Widow of WILLIE G. VARNEY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTERN COAL CORPORATION)	DATE ISSUED: 11/23/2010
)	
and)	
)	
THE PITTSSTON COMPANY,)	
c/o ACORDIA EMPLOYERS SERVICE)	
)	
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2004-BLA-05576) of Administrative Law Judge Janice K. Bullard (the administrative law judge) awarding benefits on a survivor's claim filed on August 30, 2002, 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). This case is before the Board for the third time.¹

Pursuant to employer's most recent appeal to the Board, the Board affirmed, notwithstanding employer's arguments, the administrative law judge's findings regarding the admissibility of Dr. Perper's medical report and his post-hearing deposition testimony, pursuant to 20 C.F.R. §725.414. The Board also rejected employer's argument that Dr. Perper's opinion was legally insufficient to support a finding that pneumoconiosis hastened the miner's death at 20 C.F.R. §718.205(c).² The Board, however, vacated the administrative law judge's decision awarding benefits because the administrative law judge did not properly evaluate all of the medical opinion evidence concerning the issue of death causation at 20 C.F.R. §718.205(c).³ The Board, therefore, remanded the case for the administrative law judge to reconsider the medical evidence on the issue of death causation at Section 718.205(c), specifically the reports of Drs. Musgrave, Dennis, Fino and Rosenberg. *L.V. [Varney] v. Eastern Coal Corp.*, BRB No. 08-0503 BLA (May 20, 2009)(unpub.).

On remand, the administrative law judge found that the opinion of Dr. Musgrave and the autopsy report of Dr. Dennis, finding that pneumoconiosis hastened the miner's

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director's Exhibit 3.

² Specifically, the Board, *citing Consolidation Coal Co. v. Williams*, 453 F.3d 609, 621, 23 BLR 2-345, 2-370-71 (4th Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007), noted that Dr. Perper "did not simply state that pneumoconiosis hastened the miner's death by generally weakening him and lowering his resistance." *L.V. [Varney] v. Eastern Coal Corp.*, BRB No. 08-0503 BLA (May 20, 2009)(unpub.). Instead, the Board observed that "in both his report and deposition testimony Dr. Perper opined that pneumoconiosis hastened the miner's death, both directly and indirectly, by causing pulmonary insufficiency and by contributing to, and aggravating the development of cardiac arrhythmia and pulmonary hypertension." *L.V. [Varney] v. Eastern Coal Corp.*, BRB No. 08-0503 BLA (May 20, 2009)(unpub.).

³ The Board observed that the administrative law judge's prior findings, that claimant established that the miner had pneumoconiosis at 20 C.F.R. §718.202(a), and that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), were affirmed, as unchallenged on appeal. *L.V. [Varney]*, BRB No. 08-0503 BLA, slip. op. at 3.

death, were “entitled to weight . . . because they [were] “well-reasoned and well-documented based on objective evidence and the [m]iner’s history.” Decision and Order on Remand at 7. The administrative law judge found that Dr. Fino’s contrary opinion, that pneumoconiosis did not hasten the miner’s death, was outweighed by the opinions of Drs. Perper, Musgrave and Dennis, and that Dr. Fino “did not have the benefit of examining the [m]iner.” Decision and Order on Remand at 7. Regarding Dr. Rosenberg’s opinion, that the miner’s pneumoconiosis did not hasten the miner’s death, the administrative law judge found that it was not entitled to any weight because Dr. Rosenberg relied “on x-ray results instead of better autopsy evidence, and on studies that conflict with the regulations[,]” to determine the severity of the miner’s pneumoconiosis. Decision and Order on Remand at 7. The administrative law judge concluded, therefore, that death causation was established at Section 718.205(c), based on the opinions of Drs. Perper, Musgrave and Dennis. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge failed to comply with the Board’s instructions on remand, and erred, therefore, in finding death causation established at Section 718.205(c). Specifically, employer contends that the administrative law judge “did not examine each medical opinion in light of the qualifications of the physician, the studies conducted and the objective indications upon which the medical opinion or conclusion [was] based.” Employer’s Brief at 8. Further, employer contends that the administrative law judge failed to consider whether the evidence established that “the miner’s death was hastened through a specifically defined process that reduce[d] the miner’s life by an estimable time[,]” citing *Consolidation Coal Co. v. Williams*, 338 F.3d at 609, 621, 23 BLR 2-345, 2-370-71 (4th Cir. 2006), *cert. denied* 549 U.S. 1278 (2007). Claimant responds, urging affirmance of the administrative law judge’s decision awarding benefits. The Director, Office of Workers’ Compensation Programs (the Director), has declined to file a brief in this appeal.

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.⁴ 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).

In order to establish entitlement to survivor’s benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine

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

employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Employer asserts that the administrative law judge erred in crediting the autopsy report of Dr. Dennis, who opined that pneumoconiosis hastened the miner's death, because Dr. Dennis failed to provide a sufficient basis for his finding. Specifically, employer contends that the administrative law judge failed to consider the fact that Dr. Dennis "did not explain the specifically defined process by which pneumoconiosis hastened the miner's death." Employer's Brief at 11.

In its previous decision, the Board instructed "the administrative law judge to explain how the miner's treatment records supported Dr. Dennis's conclusion that pneumoconiosis hastened the miner's death through a specifically defined process." *L.V. [Varney]*, BRB No. 08-0503 BLA, slip. op. at 7. On remand, the administrative law judge stated:

[t]he miner's treatment records, describe respiratory congestion during his final hospitalization, with diminished breath sounds. Director's Exhibit 13. Given that conclusive evidence of pneumoconiosis was not found until the autopsy was conducted, pulmonary problems that were not well-understood during the [m]iner's life are better understood in light of the autopsy. Dr. Dennis has the benefit of hindsight to better explain the [m]iner's symptoms than his doctors could during his lifetime. The fact that the symptoms are well-explained in the treatment records does not detract from Dr. Dennis' findings.

Decision and Order on Remand at 6. We conclude, contrary to employer's assertion, that the administrative law judge reasonably explained how the respiratory condition, detailed by Dr. Musgrave in the miner's treatment records, coupled with the finding of pneumoconiosis on autopsy, supported the findings of Drs. Perper and Dennis that the

miner's death was hastened by pneumoconiosis.⁵ *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155(1989)(*en banc*).

Employer also asserts that the administrative law judge erred in finding that Dr. Musgrave's opinion, describing the miner's respiratory condition, supported a finding of death causation. Employer contends that the administrative law judge erred in giving the opinion of Dr. Musgrave "controlling weight" pursuant to 20 C.F.R. §718.104(d) because she was the miner's treating physician. Contrary to employer's argument, however, the administrative law judge did not accord "controlling weight" to Dr. Musgrave's opinion. Decision and Order on Remand at 5-6. Rather, the administrative law judge found that Dr. Musgrave's opinion was not entitled to "controlling weight," because Dr. Musgrave did not fully explain her rationale for attributing the miner's respiratory condition to pneumoconiosis.⁶ Decision and Order on Remand at 5. Nonetheless, the administrative law judge found Dr. Musgrave's opinion "entitled to weight," based on the fact that she had the opportunity "to evaluate" the [m]iner during his lifetime, [care] for him until his death, and [order] and [review] objective testing.⁷ Decision and Order on Remand at 5. The administrative law judge stated:

Although testing conducted during the [m]iner's lifetime was inconclusive about a cause for [the miner's] lung disease, the autopsy clearly indicated pneumoconiosis, which explained the poorly understood symptoms that the [m]iner was experiencing at the time of his death.... Dr. Musgrave's opinion is entitled to weight, based on the fact that she had the opportunity to evaluate the [m]iner during his lifetime, [care] for him until his death, and [order] and [review] objective testing.

Decision and Order on Remand at 5.

⁵ Dr. Dennis opined that the miner's cardiovascular disease and coexistent black lung disease and emphysema hastened the miner's death through the mechanisms of pulmonary dysfunction associated with the replacement of lung tissue by anthracosilicosis with macule formation, and by precipitating or aggravating cardiovascular disease through pulmonary hypertension. *See* Director's Exhibits 12 and 13.

⁶ Dr. Musgrave listed coal workers' pneumoconiosis as a diagnosed condition in her hospital discharge summary at the time of the miner's death on July 8, 2002. Claimant's Exhibit 1.

⁷ The administrative law judge noted that Dr. Musgrave was a Board-certified Internist, with specialties in infectious disease and oncology. Decision and Order on Remand at 5 n.4.

Based on the administrative law judge's analysis of Dr. Musgrave's opinion, we conclude that the administrative law judge acted within her discretion, as fact-finder, in determining that Dr. Musgrave's opinion, detailing the miner's respiratory condition, supported the opinions of Drs. Perper and Dennis, that pneumoconiosis hastened the miner's death at Section 718.205(c). *See* 20 C.F.R. §718.104(d)(1)-(5); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 5-6, 7.

Finally, employer contends that the administrative law judge erred in discounting Dr. Fino's opinion, that pneumoconiosis played no role in the miner's death,⁸ because the doctor did not examine the miner. Contrary to employer's contention, however, in addition to finding that Dr. Fino did not examine the miner, the administrative law judge accorded less weight to the opinion of Dr. Fino, on the issue of death causation, because she properly found it outweighed by the better reasoned opinions of Drs. Dennis and Perper. As the administrative law judge gave a valid reason for giving less weight to the opinion of Dr. Fino, than the opinions of Drs. Dennis and Perper, the administrative law judge's accordance of less weight to the opinion of Dr. Fino is affirmed. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

In conclusion, as the administrative law judge explained why she gave greater weight to the opinions of Drs. Perper and Musgrave and the autopsy report of Dr. Dennis, over the contrary opinions of Drs. Fino and Rosenberg,⁹ we reject employer's assertion that the administrative law judge erred in failing to follow our instructions on remand. Because the administrative law judge's findings are rational, supported by substantial evidence, and in accordance with law, we affirm them. We, therefore, affirm the administrative law judge's finding that claimant established that the miner's death was hastened by pneumoconiosis at Section 718.205(c), based on the medical opinion evidence. *See Conley v. National Mines Corp.*, 595 F.3d 297, BLR (6th Cir. Feb. 12, 2010); *Williams*, 453 F.3d at 621, 23 BLR at 2-370-71.

⁸ The record shows that Dr. Fino opined that the miner's death was due to colon cancer and severe coronary artery disease, unrelated to his coal dust inhalation. *See* Employer's Exhibit 5.

⁹ We affirm the administrative law judge's rejection of Dr. Rosenberg's opinion on the issue of death causation, as unchallenged on appeal. *Skrack v. Consolidation Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge