

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 10 February 2015**

CASE NO.: 2010-BLA-5809

In the Matter of:

THEODORE M. LATUSEK, JR.,

Claimant

v.

CONSOLIDATION COAL COMPANY,

Employer,

and

CONSOL ENERGY, INC.,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS'

COMPENSATION PROGRAMS,

Party-in-Interest.

**DECISION AND ORDER AWARDING BENEFITS – ON REMAND**

This case is on remand from the Benefits Review Board (“Board”). It arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (2010), and the regulations issued thereunder, found in Title 20 of the Code of Federal Regulations.<sup>1</sup>

A Decision and Order Awarding Benefits was issued by the undersigned Administrative Law Judge on May 9, 2012, awarding benefits to Claimant, Theodore M. Latusek, Jr. Employer, Consolidation Coal Company, appealed the decision. On August 5, 2013, the Benefits Review Board (“Board”) issued a Decision and Order affirming in part, vacating in part, and remanding the claim for “further consideration consistent” with its opinion. (BRB No. 12-0449 BLA). The record was received in the Office of Administrative Law Judges on June 17, 2014. The case was assigned to the undersigned on October 20, 2014.

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<sup>1</sup> Director’s Exhibits are marked as DX\_\_; Claimant’s Exhibits are marked as CX\_\_; Employer’s Exhibits are marked as EX\_\_; pages of the hearing transcripts are marked as Tr.\_\_\_\_.

The Board affirmed my findings as they pertain to the weight accorded the medical experts, based on their qualifications, and found that I properly considered the reliability of the medical studies and articles underlying the opinions of the medical experts. However, the Board found that I did not properly address the reports of Drs. Richard Naeye and Erica Crouch.

#### PATHOLOGY

My May 9, 2012 Decision and Order held that Claimant met his burden of showing that his diffuse interstitial disease which necessitated a lung transplant was caused by his coal dust exposure, and it set forth reasons for the holding. I credited the physicians who found that the interstitial fibrosis was caused by coal dust exposure because of their superior qualifications to offer such opinions. I also found that the pathology reports were consistent with the physician opinions that Claimant's interstitial fibrosis was caused by coal dust exposure. The physicians referenced were Drs. James Dauber, Constance A. Jennings, Cecile Stephanie Rose and Jack Parker. However, the Board ruled that the opinions of Drs. Naeye and Crouch were not adequately considered in the discussion of the pathology.

The physicians whom I credited reasoned that their findings of interstitial fibrosis caused by coal dust exposure were supported by the presence of coal workers' pneumoconiosis in the lung tissue. Specifically, Dr. Jennings reasoned that the histologic findings from the pathology of the July 3, 2006 lung transplant included abundant polarized silicates within the alveolar space strongly indicating silicates in the pathogenesis of the fibrotic process, and Dr. Dauber explained that his review of the transplant records as well as the pathology of the lung tissue showed multiple hilar lymph nodes with focally calcified anthracosilicotic nodules, meaning that the regional lymph nodes were anthracotic due to the fact that the coal particles will transport through the lymphatics, then through the local lymph nodes and stay there. He reasoned that the pathology showed that Claimant had a lot of dust in the lung at the time that usual interstitial pneumonia was developing. Dr. Rose offered the opinion that the transplant pathology was consistent with findings from the 1992 biopsy pathology in that it showed interstitial lung disease in a UIP pattern progressing to end stage fibrotic lung disease with findings of air-way-centered injury that were consistent with an inhalation exposure, which she determined, with a reasonable degree of probability, was Claimant's coal dust exposure.

Employer argues that the reports of Dr. Naeye and Dr. Crouch are inconsistent with this reasoning, because they found "little coal dust deposition" and ruled out occupational dust exposure as a cause of Claimant's IPF.<sup>2</sup> Dr. Naeye reported that the pathology from the explanted left lung tissue shows no black pigment and "no very tiny birefringent crystals of toxic silica associated with the fibrosis." He opined that the near absence of fibrosis in nearby lymph nodes is categorical confirmation that the fibrosis is not occupational-silicotic in origin. He explained that when silica or other environmental fibrogenic agents damage lung tissue they eventually drain into nearby lymph nodes where they produce fibrosis. Dr. Crouch's review of the tissue slides from the explanted left lung and from the biopsy of the right middle and upper lobes of lung in an August 21, 2009 report led to her diagnosis of chronic organizing interstitial pneumonia and coal dust deposition with small numbers of coal dust macules consistent with mild simple coal workers' pneumoconiosis. Dr. Crouch reported that the histologic findings in

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<sup>2</sup> Employer's brief on remand, p. 15.

the 1992 biopsy are generally consistent with usual interstitial pneumonia (UIP) and the clinical diagnosis of idiopathic pulmonary fibrosis (IPF). She found a few coal dust macules, but no larger dust related lesions, and no concordance between the distribution of dust and the distribution or severity of the observed fibrosis.

Dr. Naeye's report on the pathology of the explanted lung tissue finding no pneumoconiosis and not even black pigment is contrary to the preponderance of pathology evidence as it is inconsistent with the July 3, 2006 pathology report from UPMC, it is inconsistent with the reports on the lung pathology of the 1992 biopsy by Drs. Waldron, Kleinerman and Hanon, and it is inconsistent with Dr. Naeye's own earlier February 7, 1995 pathology report interpreting the 1992 lung biopsy.

The UPMC pathology report finds multiple hilar lymph nodes with focally calcified anthracosilicotic nodules. Dr. Dauber referenced this finding in his testimony explaining that the pathology from the transplant showed multiple hilar lymph nodes with focally calcified anthracosilicotic nodules. (EX 12 at 28). Dr. James Waldron and Dr. Koichi Honma reported on the pathology of the June 12, 1992 biopsy at the request of Dr. Jennings. Dr. Waldron, in an Oct 13, 1992 report diagnosed usual interstitial pneumonia and found dust macules consistent with coal worker's pneumoconiosis, which contained abundant polarizable silicates. Dr. Honma, in a report dated November 14, 1995, found extensive areas of advanced diffuse interstitial fibrosis and also a small quantity of silicate material mixed with carbonaceous dust. Dr. Jerome Kleinerman submitted a report and a follow-up supplemental report dated December 5, 1995, at the request of the Employer after review of the June 12, 1992 biopsy slides. His principle diagnosis was interstitial pneumonitis and fibrosis, but he also reported observing in some slides a minimal number of macules of simple coalworker's pneumoconiosis, and within the lesions of pneumoconiosis he observed particles with anisotropic properties characteristic of crystalline silicates and free crystalline silica. Dr. Naeye's report on the pathology of the explanted lung tissue is inconsistent with his own earlier February 7, 1995 pathology report on tissue from the lung biopsy as his earlier report diagnosed simple coal worker's pneumoconiosis characterized by presence of several anthracotic micrododules, and observed black pigment, albeit a small amount, and birefringement crystals of all sizes.

Even Dr. Crouch's review of the tissue slides from the explanted left lung and from the biopsy is not totally consistent with the conclusions of Dr. Naeye. As previously stated, Dr. Naeye did not diagnose pneumoconiosis and did not find even black pigment whereas Dr. Crouch did find coal dust deposition with small numbers of coal dust macules consistent with mild simple coal workers' pneumoconiosis.

Dr. Naeye is highly qualified as a pathologist. He is Board-certified in Anatomic and Clinical Pathology and was a Professor of Pathology at Penn State University College of Medicine and has published a number of learned papers on pathology. However, his findings cannot be credited over the other physicians whose reports note the presence of pneumoconiosis and silicates, as they are also very qualified to offer their opinions. The qualifications of the pathologist who submitted the report for the UPMC transplant, Dr. Sanja Dacic, are not of record but the report itself identifies her as an M.D. and a PhD. The qualifications of Dr. Koichi Honma are not of record, but Dr. Jennings, who is the Clinical Director of the Interstitial Lung Disease

Laboratory at the National Jewish Center for Immunology and Respiratory Medicine in Denver, Colorado testified that she sent the pathology slides to Dr. Honma in Japan because he has extensive experience in silicosis-induced lung disease. (DX 44 at 29). Dr. Kleinerman, at the time of his report was Board-certified in Pathologic Anatomy and Clinical Pathology and was Chairman of the Department of Pathology at Mount Sinai School of Medicine of City of New York and had been Vice-chairman of Pathology Standards for Silica Related Pulmonary Disease, National Institute of Occupational Safety and Health.

Accordingly, the reports of Drs. Naeye and Crouch are not credited over the reports of Drs. Dauber, Jennings, Rose and Parker who opined that the pathology evidence is consistent with Claimant's interstitial fibrosis being caused by coal dust exposure. Claimant has satisfied his burden of proving a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 by establishing a total pulmonary disability caused by coal dust exposure.

#### RENDER JUSTICE UNDER THE ACT

The Board also instructed that if I find that Claimant has met his burden of proving a mistake in a determination of fact, I must render a specific finding as to whether granting modification would render justice under the Act as required by *Westmoreland County v. Sharpe*, 692 F. 3d 317, 327-28 (4<sup>th</sup> Cir. 2012; *Sharpe v. Director OWCP*, 495 F. 3d 125, 131-132 (4<sup>th</sup> Cir, 2007).

In *Hilliard v. Old Ben Coal Co.*, 292 F.3d 533, 22 B.L.R. 2-433, Case No. 00-3222 (7th Cir. May 31, 2002)(J. Wood dissenting) the Seventh Circuit held that a timely-requested modification should be denied only if the moving party has engaged in such contemptible conduct or conduct that renders its opponent so defenseless, that it could be said correcting the decision would not render justice under the Act. The Court instructed that the Act expresses a preference for accuracy over finality. Here, the evidence, including that developed as a result of the examination of the transplant lung tissue, demonstrates that Claimant's total pulmonary disability relates to his coal dust exposure. Further, as testified by Dr. Parker, who worked for National Institute for Occupational Safety and Health (NIOSH) as Chief/Acting Chief of the clinical investigation branch and the coal workers' surveillance and B reader certification programs, which he ran from 1991 to 1998, it is becoming more slowly accepted that coal miners may develop interstitial fibrosis in the absence of or with minimal evidence of, traditional coal macules or silicotic nodules (DX 103 at 14). Thus, granting the Claimant's request for modification of the decision by Judge Leland to find entitlement to benefits would render justice under the Act because new evidence along with further reflection on the evidence previously submitted shows that the denial of entitlement was wrongly decided.

#### ONSET DATE

Benefits commence in a miner's claim on the date the medical evidence first establishes that he became totally disabled due to pneumoconiosis, or if such a date cannot be determined from the record, the first day of the month in which the miner filed his most recent claim. 20 C.F.R. § 725.503 (2010); *Carney v. Director, OWCP*, 11 B.L.R. 1-32 (1987); *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1047 (1990). As Claimant ceased all employment on April 30, 1994, on the advice of Dr. Jennings, that date is considered to be onset of his total disability.

ATTORNEY'S FEE

Claimant's counsel shall file within 30 days of the date of issuance of this Decision and Order with this Office and with opposing counsel, a petition for a representative's fees and costs in accordance with the regulatory requirements set forth at 20 C.F.R. § 725.366 (2010). Director's Counsel shall file any objections with this Office and with Claimant's counsel within 20 days of receipt of the petition for fees and costs. It is requested that the petition for services and costs clearly provide (1) counsel's hourly rate with supporting argument or documentation; (2) a clear itemization of the complexity and type of services rendered; and (3) that the petition contains a request for payment for services rendered and costs incurred before this Office only as the undersigned does not have authority to adjudicate fee petitions for work performed before the district director or appellate tribunals. *Ilkewicz v. Director, OWCP*, 4 B.L.R. 1-400 (1982).

**ORDER**

IT IS HEREBY ORDERED that Consolidation Coal Company shall pay all augmented benefits to which Theodore M. Latusek, Jr. is entitled under the Act, commencing April 30, 1994.

THOMAS M BURKE  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed. At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).