

BRB No. 05-0473 BLA

| | | |
|-------------------------------|---|-------------------------|
| KATHERINE M. PECHATSKO |) | |
| (Widow of NICK PECHATSKO) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| U.S. STEEL MINING COMPANY |) | DATE ISSUED: 01/19/2006 |
| |) | |
| Employer-Petitioner |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Debra L. Henry, Belle Vernon, Pennsylvania, for claimant.

D. Scott Newman (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-6208) of Administrative Law Judge Daniel L. Leland awarding benefits on 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). The administrative law judge adjudicated this

claim pursuant to the regulations contained in 20 C.F.R. Part 718.¹ The administrative law judge found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). Claimant² responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Worker's Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.³ See 20 C.F.R. §§718.1, 718.205(c);

¹Employer conceded that the miner worked twenty years of coal mine employment and suffered from pneumoconiosis arising out of coal mine employment. Hearing Transcript at 5.

²Claimant is the widow of the miner, Nick Pechatsko. The miner filed his first claim on September 15, 1980. Director's Exhibit 1. This claim was denied by the Department of Labor on January 16, 1981 because the evidence did not show that the miner had pneumoconiosis, that the disease was caused at least in part by coal mine work, and that he was totally disabled by the disease. *Id.* The miner filed his second claim on October 9, 1985. *Id.* On September 11, 1991, Administrative Law Judge George P. Morin issued an Order Dismissing Claim, granting the miner's request for leave to withdraw his claim. *Id.* The miner died on October 9, 2001. Director's Exhibits 3, 10. Claimant filed her survivor's claim on August 21, 2002. Director's Exhibit 3.

³Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by

Neeley v. Director, OWCP, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). We agree. The record consists of a death certificate, an autopsy report by Dr. Zhang, and the reports of Drs. Oesterling, Biundo, and Green. The death certificate listed the immediate cause of the miner's death as cardiopulmonary arrest due to advanced lung distress syndrome, chemotherapy and Hodgkin's lymphoma. Director's Exhibit 10. Further, the death certificate listed benign prostatic hypertrophy, pneumonia and a urinary tract infection as other significant conditions contributing to the miner's death. *Id.* Regarding the autopsy report, although Dr. Zhang diagnosed diffuse alveolar damage (adult respiratory distress syndrome), simple coal workers' pneumoconiosis and multiple enlarged lymph nodes with anthracotic pigments, he opined that diffuse alveolar damage (adult respiratory distress syndrome) caused the miner's death. Director's Exhibit 11. Dr. Oesterling opined that coal workers' pneumoconiosis did not hasten, contribute to, or cause the miner's death.⁴ Employer's Exhibit 4. In contrast, Dr. Biundo opined that pneumoconiosis significantly contributed to the miner's death.⁵ Director's

complications of pneumoconiosis, or

(3) Where the presumption set forth at §718.304 is applicable.

...

(5) 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).

⁴Although Dr. Oesterling agreed with the autopsy protocol diagnosis of diffuse alveolar damage or adult respiratory distress syndrome, he opined that the miner's very mild form of coal workers' pneumoconiosis was insufficient to have been a factor in his demise in any way. Employer's Exhibit 4.

⁵Dr. Biundo opined that "[the miner] would have died any way even if he did not have pneumoconiosis/black lung, but his life expectancy probably would have been longer and [the miner] would have been able to fight off disease, pulmonary insult, albeit, pulmonary embolism, infection, scarring and his immune [system] would have been more aggressive and decisive and therefore his chance of survival would have been higher." Director's Exhibit 14.

Exhibit 14. Likewise, Dr. Green opined that coal mine dust exposure and pneumoconiosis directly contributed to the miner's death.⁶ Claimant's Exhibits 1, 4.

The administrative law judge determined that Dr. Zhang did not render an opinion regarding the issue of whether pneumoconiosis contributed to the miner's death.⁷ Decision and Order at 4. In addition, the administrative law judge permissibly discredited the death certificate because it is not reasoned.⁸ *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). In weighing the remaining conflicting opinions of Drs. Oesterling, Biundo, and Green, the administrative law judge found that Dr. Green's opinion outweighed Dr. Oesterling's contrary opinion, based on Dr. Biundo's supporting opinion and on Dr. Green's superior qualifications.

Employer asserts that the administrative law judge erred in according greater weight to Dr. Green's opinion than to Dr. Oesterling's contrary opinion. Specifically, employer argues that the administrative law judge failed to explain why he found that Dr. Green's opinion outweighed Dr. Oesterling's contrary opinion on the basis that Dr. Green's opinion is corroborated by Dr. Biundo's opinion. Citing *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004), the administrative law judge found that "Dr. Green's opinion is in accord with Dr. Biundo who was the miner's treating physician." Decision and Order at 5. This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. Although the Third Circuit, in *Soubik*, held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician, *Soubik*, 366 F.3d at 226, 23 BLR at 2-101, the court has also indicated that automatic preferences are disfavored. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Thus, the opinions of treating physicians should not be

⁶Dr. Green opined that "[p]neumoconiosis contributed to the respiratory failure by causing loss of lung tissue (emphysema), airway obstruction (chronic or industrial bronchitis) and impairment of gas transfer (macular pneumoconiosis)." Claimant's Exhibit 1. Dr. Green also opined that "[p]neumoconiosis would, in effect, hasten [the miner's] death but would also make it less likely that [the miner] would recover from an episode of ARDS." *Id.*

⁷The administrative law judge stated that "Dr. Zhang's opinion does not shed any light on whether pneumoconiosis made a substantial contribution to the miner's death." Decision and Order at 4.

⁸The administrative law judge stated that "[t]he death certificate does not even mention pneumoconiosis, which the employer concedes was present, and is unreasoned." Decision and Order at 4.

presumed to be correct, entitled to the greatest weight or considered to have the most probative value. Rather, the administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to the opinions of the treating physicians, when warranted. *See* 20 C.F.R. §718.104(d); *Mancia*, 130 F.3d at 590-1, 21 BLR at 2-238; *Lango*, 104 F.3d at 577, 21 BLR at 2-20-1.

In this case, the administrative law judge stated that Drs. Oesterling, Biundo, and Green gave well reasoned opinions. Decision and Order at 4. However, the administrative law judge did not explain why he found that Dr. Biundo's opinion is entitled to deference, as supportive of Dr. Green's opinion based on Dr. Biundo's status as the miner's treating physician. The Administrative Procedure Act (APA), 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, since the administrative law judge did not explain why he found that Dr. Biundo's opinion is entitled to deference based on his status as the miner's treating physician, *see* 20 C.F.R. §718.104(d); *Mancia*, 130 F.3d at 590-1, 21 BLR at 2-238; *Lango*, 104 F.3d at 577, 21 BLR at 2-20-1, we hold that the administrative law judge erred in relying on Dr. Biundo's opinion to corroborate Dr. Green's opinion. *Wojtowicz*, 12 BLR at 1-165.

Employer also argues that the administrative law judge failed to explain why he found that Dr. Green's opinion outweighed Dr. Oesterling's contrary opinion on the basis of Dr. Green's qualifications. Although both Dr. Green and Dr. Oesterling are Board-certified in anatomical pathology, Claimant's Exhibit 2; Employer's Exhibit 2, the administrative law judge found that Dr. Green's qualifications are superior to Dr. Oesterling's qualifications, based on Dr. Green's expertise and publication of manuscripts regarding occupational pneumoconiosis. Decision and Order at 5. The administrative law judge specifically stated:

A review of Dr. Green's curriculum vitae reveals that he is a recognized expert on occupational lung diseases. He co-authored the pathology standards for coal workers' pneumoconiosis and has published numerous peer-reviewed manuscripts on occupational lung disease and coal workers' pneumoconiosis. He is the former Chief of Pathology Section of the National Institute for Occupational Safety and Health. *See* CX 2. Dr. Oesterling's relevant expertise is limited to his work as a medical resident, the coroner of Indiana County, PA, and as a consultant to the United Mine Workers. *See* EX 2 at 4-6. His *relevant* experience ended in 1974. *Id.* at 6. He did not indicate that he had published any articles on occupational lung disease or coal workers' pneumoconiosis. I believe that Dr. Green's

recognized expertise and publication of manuscripts on the pathology of coal workers' pneumoconiosis renders his opinion more credible than Dr. Oesterling's opinion, and I therefore credit the opinion of Dr. Green that decedent's pneumoconiosis impaired his ability to resist infection and hastened his death from ARDS.

Id. (emphasis added). However, as argued by employer, the administrative law judge did not consider Dr. Oesterling's testimony regarding his current expertise and experience in the field of occupational lung diseases. During a March 18, 2004 deposition, Dr. Oesterling stated, "[s]ince coming to Pittsburgh, I have done a very constant practice in occupational lung diseases and have had cases referred to me, as was the case here, with records and the slides or other materials." Transcript at 6. Further, when asked if he kept current with the literature on occupational lung diseases, particularly pneumoconiosis, Dr. Oesterling stated:

Yes, sir, I have tried very hard to do so. In my preferred way of doing this, I do go through the literature. I do keep current textbooks, but I do also get to any of the conferences that are offered on occupational lung disease and the pathology thereof.

Most recently, there was one in Houston the (sic) Baylor sponsored. They had authorities from all over the world. They had most of the members of the asbestos panel there for that meeting. They had many of the men who are well recognized in general for their occupational expertise, Dr. Cherg among them. So those meetings, which were very extensive three-day meetings, are by far and away to me the best way of staying current.

Id. at 6-7.

An administrative law judge must address and discuss all relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Because the administrative law judge did not consider Dr. Oesterling's testimony regarding his current expertise and experience in occupational lung disease, we hold that the administrative law judge erred in finding that Dr. Green's opinion outweighed Dr. Oesterling's contrary opinion, based on Dr. Green's qualifications. *McCune*, 6 BLR at 1-988; Employer's Exhibit 2.

In view of the aforementioned errors by the administrative law judge in weighing the conflicting opinions of Drs. Oesterling, Biundo, and Green, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2),

and remand the case for further consideration of the medical opinion evidence at subsection 718.205(c)(2) in accordance with the requirements of the APA. *Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge