

BRB No. 08-0116 BLA

L.W.)
(Widow of D.W.))
)
Claimant-Respondent)
)
v.)
) DATE ISSUED: 09/25/2008
CANYON FUEL COAL c/o ARCH COAL)
COMPANY)
)
and)
)
COASTAL STATES ENERGY 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 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

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

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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/carrier (employer) appeals the Decision and Order on Remand (2004-BLA-00153) of Administrative Law Judge Richard K. Malamphy denying employer's request for modification of an award of benefits in 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 This is the second time that this case has been before the Board. In his first Decision and Order, the administrative law judge rejected employer's request for modification and claimant's motion to dismiss employer's request for modification. Both employer and claimant appealed. The Board affirmed the administrative law judge's denial of claimant's motion to dismiss, but vacated the administrative law judge's denial of employer's request for modification and remanded the case to the administrative law judge. The Board instructed the administrative law judge to reconsider the medical opinions of Drs. Tuteur and Tomashefski under 20 C.F.R. §§718.204(c) and 718.205(c), and to render a finding as to whether modifying the awards of benefits would render justice under the Act. The Board also directed the administrative law judge to place the burden upon employer to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) by a preponderance of the evidence.² [*L.W.*] *v. Canyon Fuel LLC*, BRB Nos. 06-0234 BLA and 06-0234 BLA-A (Sept. 28, 2006) (unpub.).

On remand, the administrative law judge gave greatest weight to the medical opinions in which the physicians concluded that the miner was totally disabled due to

¹ The miner filed a claim for benefits on July 29, 1992, which was denied by the district director on December 17, 1992. Director's Exhibit 28. The miner submitted a second application for benefits on March 1, 1999. Director's Exhibit 1. The miner died on June 4, 1999. Claimant, the miner's surviving spouse, filed a claim for survivor's benefits on August 31, 1999. Director's Exhibit 29. The claims were consolidated and in a Decision and Order issued on November 6, 2001, Administrative Law Judge Paul H. Teitler awarded benefits in both claims. The Board affirmed Judge Teitler's Decision and Order and summarily denied employer's Motion for Reconsideration. Director's Exhibits 100, 106. Employer filed a timely request for modification.

² The revised version of 20 C.F.R. §725.310, which became effective on January 19, 2001, does not apply in this case, as both the miner's claim and the survivor's claim were pending at the time of the effective date of the amended regulations. 20 C.F.R. §725.2(c). Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge determined that employer failed to establish a mistake in a determination of fact at Section 725.310 (2000) and denied employer's request for modification. Employer argues on appeal that the administrative law judge did not properly weigh the relevant medical opinion evidence. Claimant has responded and urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a limited response in which he asserts that employer has misstated the burden of proof that it is required to satisfy pursuant to Section 725.310 (2000).

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 applicable law.³ 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).

Request for Modification of the Award in the Miner's Claim

In addressing the issue of total disability due to pneumoconiosis on remand, the administrative law judge considered the medical opinions of Drs. Lincoln, Farney, Poitras, Leis, Perper, Caffrey, Naeye, Cander, Fino, Tuteur and Tomashefski. The administrative law judge initially reviewed each opinion to determine whether it was well-documented and well-reasoned. Pursuant to Section 718.204(c), the administrative law judge found that the opinions in which Drs. Poitras, Perper and Cander identified pneumoconiosis as a substantially contributing cause of the miner's total disability satisfied this criteria. Decision and Order on Remand at 19-20, 22; Director's Exhibits 7, 59; Claimant's Exhibit 1. With respect to the opinions in which the physicians indicated that the miner had coal workers' pneumoconiosis, but that it was too mild to have caused any impairment, the administrative law judge determined that the conclusions expressed by Drs. Tuteur and Tomashefski were well-reasoned and well-documented.⁴ Decision

³ This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit as the miner's last twelve years of coal mine employment were in Utah. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 28.

⁴ We affirm the administrative law judge's findings with respect to the extent to which the medical opinions relevant to 20 C.F.R. §718.204(c) were documented and reasoned, as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and Order on Remand at 22-23; Director's Exhibit 113; Employer's Exhibit 1. The administrative law judge resolved the conflict between the medical opinions by relying upon his assessment of the physicians' relative qualifications, stating:

[T]he undersigned finds that Dr. Cander had superior qualifications. Dr. Cander is [B]oard-certified in internal medicine. He is the Chairman of the Department of Medicine at the Albert Einstein Medical Center. He is also a professor at Jefferson Medical College. He has received several public appointments to committees that have examined coal workers' pneumoconiosis, including an appointment to Governor William Scranton's Task Force on Coal Workers' Pneumoconiosis. He was also a consultant to the Department of Labor on Coal Workers' Pneumoconiosis. He has also given testimony before the West Virginia Legislature and the Senate Committee on Labor and Welfare on coal workers' pneumoconiosis. He has also published a substantial number of papers . . . [W]hile Drs. Perper, Tuteur and Tomashefski are not as qualified as Dr. Cander, they are all highly qualified. However . . . Dr. Tuteur, who is [B]oard-certified in internal medicine and has had significant experience with pulmonary diseases, is more highly qualified than Dr. Perper or Dr. Tomashefski. Dr. Tuteur is currently an associate physician at Barnes-Jewish Hospital in St. Louis, Missouri. He is also a Director of the Pulmonary Function Laboratory at Washington University School of Medicine. Dr. Tuteur is certified by the American Board of Internal Medicine in internal medicine and pulmonary disease. He has published an extensive number of articles. The undersigned finds that Drs. Perper and Tomashefski are equally qualified...The qualifications of Dr. Poitras are unknown, as his curriculum vitae is not a part of the record.

Decision and Order on Remand at 23-24. The administrative law judge concluded that, in light of Dr. Cander's superior qualifications and the fact that employer bore the burden of proof, employer failed to establish that an error was made in the prior determination that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(c). *Id.* at 24.

Employer contends that the administrative law judge erred in finding that Dr. Cander possessed qualifications superior to those of Drs. Tomashefski and Tuteur without providing an adequate rationale. Employer maintains that because Drs. Tomashefski and Tuteur are Board-certified in pulmonary medicine, they are better-qualified than Dr. Cander, who is Board-certified in internal medicine, to assess the cause of the miner's totally disabling pulmonary impairment. Employer also argues that, contrary to the administrative law judge's finding, Dr. Tomashefski has qualifications superior to those of Dr. Perper.

We hold that employer's allegations of error are without merit. The administrative law judge, as fact-finder, is granted substantial discretion in the consideration of the medical evidence and in resolving conflicts between the medical opinions of record. *See Hansen v. Director, OWCP*, 984 F.2d 364, 17 BLR 2-48 (10th Cir. 1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youhiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). In the present case, the administrative law judge did not abuse his discretion in determining that Dr. Cander's qualifications are superior to those of the other physicians who rendered opinions regarding the cause of the miner's total disability. It was not unreasonable for the administrative law judge to conclude that Dr. Cander's qualifications provided a basis for according greater weight to his opinion on the issue of disability causation. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel*, 8 BLR at 1-141; Decision and Order on Remand at 24; Director's Exhibit 59.

Moreover, contrary to employer's contention, the administrative law judge was not required to discredit Dr. Cander's opinion because he did not address whether the coronary artery disease diagnosed on autopsy was an alternate cause of the miner's disabling hypoxemia. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Dr. Cander acknowledged that the miner had heart disease, but noted that the miner's symptoms of shortness of breath were not entirely due to his cardiac status and explained that coal dust exposure is a cause of hypoxemia. Director's Exhibit 59. In light of the administrative law judge's permissible finding that Dr. Cander's opinion was entitled to greatest weight, we decline to address employer's arguments regarding the administrative law judge's relative weighing of the remaining physicians' qualifications and affirm the administrative law judge's determination that the evidence of record was sufficient to establish that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(c). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). We also affirm, therefore, the administrative law judge's denial of employer's request for modification of the award of benefits in the miner's claim.

Request for Modification of the Award in the Survivor's Claim

In considering employer's request for modification of the award of benefits in the survivor's claim, the administrative law judge considered the opinions of Drs. Leis, Farney, Perper, Caffrey, Naeye, Cander, Fino, Tuteur and Tomashefski. The administrative law judge credited the opinions in which Drs. Fino, Tuteur and Tomashefski stated that the miner's pneumoconiosis was too mild to have played any role in his death as well-reasoned and well-documented. Decision and Order on Remand at 26; Director's Exhibits 33, 113; Employer's Exhibits 1, 3. The administrative law judge determined that the opinions in which Drs. Perper and Cander identified pneumoconiosis as a substantially contributing cause of death were also well-reasoned

and well-documented.⁵ *Id.* at 25-26; Director's Exhibit 59; Claimant's Exhibit 1. To resolve the conflict between the physicians' opinions, the administrative law judge again relied upon his consideration of their respective qualifications, stating that:

[T]he undersigned finds Drs. Perper and Tomashefski, who have backgrounds in pathology, to be more qualified than [sic] the other physicians. The undersigned further finds that Drs. Perper and Tomashefski both have significant experience in their field of expertise. They are deemed to be equally qualified. Next, the undersigned finds that Dr. Cander is more qualified than Drs. Fino and Tuteur. All three of these physicians have great experience working with internal medicine and pulmonary diseases. However, only Dr. Cander's curriculum vitae noted substantial experience with coal workers' pneumoconiosis, as well as experience with internal medicine. Dr. Fino, who has published several papers, [has] been appointed to the Division of Pulmonary Disease at St. Clair Memorial Hospital, and [has] been appointed Assistant Clinical Professor of Medicine for the Division of Pulmonary Disease at the University of Pittsburgh, and Dr. Tuteur are deemed to be equally qualified.

Decision and Order on Remand at 27. Based upon these findings, the administrative law judge determined that "[c]laimant's physicians are better qualified than [e]mployer's physicians." *Id.* The administrative law judge concluded, therefore, that the evidence supported a finding that the miner's death was due to pneumoconiosis and that employer failed to establish a mistake in a determination of fact in the award of benefits in the survivor's claim. *Id.*

Employer alleges that the administrative law judge erred in finding that Drs. Tomashefski and Perper offered equally documented and reasoned opinions regarding the cause of the miner's death. Employer also argues that the administrative law judge erred in determining that claimant's physicians are better qualified than employer's physicians. Employer maintains that because Dr. Cander is not a Board-certified pathologist or pulmonologist, he is not as qualified as Drs. Tuteur and Tomashefski to offer a credible opinion as to whether pneumoconiosis caused, contributed to, or hastened the miner's death under Section 718.205(c). Employer also contends that Dr. Cander's opinion is deficient because he did not explain why the miner's severe coronary artery disease,

⁵ We affirm the administrative law judge's finding that the opinions of Drs. Leis, Farney, Caffrey and Naeye, regarding the cause of the miner's death, were not well-reasoned, as it is not challenged on appeal. *Skrack*, 6 BLR at 1-711.

which was revealed on autopsy, would not have been a cause of the miner's hypoxemia and the actual cause of the miner's death.

These contentions are without merit. Dr. Perper stated that the miner's "pneumoconiosis was a substantial contributory cause of death, through severe pulmonary dysfunction and hypoxemia that caused, precipitated or aggravated a final incident of myocardial infarction on a background of severe arteriosclerotic heart disease and related coronary thrombosis and myocardial infarction." Director's Exhibit 33. Dr. Perper explained, "the increased susceptibility to heart damage by the coal workers' pneumoconiosis related respiratory impairment is a reasonable and effective hastening mechanism of death." Claimant's Exhibit 1. Contrary to employer's argument, therefore, the administrative law judge rationally determined that Dr. Perper's opinion regarding the cause of the miner's death was as well-reasoned as Dr. Tomashefski's opinion.⁶ See *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order on Remand at 25.

In addition, we affirm, as within a reasonable exercise of his discretion, the administrative law judge's finding that Dr. Cander possesses qualifications superior to those of Drs. Fino and Tuteur. The administrative law judge's determination that Dr. Cander has more extensive experience involving pneumoconiosis is supported by the administrative law judge's consideration of Dr. Cander's specific background as discussed previously, slip op. at 5, 7. *Dillon*, 11 BLR at 1-114; *Wetzel*, 8 BLR at 1-141; Decision and Order at 27; Director's Exhibit 59. Similarly, the administrative law judge was not required to find that Board-certification in pulmonary medicine or pathology presumptively outweighs any other qualification. See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). Moreover, contrary to employer's contention, the administrative law judge did not err in treating Dr. Cander's opinion regarding the cause of the miner's death as well-reasoned. Dr. Cander acknowledged that the primary cause of the miner's demise was a myocardial infarction due to coronary

⁶ We also reject employer's assertion that the administrative law judge should have accorded Dr. Perper's opinion less weight than Dr. Tomashefski's opinion, as Dr. Perper devotes the majority of his time to preparing reports for claimants in connection with litigation. A physician's opinion may be discredited if specific evidence exists that the physician has altered his or her diagnosis to satisfy the party for whom the medical opinion was prepared; the fact that a physician rendered the opinion on behalf of a claimant does not justify discrediting that opinion. *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Employer has not identified any evidence in support of its contention.

artery disease, but noted that coal dust exposure is a cause of hypoxemia and that the miner's symptoms of shortness of breath were not entirely due to his cardiac status. Director's Exhibit 59. We affirm, therefore, the administrative law judge's determination that the evidence of record was sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c). *Pickup*, 100 F.3d at 873, 20 BLR at 2-340; *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 26. Consequently, we also affirm the administrative law judge's denial of employer's request for modification of the award of benefits in the survivor's claim.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge