BRB No 00-0753 BLA

WILMA L.LEE (Widow of ALVA D. LEE) Claimant-Respondent v. OLD BEN COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand-Awarding Benefits of Donald W. Mosser Administrative Law Judge, United States Department of Labor.

Jack N. VanStone (VanStone & Kornblum), Evansville, Indiana, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Dorothy L. Page (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (95-

BLA-0146) of Administrative Law Judge Donald W. Mosser rendered 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).[1] Claimant filed her application for benefits on August 21, 1991. Director's Exhibit 1. Her case is now before the Board for the second time.

Initially, the administrative law judge credited the miner with thirty-five years of coal mine employment, found that the medical evidence established that the miner had pneumoconiosis arising out of coal mine employment, and concluded that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

Upon consideration of employer's appeal challenging only the finding of death due to pneumoconiosis, the Board held that the administrative law judge permissibly accorded great weight to the death certificate on which the miner's treating physician had listed "pneumoconiosis." Additionally, the Board held that the administrative law judge properly credited two other physicians' reports as corroborative of the death certificate. The Board determined, however, that the administrative law judge did not provide valid reasons for discounting the medical opinions of four physicians who concluded that the miner's death was unrelated to pneumoconiosis. Consequently, the Board vacated the award of benefits and remanded the case for the administrative law judge to reweigh the opinions of employer's four experts. *Lee v. Old Ben Coal Co*., BRB No. 98-1344 BLA (Jul. 13, 1999)(unpub.).

On remand, the administrative law judge reweighed and again accorded less weight to the opinions of Drs. Castle, Kleinerman, Renn, and Tuteur that pneumoconiosis did not contribute to the miner's death. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge made several errors in weighing the medical reports of its physicians. Employer additionally argues that if this case is remanded for further consideration, the administrative law judge should be instructed to reassess claimant's medical evidence in light of intervening case law. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals for the District of Columbia

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which all parties have responded. The parties agree that none of the regulations at issue in the lawsuit affects the outcome of this case. Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed with the adjudication of 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 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 establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *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)(2), (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); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992). 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).

Drs. Tuteur, Renn, Castle, and Kleinerman reviewed the miner's medical records and agreed that he had coal workers' pneumoconiosis and died of respiratory failure caused by pneumonia and congestive heart failure. Employer's Exhibit 2-4, 7-12. They concluded, however, that coal workers' pneumoconiosis did not hasten his death because the disease was too mild to cause any respiratory or pulmonary impairment. They opined that the shortness of breath and hypoxia experienced by the miner in the later years of his life resulted instead from severe coronary artery disease, ischemic cardiomyopathy, and congestive heart failure documented in the miner's multiple hospitalization records.

Upon review of the administrative law judge's Decision and Order in light of the record and the applicable law, we find merit in employer's argument that the

administrative law judge did not provide valid reasons for according less weight to the reports of Drs. Kleinerman, Renn, and Tuteur. The administrative law judge discounted Dr. Kleinerman's opinion because the administrative law judge found that Kleinerman did not mention any chest x-rays taken after 1985, did not mention the reports of either the miner's treating physician, Dr. Gehlhausen, or of claimant's consulting expert, Dr. Houser, and did not address any blood gas studies administered after 1985. As employer correctly notes, Dr. Kleinerman listed all of the x-rays and blood gas studies in the record, and specifically discussed the results of several post-1985 x-rays and blood gas studies. Employer's Exhibit 12 at 11, 12 and Appendix. Additionally, Dr. Kleinerman discussed all of the hospital treatment records completed by Dr. Gehlhausen, and specifically mentioned both the "Record of Death" signed by Dr. Gehlhausen, and Dr. Houser's two reports. Employer's Exhibit 12 at 2-13. Thus, substantial evidence does not support the administrative law judge's weighing of Dr. Kleinerman's opinion.

Additionally, substantial evidence does not support the administrative law judge's discounting of Dr. Renn's opinion because Renn "neither list[ed] nor discuss[ed]" any blood gas studies taken after 1985. Decision and Order on Remand at 4. As noted by employer, Dr. Renn specifically discussed at least one post-1985 hospital blood gas study, stating that it revealed "acute respiratory alkalosis and severe hypoxemia, as expected when one is in the throes of congestive heart failure."[2] Employer's Exhibit 2 at 6.

[2] Review of the record indicates that although Dr. Renn did not chart the individual results of each post-1985 hospital blood gas study as did Dr. Kleinerman, Dr. Renn listed and discussed the hospitalization records in which all of the post-1985 blood gas studies are contained as laboratory data. Employer's Exhibit 2 at 1-3. Dr. Renn's view was that pulmonary function studies, blood gas studies, and lung diffusion tests taken at times when the miner was not experiencing acute exacerbations of congestive heart failure revealed no respiratory or pulmonary impairment, indicating that his coal workers' pneumoconiosis was causing no impairment.

Further, we agree with employer's contention that the administrative law judge's analysis of Dr. Tuteur's opinion is not in accordance with law. Echoing Dr. Renn, Dr. Tuteur observed that "[t]hrough 1985, arterial blood gas analyses are always within normal limits. Thereafter, associated with a series of acute cardiopulmonary illnesses, these values waxed and waned, not unexpectedly." Employer's Exhibit 2 at 8. Rather than address Dr. Tuteur's opinion that the hospital blood gas studies reflected acute illnesses rather than chronic impairment due to coal workers' pneumoconiosis, the administrative law judge took issue with Dr. Tuteur's statement that the post-1985 blood gas study values waxed and waned. However, the administrative law judge's finding that "the changes in the blood gas values" reflected "very little variance in the numbers," Decision and Order on Remand at 3, rests upon his own impermissible interpretation of the medical data. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987)("The interpretation of objective data is a medical determination and an administrative law judge may not substitute his opinion for that of a physician. . . ."). Consequently, we are unable to affirm it.[3] In light of the erroneous reason provided for discounting Dr. Tuteur's opinion, and because substantial evidence does not support the administrative law judge's analysis of the opinions of Drs. Renn and Kleinerman, *O'Keeffe, supra*, we must vacate the award of benefits and remand this case for further consideration of whether pneumoconiosis hastened the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Railey, supra*.

However, we hold that the administrative law judge provided a valid reason for according less weight to Dr. Castle's opinion. Substantial evidence supports the administrative law judge's finding that Dr. Castle relied heavily on Dr. Naeye's description of few silicotic nodules, without referring to the autopsy prosector's conflicting description of multiple such nodules in the miner's lungs. Employer's Exhibit 4 at 3-4, Director's Exhibit 3 at 6; *see Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993)(the administrative law judge assesses the quality of a physician's reasoning). As noted by the administrative law judge, Decision and Order on Remand at 2, we have already held that the administrative law judge permissibly accorded greater weight to the autopsy prosector's description than to Dr Naeye's more conservative assessment. *Lee*, slip op. at 5. Accordingly, we reject employer's contention that the administrative law judge simply relied upon the

[3] Because Dr. Tuteur clearly discussed what he believed to be the significance of the post-1985 blood gas studies in his initial report, we see no basis to affirm the administrative law judge's additional finding that Dr. Tuteur deserved less weight because his later, supplemental report "fail[ed] to note" the post-1985 blood gas studies. Decision and Order on Remand at 3. Dr. Tuteur's supplemental report was intended only to address additional data submitted to Dr. Tuteur. Employer's Exhibit 3. Even so, Dr. Tuteur began his supplemental report by stating, "[t]his report is based on . . . and includes all those data reviewed for the initial Independent Medical Review . . . as well as the following medically-relevant data." Employer's Exhibit 3 at 1.

same, invalid reasons provided in his first decision.

Employer argues further that case law issued since the Board's prior decision in this case suggests that the administrative law judge on remand be instructed to reweigh claimant's evidence and determine whether claimant has presented substantial evidence that pneumoconiosis hastened the miner's death. Employer relies primarily on *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, BLR (4th Cir. 2000), in which it was held that mere reference on a death certificate to pneumoconiosis, without further explanation, does not constitute a reasoned medical opinion and therefore is not substantial evidence that pneumoconiosis hastened death. Employer argues that here, as in *Sparks*, the death certificate does not explain how pneumoconiosis hastened death, yet the administrative law judge accorded greatest weight to the death certificate.

On the "Record of Death" signed by Dr. Gehlhausen, the cause of death blank contains the following list of conditions: "Pneumonia-1 week, CHF-3 months, Recurrent MI-15 years, Emphysema-Pneumoconiosis." Director's Exhibit 2. Review of the record indicates that Dr. Gehlhausen's hospital treatment records note pneumoconiosis by history, but do not discuss its impact on the miner's health or on the course of his treatment for heart attacks, pneumonia, and congestive heart failure. Employer's Exhibit 2. The record contains no narrative report from Dr. Gehlhausen discussing how pneumoconiosis hastened the miner's death. In our prior decision, we upheld the administrative law judge's decision to accord great weight to the Record of Death because it was prepared by the miner's treating physician. *Lee*, slip op. at 5.

Upon consideration of these facts in view of the new case law cited by employer, we do not believe that our prior affirmance of the administrative law judge's reliance upon the Record of Death should be controlling on remand. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting)(the law of the case doctrine is a discretionary rule of practice). Although we recognize that this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, we regard the Fourth Circuit court's opinion in *Sparks* as persuasive authority, and we conclude that it is an opinion which the Seventh Circuit court would take into account if it were reviewing this case.[4] Since the administrative law judge here relied primarily upon Dr. Gehlhausen's Record of Death, which lists pneumoconiosis among several causes of death but does not explain how pneumoconiosis hastened death, we vacate the administrative law

[4] Moreover, the *Sparks* court, in reaching its holding, cited the Seventh Circuit court's opinion in *Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 16 BLR 2-57 (7th Cir. 1992), holding that merely listing "black lung" on the miner's death certificate was not enough to show that pneumoconiosis contributed to his death. In the prior appeal, the *Stone* decision was not brought to the Board's attention.

judge's prior finding that claimant "produced enough evidence to show that her husband's pneumoconiosis hastened his death," [1998] Decision and Order at 24, and we instruct the administrative law judge to reweigh claimant's evidence on remand.

In reweighing the medical evidence to determine whether pneumoconiosis hastened the miner's death, the administrative law judge should address not only the quality of the documentation and reasoning in the opinions by employer's experts, but should also examine the documentation and reasoning in the consulting opinions by Drs. Long and Houser, previously credited by the administrative law judge as corroborative of the Record of Death. Specifically, the administrative law judge should identify what medical evidence Dr. Long referred to in support of her conclusion that "the compromise of the miner's respiratory reserve due to CWP" contributed to his death. Director's Exhibit 4; *see Migliorini v. Director, OWCP*, 898 F.2d 1292, 1295, 13 BLR 2-418, 2-423 (7th Cir. 1990); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-22 (1987). This is particularly relevant in view of the contrary opinions of record stating that coal workers' pneumoconiosis did not compromise the miner's respiratory or pulmonary condition. Employer's Exhibits 2-4, 7, 12. If the administrative law judge again considers the post-1985 hospital blood gas studies important to resolving this dispute, he should indicate how much weight he accords to the medical opinions stating that the post-1985 blood gas studies reflect acute illnesses for which the miner was hospitalized at the time. *Id*.; *see Casella v. Kaiser Steel Corp*., 9 BLR 1-131, 1-134 (1986)(administrative law judge must discuss evidence stating that qualifying objective test scores do not reflect a chronic pulmonary condition but rather, an unrelated health condition). Additionally, in weighing Dr. Houser's opinion, the administrative law judge. should take into account the fact that a consulting physician who reviewed Dr. Houser's report criticized his medical reasoning.[5] Employer's Exhibit 4; *see Peabody Coal Co. v. Director, OWCP [Brinkley]*, 972 F.2d 880, 881 (7th Cir. 1987)(the administrative law judge must consider all relevant medical evidence).

[5] Review of Dr. Houser's opinion indicates that he explained his opinion that pneumoconiosis hastened death, with reference to specific medical evidence. Claimant's Exhibit 13; *see Migliorini, supra*. Because Dr. Houser did so, his opinion is not speculative, contrary to employer's assertion. In the prior decision, the administrative law judge did not rely to any extent on Dr. Houser's reasoning, but simply noted that Houser "agreed with [Dr. Long's] finding." [1998] Decision and Order at 24.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge