BRB No. 06-0298 BLA

MYRTLE MORRIS (Widow of JAMES MORRIS)	)	
Claimant-Petitioner	)	
v.	)	
U.S. STEEL MINING COMPANY	)	DATE ISSUED: 12/29/2006
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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell and Ryan L. Kelly (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

William J. Evans and John P. Ball (Parsons Behle & Latimer), Salt Lake City, Utah, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-5812) of Administrative Law Judge Richard K. Malamphy awarding benefits on a 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 involves a survivor's claim filed on May 7, 2001. After crediting the miner with at least thirty-five years of coal mine employment, the administrative law judge found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The

administrative law judge also found that claimant[1] was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence was sufficient 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 awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the autopsy evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Employer also contends that the administrative law judge erred in finding that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Claimant responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Employer argues that the administrative law judge committed numerous errors in finding the autopsy evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[2] is sufficient to support a finding of pneumoconiosis.[3]

In his consideration of whether the evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge considered the opinion of Dr.

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[1]Claimant is the surviving spouse of the deceased miner who died on August 11, 2000. Director's Exhibit 7.

[2]"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[3]Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that the pneumoconiosis was due to coal mine employment pursuant to 20 CF.R §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Graham, the autopsy prosector, along with the medical opinions of Drs. Perper, Naeye and Repsher. The administrative law judge accorded great weight to Dr. Graham's opinion, that the miner suffered from pneumoconiosis, based upon Dr. Graham's status as the autopsy prosector. Decision and Order at 7. The administrative law judge also credited Dr. Perper's opinion that the miner suffered from coal workers' pneumoconiosis. *Id.* The administrative law judge further found that the opinions of Drs. Naeye and Repsher, that the miner did not suffer from pneumoconiosis, were not sufficiently reasoned. *Id.* The administrative law judge, therefore, found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

Employer initially contends that the administrative law judge erred in crediting Dr. Graham's opinion based upon his status as the autopsy prosector. We agree. When evaluating the pathology-related evidence, an administrative law judge must first determine the credibility and weight of the reviewing pathologists' contrary opinions before giving complete deference to a physician's opinion based upon his status as the autopsy prosector. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Should an administrative law judge credit the opinion of a physician based upon his status as an autopsy prosector, he must provide an adequate rationale for concluding that the prosector's additional gross examination provided him with an advantage over the reviewing physicians under the particular facts of the case. *Id.*

In this case, the administrative law judge erred in crediting Dr. Graham's opinion based upon his status as the autopsy prosector without explaining how this status provided him with an advantage over the reviewing physicians. In this case, the administrative law judge failed to address the significance of the qualifications of Drs. Naeye and Repsher.[4] The administrative law judge also failed to address whether Dr. Graham's diagnoses were sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge did not adequately discuss the credibility of Dr. Graham's opinion in regard to the contrary opinions of record.

The administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2) are also complicated by his failure to make an appropriate distinction between clinical and

[4]The administrative law judge properly noted that Dr. Naeye is Board-certified in Anatomic and Clinical Pathology while Dr. Repsher is Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 5-6; Employer's Exhibits 3, 4. The administrative law judge noted that Dr. Graham's qualifications are not found in the record. Decision and Order at 4.

legal pneumoconiosis. A miner may suffer from clinical pneumoconiosis, legal pneumoconiosis or both diseases.

In this case, the administrative law judge never specifically addressed whether Dr. Graham diagnosed clinical or legal pneumoconiosis.[5] To the extent that Dr. Graham attributed the miner's pulmonary fibrosis/emphysema to his coal dust exposure, these diagnoses could constitute "legal" pneumoconiosis. In his consideration of Dr. Graham's opinion, the administrative law judge erred in failing to address whether Dr. Graham's opinion regarding the etiology of the miner's pulmonary fibrosis/emphysema was sufficiently reasoned.[6] *See Clark*, *supra*; *Lucostic*, *supra*.

Dr. Perper reviewed the miner's autopsy slides and autopsy report. Dr. Perper clearly diagnosed coal workers' pneumoconiosis (clinical pneumoconiosis). *See* Claimant's Exhibits 1, 2. Dr. Perper also noted that there was "an abundant volume of credible and peer-review medical literature substantiating a causal relationship between exposure to mixed coal dust containing silica and coal workers' pneumoconiosis, and the development of centrilobular emphysema and pulmonary cancer." Claimant's Exhibit 2. Consequently, Dr. Perper arguably attributed both the miner's emphysema and cancer to his coal dust exposure. These diagnoses, if credited, are sufficient to establish a finding

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[5]In his autopsy report, Dr. Graham listed the following final diagnoses: (1) pulmonary emphysema; (2) bronchiogenic carcinoma; (3) bronchopneumonia; (4) arteriosclerotic cardiovascular disease; (5) benign prostatic hypertrophy; and (6) arteriolar nephrosclerosis. Director's Exhibit 8. Dr. Graham further stated that:

> [The decedent], a retired coal miner, died of pulmonary failure caused by bilateral bronchopneumonia with underlying pulmonary fibrosis, emphysema and [b]ronchogenic carcinoma of the lung. [The miner's] pulmonary fibrosis/emphysema is consistent with Coal Workers Pneumoconiosis, a chronic lung condition seen in miners, and it was most probably caused by the [the miner's] long term exposure to coal dust as a miner.

Director's Exhibit 8.

[6]The administrative law judge accorded less weight to the opinions of Drs. Naeye and Repsher because they did not address the significance of the fact that the miner had quit smoking "some twenty to thirty years before his death." Decision and Order at 7. In crediting Dr. Graham's opinion, that the miner's fibrosis and emphysema were due to his coal mine employment, the administrative law judge failed to address the significance of the fact that Dr. Graham failed to acknowledge the existence of any smoking history whatsoever.

of "legal" pneumoconiosis.

> In his consideration of Dr. Perper's opinion, the administrative law judge stated:
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> > Dr. Perper…believed that the Miner suffered from CWP. He noted that the autopsy slides showed coal macules, centrilobular emphysema, and metastatic lung cancer – all of which were associated with exposure to coal dust.
>
> Decision and Order at 7.
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> The administrative law judge subsequently stated:
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> > I….give weight to Dr. Perper's findings regarding the relation between CWP and centrilobular emphysema.
>
> Decision and Order at 7.

The administrative law judge erred in failing to address whether Dr. Perper's diagnosis of clinical pneumoconiosis was sufficiently reasoned. *See Clark*, *supra*; *Lucostic*, *supra*. In regard to Dr. Perper's finding of "legal" pneumoconiosis, the administrative law judge did not address Dr. Perper's reason for attributing the miner's emphysema and lung cancer to his coal dust exposure. The administrative law judge also failed to explain why Dr. Perper's opinion was entitled to greater weight than the contrary opinions of Drs. Naeye and Repsher.[7] Consequently, the administrative law judge's analysis of Perper's opinion does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Drs. Naeye and Repsher each reviewed the miner's autopsy report, autopsy slides and other medical evidence. *See* Employer's Exhibits 1, 2, 9, 10. Neither of these

[7]The administrative law judge failed to address the significance of the fact that both Drs. Naeye and Repsher provided detailed criticisms of Dr. Perper's findings. *See* Employer's Exhibits 9, 10.

physicians diagnosed clinical or legal pneumoconiosis.[8] *Id.*

In regard to clinical pneumoconiosis, the administrative law judge accorded less weight to the opinions of Drs. Naeye and Repsher because the doctors did not "explain the presence of fibrosis in the [m]iner's lung tissue, stating only that it is not severe enough to indicate CWP." Decision and Order at 7. The administrative law judge, however, failed to address the reasons provided by Drs. Naeye and Repsher for their respective opinions that the miner did not suffer from clinical pneumoconiosis.[9]

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[8]Dr. Naeye opined that coal workers' pneumoconiosis was absent in the miner's lungs. Employer's Exhibit 1. Dr. Naeye further opined that the miner's lung cancer was "almost certainly the consequence of his cigarette smoking." *Id.* Dr. Naeye also explained that "[c]entrilobular emphysema severe enough to cause signs, symptoms and disability is very rare if it exists at all in coal miners who have never smoked cigarettes." *Id.*

Dr. Repsher found no evidence of coal workers' pneumoconiosis. Employer's Exhibit 2. Dr. Repsher diagnosed centrilobular and panlobular emphysema secondary to cigarette smoking. *Id.* Dr. Repsher also opined that the miner's extensive large cell bronchiogenic cancer was secondary to cigarette smoking. *Id.* Dr. Repsher opined that the miner "never had evidence of either medical or legal CWP during his life…." Employer's Exhibit 10.

[9]Dr. Naeye explained that:

> There are enough lung and lymph node tissues available for microscopic review to determine that coal workers' pneumoconiosis (CWP) was absent in [the miner's] lungs. The minimum criteria for the diagnosis of the disorder require that tissue damage specific to CWP be present in the lungs. The earliest appearing damage is of two types: (a) fibrosis admixed with black pigment at sites adjacent to small pulmonary arteries and airways beneath the pleura, (b) rims of focal emphysema around black deposits. Enough lung tissue is available for microscopic review in the present case to make these determinations. Fibrosis, but no significant black pigment or very tiny birefringent crystals of free silica, are present at two subpleural sites in the lungs. Neither toxic free silica nor resulting fibrosis are present at sites adjacent to bronchioles where the fibrosis can cause chronic abnormalities in lung function. Advanced fibrosis is also absent in lymph nodes. This latter finding is additional evidence that CWP was absent because when CWP is present such fibrosis is usually more advanced in lymph nodes than in the lungs. Because CWP was absent in the present case, it could not have caused any impairments in lung function or

The administrative law judge also accorded less weight to the opinions of Drs. Naeye and Repsher because "they relied on out-dated medical studies." Decision and Order at 7. The administrative law judge provided no support for this statement. Hence, the administrative law judge's analysis does not comport with the requirements of the APA. *Wojtowicz*, *supra*.

Finally, the administrative law judge accorded less weight to the opinions of Drs. Naeye and Repsher because they "did not adequately discuss the important fact that Miner had quit smoking some twenty to thirty years before his death." Decision and Order at 7. In his April 19, 2005 report, Dr. Perper opined that:

> Although it is true that heavy smoking is a well recognized risk for development of pulmonary cancer, it is equally recognized that this risk decreases significantly after cessation of smoking, and after 15 years or more it may decrease by 80% and it may approach the risk for non-smokers.

> produced any disability. For the same reasons CWP did not have any role in this man's death.
>
> It is important to note that small amounts of black pigment were present at subpleural sites in the lungs of this man. The anthracosis is carbon pigment in an amorphous form. Small amounts of such pigment are present in almost everyone's lungs. No toxicity has ever been ascribed to carbon in its amorphous form. The small amounts of this carbon in the lungs of [the miner] could have originated from his cigarette smoking and the carbon that all citizens inhale from engine exhausts and other non-mine environmental sources.

Employer's Exhibit 1 (footnotes omitted).

> Dr. Repsher explained that:
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> There is no evidence of coal workers pneumoconiosis. Specifically, there are no coal macules, micronodules, or macronodules, which are the hallmark and *sine qua non* for making a pathological diagnosis of coal workers pneumoconiosis. This is thoroughly discussed in the College of American Pathologists monograph with regard to the pathologic diagnosis of coal workers pneumoconiosis.

Employer's Exhibit 2.

Claimant's Exhibit 1 at 9.

The administrative law judge, however, failed to address Dr. Repsher's following response to Dr. Perper's comments:

> I never suggested, let alone implied, that the risk of lung cancer in a cigarette smoker does not decrease over time after cessation of smoking. Actually, I stated that "the risk of developing bronchogenic cancer in a long time cigarette smoker never returns to baseline and continues to be elevated through the remainder of their life." This statement is unequivocally true and supported by the total weight of the medical literature.

Employer's Exhibit 10 at 2.

Notably, Drs. Naeye and Repsher were each aware of the fact that that the miner had ceased smoking cigarettes for a significant period of time prior to his death.[10] The administrative law judge failed to address the detailed explanations provided by Drs. Naeye and Repsher as to why the miner's emphysema and cancer were attributable to cigarette smoking and not coal dust exposure. By characterizing the miner's cessation of cigarette smoking as an "important fact," the administrative law judge also improperly substituted his own opinion for that of the medical experts. *See generally Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the autopsy evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). On remand, the administrative law judge should render separate and distinct findings as to whether the autopsy evidence is sufficient to establish the existence of "clinical" pneumoconiosis and whether it is sufficient to establish the existence of "legal" pneumoconiosis. In making these determinations, the administrative law judge is instructed to address whether each of the relevant medical opinions of record is sufficiently reasoned.

In light of our decision to vacate the administrative law judge's finding that the autopsy evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.203 and 718.205(c).

We finally find it necessary to address the interplay between clinical and/or legal

[10]Dr. Naeye noted that the miner smoked cigarettes for at least 40 years, quitting when he was about 65 years old. Employer's Exhibit 1. Dr. Repsher noted that the miner smoked an unstated amount of cigarettes from age 10 until age 50. Employer's Exhibit 2.

pneumoconiosis and 20 C.F.R. §718.203. While Section 718.201(a)(1) requires that a miner's clinical pneumoconiosis arise out of his coal mine employment, this analysis is relevant to Section 718.203, as Section 718.202(a)(2) does not require claimant to prove causation in order to establish clinical pneumoconiosis. *See generally Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc*). Thus, on remand, should the administrative law judge find that the autopsy evidence is sufficient to establish the existence of "clinical" pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), he must address whether the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203.[11]

However, on remand, should the administrative law judge find that the autopsy evidence is sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge would have already found that the miner's chronic lung disease or impairment arose out of the miner's coal mine employment. 20 C.F.R. §718.201(a)(2). Consequently, if, on remand, the administrative law judge finds the evidence sufficient to establish the existence of "legal" pneumoconiosis, he need not separately determine the etiology therof at 20 C.F.R. §718.203(b), as his findings at 20 C.F.R. §718.202(a)(2) will necessarily subsume that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).[12]

[11]Because the miner, in this case, was employed for more than ten years in one or more coal mines, claimant is entitled to a rebuttable presumption that the miner's clinical pneumoconiosis arose out of such employment. *See* 20 C.F.R. §718.203(b). On remand, the administrative law judge would be required to determine whether employer's evidence is sufficient to establish rebuttal of this presumption.

[12]In his consideration of the evidence pursuant to 20 C.F.R. §718.203, employer correctly notes that the administrative law judge appears to have improperly granted claimant the benefit of an rebuttable presumption that the miner's chronic lung diseases arose out his coal mine employment. *See* Decision and Order at 7-8. In order to establish the existence of "legal" pneumoconiosis, claimant bears the burden of establishing that one of the miner's chronic lung diseases arose out of his coal mine employment. *See* 20 C.F.R. §718.201(a)(2).

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge