BRB No. 02-0223 BLA

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| LINDA WELCH<br>(Widow of JOHN L. WELCH)<br><br>Claimant-Respondent<br><br>v.<br><br>SOLDIER CREEK COAL COMPANY<br><br>Employer-Petitioner<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-In-Interest | ) | DATE ISSUED:<br><br>DECISION and ORDER |

Appeal of the Decision and Order-Award of Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Martin J. Linnet (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd), Washington, D.C., for employer.

Rita Roppolo (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (2000-BLA-00581, 2000-BLA-00810) of Administrative Law Judge Paul H. Teitler rendered 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).[1] The miner's initial application for benefits filed on July 29, 1992 was finally denied by the District Director of the Office of Workers' Compensation on December 17, 1992. Director's Exhibit 28. On March 1, 1999, the miner filed the current application, which is a duplicate claim for benefits because it was filed more than one year after the final denial of a previous claim. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d)(2000). The miner died on June 4, 1999, and claimant filed her application for survivor's benefits on August 31, 1999. Director's Exhibit 29.

After a hearing, the administrative law judge credited the miner with fourteen years and nine months of coal mine employment pursuant to the parties' stipulation, and, based on autopsy and medical opinion evidence, found that the miner suffered from pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.202(a)(2),(4); 718.203(b). The administrative law judge further found that the miner was totally disabled by a respiratory or pulmonary impairment and that the miner's total disability was due to pneumoconiosis. *See* 20 C.F.R. §718.204. Consequently, the administrative law judge found that a material change in conditions was established since the denial of the miner's first claim, *see* 20 C.F.R. §725.309(d)(2000), and awarded benefits. Turning to the survivor's claim, the administrative law judge found that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(5). Accordingly, the administrative law judge awarded survivor's benefits. Additionally, the administrative law judge found that Soldier Creek Coal Company (Soldier Creek) was the operator responsible for the payment of benefits.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical opinions when he found that the miner's total disability was due to pneumoconiosis and that pneumoconiosis was a substantially contributing cause of the miner's death. Additionally, employer argues that the Director, Office of Workers' Compensation Programs (the Director), failed to identify the proper responsible operator and that liability for benefits must be imposed upon the Black Lung Disability Trust Fund (the Trust Fund). Claimant responds, urging affirmance. The Director responds, urging that the case be remanded for the administrative law judge to decide which of two companies is the guarantor of Soldier Creek's self-

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

insured status.[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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits on the miner's claim under the Act, 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 be entitled to survivor's benefits under the Act, 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. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 874, 20 BLR 2-334, 2-340 (10th Cir. 1996). 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).

Based on the medical opinions of Drs. Poitras, Cander, and Perper, the administrative law judge found that the miner's total disability was due to pneumoconiosis. *See* 20 C.F.R. §718.204(c); *Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR 2-9 (10th Cir. 1989). Dr. Poitras examined and tested the miner on March 30, 1999 and diagnosed severe obstructive and restrictive lung disease due to coal dust exposure, smoking, and uranium exposure. Director's Exhibit 7. The miner died approximately two months after Dr. Poitras's examination. Director's Exhibits 5, 31. Thereafter, Dr. Cander, who is Board-certified in Internal Medicine, reviewed the autopsy report and the miner's medical records and concluded that the miner was totally disabled by hypoxemia due to pneumoconiosis at the time of his death. Director's Exhibit 49. Dr. Perper, who is Board-certified in Anatomical, Clinical, and Forensic Pathology, reviewed the autopsy report and slides and the

[2] We affirm as unchallenged on appeal the administrative law judge's findings that the existence of pneumoconiosis arising out of coal mine employment, total disability, and a material change in conditions were established. 20 C.F.R. §§718.202(a)(2),(4), 718.203(b), 718.204, 725.309(d)(2000); *see Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

miner's medical records and opined that the miner was totally disabled by severe pulmonary dysfunction and hypoxemia resulting from coal workers' pneumoconiosis and coal-dust-related emphysema. Director's Exhibit 33; Claimant's Exhibit 1.

By contrast, Dr. Caffrey, who is Board-certified in Anatomical and Clinical Pathology, reviewed the autopsy materials and the miner's medical records and concluded that the miner's pneumoconiosis was too mild to have caused significant pulmonary impairment. Director's Exhibit 45. Dr. Caffrey added that the miner had emphysema due mostly to smoking with "possibly a minor contribution from the coal workers' pneumoconiosis," Director's Exhibit 45 at 4, but concluded that any impairment the miner suffered during life was due to smoking and coronary artery disease. Dr. Naeye, also Board-certified in Anatomical and Clinical Pathology, reviewed the autopsy materials and the miner's medical records and concluded that the miner had simple coal workers' pneumoconiosis that was too mild to have produced any impairment. Director's Exhibits 2, 4, 5. Dr. Naeye noted that the miner was totally disabled by pulmonary impairments prior to his death, but stated that these resulted from coronary artery disease and smoking. *Id*. Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the evidence of record and concluded that the miner had pneumoconiosis that was too mild to cause impairment. Employer's Exhibits 3, 6. Dr. Fino agreed that the miner was totally disabled by hypoxia at the time of his death, but concluded that the hypoxia did not result from pneumoconiosis and was probably due to coronary artery disease. Employer's Exhibit 3.

In finding that the miner's total disability was due to pneumoconiosis, the administrative law judge noted that Dr. Poitras was the only physician to examine the miner and did so shortly before the miner's death. The administrative law judge further found that Dr. Poitras's examination was thorough and his report well-documented and reasoned. The administrative law judge additionally found Dr. Poitras's conclusions to be supported by the "well-reasoned and well-documented opinions" of Drs. Perper and Cander, "whose excellent qualifications are also taken into account. . . ." Decision and Order at 14. The administrative law judge found that the contrary opinions of Drs. Naeye and Fino were less persuasive, and concluded that Dr. Caffrey did not adequately explain how he ruled out coal dust exposure as a factor in the miner's total disability.

Employer contends that the administrative law judge erred in relying on Dr. Poitras's opinion when, employer asserts, Dr. Poitras was equivocal as to the cause of the miner's total disability. Employer's Brief at 20-21. Dr. Poitras diagnosed severe obstructive and restrictive lung disease, the etiology of which was, "1. Exposure to coal dusts as well as other inorganic dusts associated with coal mining and uranium mining. 2. 20 year smoking history. 3. Uranium mining exposure." Director's Exhibit 7 at 4. Dr. Poitras concluded that the miner was "markedly impaired" by the obstructive and restrictive lung disease. *Id*. Asked to address the

extent to which the diagnoses contributed to the miner's impairment, Dr. Poitras wrote, "1. Restriction and fibrosis may be in part due to coal dust/etc. but probably due more to uranium exposure. 2. Obstruction 2° to smoking and fibrosis (coal dust + uranium) ~ 50/50?" *Id*.

The administrative law judge took the qualified nature of Dr. Poitras's last statement into account and found that "[w]hile Dr. Poitras appears to discount the role coal mine dust exposure played in the [m]iner's respiratory condition, he includes coal mine dust exposure as part of its etiology." Decision and Order at 14. Based on Dr. Poitras's clearer, more forceful discussion of etiology, the administrative law judge found that Poitras diagnosed disabling lung disease "due to several factors, including coal dust, uranium exposure, and cigarette smoking. Accordingly, I find his report sufficient to establish that the [m]iner's coal mine dust exposure was a contributor to his disability." *Id*. The administrative law judge thus considered Dr. Poitras's entire opinion and found it sufficient to support claimant's burden. It is the administrative law judge's role to determine the weight of unclear or uncertain testimony, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th), and his reading of Dr. Poitras's report is not unreasonable. Therefore, we hold that the administrative law judge did not err in his analysis of Dr. Poitras's opinion.

Employer next argues that the administrative law judge provided an invalid reason for giving less weight to Dr. Caffrey's opinion. Employer's Brief at 23. Contrary to employer's contention, the administrative law judge acted within his discretion in finding that Dr. Caffrey did not adequately explain how he ruled out coal dust exposure as a factor in the miner's total disability, yet at the same time he conceded that pneumoconiosis possibly contributed to the miner's emphysema. *See Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993)(It is within the administrative law judge's discretion to determine credibility and weigh the evidence). Therefore, we reject employer's contention.

Employer alleges that the administrative law judge did not provide a rationale for according less weight to the opinions of Drs. Naeye and Fino, and thus violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer's Brief at 22. Based on our review of the administrative law judge's decision, we conclude that the administrative law judge adequately explained his reasoning. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803-04, 21 BLR 2-302, 2-310-12 (4th Cir. 1998); *Mangus*, 882 F.2d at 1528 n.2, 13 BLR at 2-11 n.2. As noted above, the administrative law judge attached significance to the fact that Dr. Poitras was the only physician to examine the miner and did so shortly before the miner's death, a credibility determination employer does not challenge. The administrative law judge then found that Dr. Poitras's opinion was well-reasoned and documented, and supported by the "well-

reasoned" opinions of Drs. Perper and Cander, whose credentials the administrative law judge also considered. Decision and Order at 15. These are determinations committed to the administrative law judge's discretion, *see Hansen, supra*, and employer presents no reason to disturb them. It was in the context of having made these findings that the administrative law judge found that "Drs. Naeye and Fino specifically rule out any disability due to pneumoconiosis, however, I do not find their opinions as persuasive as those of Drs. Perper, Cander and Poitras." *Id*. In sum, the administrative law judge's reasoning is sufficiently clear: given the probative value assigned to the opinions of Drs. Poitras, Perper, and Cander, the opinions of Drs. Fino and Naeye did not outweigh them. Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), which we therefore affirm.

In the survivor's claim, the administrative law judge relied on the opinions of Drs. Leis, Cander, and Perper to find that pneumoconiosis hastened the miner's death. *See* 20 C.F.R. §718.205(c)(5). Dr. Leis, who is Board-certified in Anatomical, Clinical, and Forensic Pathology and as a Medical Examiner, conducted the autopsy and diagnosed simple coal workers' pneumoconiosis. Director's Exhibit 5. On the miner's death certificate, Dr. Leis attributed death to acute myocardial infarction due to coronary artery disease, and listed coal workers' pneumoconiosis as a significant contributing condition. Director's Exhibit 31. Subsequently, Dr. Leis testified that the miner's pneumoconiosis contributed to his death by impairing his ability to oxygenate his blood, leaving him more vulnerable to heart damage from his coronary artery disease. Employer's Exhibit 1 at 8-9. Dr. Cander concluded that pneumoconiosis hastened the miner's death by causing hypoxemia that triggered a fatal cardiac arrhythmia. Director's Exhibit 49. Dr. Perper opined that coal workers' pneumoconiosis and coal-dust-related emphysema hastened the miner's death by causing pulmonary impairments that reduced his capacity to survive a myocardial infarction. Claimant's Exhibit 1 at 11. Dr. Perper could not exclude the possibility that hypoxemia from pneumoconiosis caused a fatal cardiac arrhythmia. *Id*. By contrast, Drs. Caffrey, Naeye, and Fino all concluded that the miner's pneumoconiosis was too mild to have hastened his death. Director's Exhibits 2, 4, 5, 45; Employer's Exhibits 3, 6.

The administrative law judge accorded "great weight to the autopsy report and deposition testimony of Dr. Leis." Decision and Order at 16. The administrative law judge was persuaded by Dr. Leis's testimony that pneumoconiosis hastened death

by reducing the miner's ability to oxygenate his blood.[3] *Id*. The administrative law judge further found that Dr. Leis's opinion was supported by those of Drs. Cander and Perper, and concluded that all three opinions merited greater weight than those of Drs. Naeye, Fino, and Caffrey.

Employer contends that the administrative law judge did not provide an adequate rationale for according great weight to Dr. Leis's opinion. Employer's Brief at 14. Based on our review of the administrative law judge's decision, we again conclude that he adequately explained his reasoning. It is within the administrative law judge's discretion to accord greater weight to the autopsy prosector's opinion, *see Pickup*, 100 F.3d at 874, 20 BLR at 2-341, and it is sufficiently clear that is what he did. In discussing the medical opinions, the administrative law judge noted Dr. Leis's testimony that he identified pneumoconiosis as a significant contributing condition based on both his gross and microscopic examination of the miner's lung tissue. Decision and Order at 8; Employer's Exhibit 1 at 7. The administrative law judge quoted Dr. Leis's gross findings that the lung surfaces "were almost completely black," and that there was "black anthracotic pigment trapped in tissue which was focally scarred, and there were some associated changes of emphysema." Employer's Exhibit 1 at 7. The administrative law judge's discussion of Dr. Leis's opinion makes clear his reasons for giving "great weight to the autopsy report and deposition testimony of Dr. Leis." Decision and Order at 16; *see Lockhart, supra*; *Mangus, supra*. Consequently, we reject employer's contention.

Likewise, we hold that contrary to employer's contention, the administrative law judge provided a sufficient rationale for according greater weight to the opinions of Drs. Leis, Cander, and Perper than to those of Drs. Naeye, Fino, and Caffrey. Having already accorded great weight to Dr. Leis's opinion as the autopsy prosector, the administrative law judge found that the opinions of Drs. Cander and Perper further supported Leis's opinion. Viewed in context, his finding that the three opinions together were "worthy of greater weight" indicates that he found them to outweigh those of employer's physicians. Consequently, we reject employer's contention, and we affirm the administrative law judge's finding that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(5). *See Pickup, supra*.

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[3] Employer's contention that Dr. Leis actually opined that pneumoconiosis did not hasten death lacks merit. Employer is correct that Dr. Leis testified that pneumoconiosis did not speed up the miner's development of coronary artery disease. Employer's Exhibit 1 at 10. The administrative law judge considered that testimony and found that it did not mean that pneumoconiosis did not hasten the miner's death. Decision and Order at 16. Review of Dr. Leis's testimony reflects that he did not retract his opinion that pneumoconiosis contributed to death by reducing the miner's ability to oxygenate his blood. Employer's Exhibit 1 at 8-9.

Employer challenges its designation as the responsible operator. Review of the record reflects that Soldier Creek was the operator to most recently employ the miner for a year, is self-insured, and is still in existence and operating its coal mines. Director's Exhibits 2, 28, 30, 38. The record also reflects that Soldier Creek has been owned by two different parent corporations, first by Sun Coal Company (Sun) and then by Coastal States Energy Company (Coastal). The Director has never considered Sun or Coastal to be the responsible operator. At the time of the miner's first claim filed in 1992, the Director named Soldier Creek as the responsible operator and listed Sun as an "insurance carrier." Director's Exhibit 28. In the miner's current claim and in the survivor's claim, the Director named Soldier Creek, "self-insured through Coastal States Energy Company," as the responsible operator. Director's Exhibits 46, 47.

Notwithstanding that Coastal was not named the responsible operator, employer's counsel, representing both Soldier Creek and Coastal, argued to the administrative law judge that Coastal was not the responsible operator because it did not own Soldier Creek when the miner worked for Soldier Creek. Director's Exhibit 36; Tr. at 4. In his Decision and Order, the administrative law judge approached the issue using the successor operator regulation, 20 C.F.R. §725.725.493(a)(2)(2000). He found that Coastal was the successor operator of Sun and that therefore, Soldier Creek, "self-insured through Coastal States Energy Company Co. [sic] was properly designated the responsible operator herein." Decision and Order at 5.

Employer contends that there is no evidence that Coastal became the successor of Sun and asserts that because Coastal is not the responsible operator, liability must be imposed on the Trust Fund. Employer's Brief at 11-12. The Director responds that the administrative law judge erred in applying the successor operator regulation because Soldier Creek is self-insured, still exists, and is still in operation. The Director states that Sun and Coastal were merely "parent companies," and "come into play only as insurers or more precisely, guarantors of Soldier Creek's self-insured status." Director's Brief at 2. The Director requests remand for the administrative law judge to determine which company, Sun or Coastal, is the guarantor of Soldier Creek's self-insured status. *Id*.

As noted above, Soldier Creek meets all the criteria of a responsible operator, and was named as the responsible operator. *See* 20 C.F.R. §§725.492(2000), 725.493(2000). No party contends that Soldier Creek is not self-insured. *See* 20 C.F.R. §§725.492(a)(4)(2000); 726.4, 726.101. Thus, substantial evidence supports the administrative law judge's ultimate conclusion that Soldier Creek was properly designated as the responsible operator. Consequently, we reject employer's argument that benefits liability must be imposed on the Trust Fund. Given that Soldier Creek is the responsible operator and is self-insured, the Director does not explain why remand is necessary to further determine which parent company, Sun or Coastal, is the guarantor of

Soldier Creek's self-insured status. Therefore, we will affirm the administrative law judge's finding that Soldier Creek is the responsible operator.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge