BRB No. 02-0739 BLA

SANTA BALDONI (Widow of JOHN BALDONI)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 08/26/2003
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas Baldoni, lay representative, Jessup, Pennsylvania, for claimant.

Mary Forest-Doyle (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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:

Claimant[1] appeals the Decision and Order Denying Benefits (01-BLA-0880) of

[1] Claimant is Santa Baldoni, surviving spouse of the miner, John Baldoni, who died on October 7, 1992. Director=s Exhibit 5. Claimant filed her first survivor=s claim on October 28, 1992. Director=s Exhibit 16. The district director denied the survivor=s claim on January 29, 1993, on the grounds that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(2000) and failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c)(2000). *Id.* Claimant then submitted additional evidence and requested reconsideration, but the claim was again denied on March

Administrative Law Judge Robert D. Kaplan on a duplicate survivor=s claim[2] 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).[3] The administrative law judge found that the evidence established six and one-half years of qualifying coal mine employment and that the evidence, both old and new, failed to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. '718.202(a). Accordingly, the administrative law judge denied the survivor=s claim.

On appeal, claimant challenges the administrative law judge=s finding of six and one-half years of coal mine employment. Claimant also challenges the administrative law judge=s finding that the medical opinion evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The Director Office of Workers= Compensation Programs, in response, urges affirmance of the administrative law judge=s denial of benefits. Claimant replies, generally reiterating the contentions in her appeal.[4]

11, 1993, on the same basis. *Id.* No further action was taken on this claim, and the denial became final. Claimant filed a second survivor=s claim on November 30, 2000. Director=s Exhibit 1.

[2] The administrative law judge found that the Director, Office of Workers= Compensation Programs (the Director), waived his right to have the duplicate survivor=s claim denied on the basis of *res judicata*, *see* 20 C.F.R. '725.309(d)(2000), as the Director failed to raise this affirmative defense. Decision and Order at 4. The Director, in fact, expressly waived the issue of automatic denial of the duplicate survivor=s claim at the hearing. H. Tr. at 12.

[3] 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 20 C.F.R. Parts 718, 722, 725 and 726. (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4]No party has challenged the administrative law judge=s finding that the x-ray evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1). We affirm, therefore, this finding as unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge rendered no findings with respect to 20 C.F.R. '718.202(a)(2) and (a)(3). The record, however, contains no biopsy or autopsy evidence. Thus, 20 C.F.R. '718.202(a)(2) is not applicable. 20 C.F.R '718.202(a)(3) is also inapplicable. Specifically, because there is no evidence of complicated pneumoconiosis in the record, the 20 C.F.R '718.304 presumption is inapplicable. The presumption at 20 C.F.R. '718.305 is not applicable to claims, such as the instant claim, filed after January

1, 1982. 20 C.F.R. '718.305(e). The presumption at 20 C.F.R '718.306 is not applicable as the miner=s death occurred after March 1, 1978, and the survivor=s claim was filed after June 30, 1982. 20 C.F.R. '718.306(a). Thus, the existence of pneumoconiosis is not established pursuant to 20 C.F.R. '718.202(a)(3) as a matter of law. 20 C.F.R. ''718.202(a)(3), 718.304, 718.305, 718.306.

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=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a survivor=s claim filed after January 1, 1982, claimant must establish that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c).[5] *See* 20

[5] Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (3) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner=s death, or
> (3) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at '718.304 is applicable.
> (3) However, survivors are not eligible for benefits where the miner=s death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (3) Pneumoconiosis is a Asubstantially contributing cause@ of a miner=s death

C.F.R. ''718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner=s death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death. 20 C.F.R. '718.205(c)(2). Pneumoconiosis is a Asubstantially contributing cause@ of a miner=s death if it hastens the miner=s death. 20 C.F.R. '718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

Claimant initially challenges the administrative law judge=s finding of six and one-half years of coal mine employment. Claimant alleges that the evidence instead establishes eleven years of coal mine employment. Claimant, in support of this allegation, states that the miner asserted eleven years of coal mine employment on his original application for benefits with the Social Security Administration (SSA), Director=s Exhibits 15, 16. Claimant also asserts that the Commonwealth of Pennsylvania=s Department of Labor credited the miner with eleven years of coal mine employment in his state claim. Director=s Exhibit 2. We find no error in the administrative law judge=s years of coal mine employment finding. The administrative law judge reviewed all of the relevant evidence, including the miner=s SSA records from 1948-60. Decision and Order at 3. The administrative law judge permissibly relied upon the miner=s statement that he had left the mines in 1960, as he stated on his original application form filed with SSA and at his hearing. Decision and Order at 3; Director=s Exhibit 15; H. Tr. at 50. The administrative law judge found:

> Mr. Baldoni=s CME form lists three coal mine employers: Pennsylvania Coal Company, for whom he claimed to work from 1948 to 1953; Mariani Coal Company, for whom he claimed to work from 1954 to 1958; and D&H Coal Company, for whom he claimed to work from 1958 to 1960. (DX 15). This amounts to twelve years of CME, as alleged by Mr. Baldoni. Mr. Baldoni=s Social Security records begin in 1951. They confirm CME with Lena Mariani for one quarter in 1953. These records also reveal that for three quarters in 1951 and 1952, Mr. Baldoni worked for Harris Family Investment Company; for 17 quarters from 1953 through 1957, and 1959, he worked for Nino Sportswear & Bee & Gee Pants Company and other garment-related companies; and in 1960 for Pawnee Pants Manufacturing Company. (DX 15). Mr. Thomas Baldoni testified that his father worked eight-hour days for the Nino Sportswear Company. (TR 52-53). The Social Security records show

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if it hastens the miner=s death.

20 C.F.R. '718.205(c).

> that from 1951 through 1960, there were only eleven quarters unaccounted for by non-coal mine employment. The records do not cover the three and one-half years from 1948 to the mid-year of 1951. (DX 15).

Decision and Order at 3. The administrative law judge thus credited the miner with coal mine employment for all quarters where the SSA records did not show any non-coal mine employment, which would reasonably preclude coal mine employment in the same quarter. *See Justice v. Island Creek Coal Company*, 11 BLR 1-91 (1988); *Clayton v. Pyro Mining Co.*, 7 BLR 1-551 (1984); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). The administrative law judge=s calculation of six and one-half years of coal mine employment includes one quarter in 1953 during which the SSA records indicate the miner worked for Mariani Coal Company, eleven quarters for which there is no non-coal mine employment reflected, and fourteen quarters from 1948 to mid-1951, which the SSA records do not cover at all. Decision and Order at 3. The administrative law judge correctly found that this totals twenty-six quarters, or six and one-half years of coal mine employment. *Id*. We hold that the method utilized by the administrative law judge to calculate the length of the miner=s coal mine employment was reasonable, permissible, and not an abuse of discretion. *Justice*, 11 BLR at 1-92; *Clayton*, 7 BLR at 1-553-554; *Tackett*, 6 BLR at 1-841. We, therefore, affirm the administrative law judge=s finding of six and one-half years of coal mine employment.

Claimant next challenges the administrative law judge=s finding that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant relies upon the opinions of Drs. Marmo, Gentile, Biancarelli, and Gusek in support of the survivor=s claim.[6] Director=s Exhibits 5, 12, 16. Claimant also asserts that Dr.

[6] In her brief, claimant also refers to the Aopinions@ of Drs. McGuire, Walkowski, and Mackrell in support of her contention that the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R '718.202(a)(4). A review of the record indicates that Drs. McGuire and Walkowski submitted only x-ray interpretations in the miner=s claim prior to the miner=s death. Thus, their submissions do not constitute medical opinions. *See*

Sherman, the doctor that the administrative law judge credited, never personally examined the miner, and thus, should not have been credited by the administrative law judge over the opinions of Drs. Marmo, Gentile, Biancarelli, and Gusek.

Worhach v. Director, OWCP, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see also Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); Director=s Exhibits 15, 16. Furthermore, the record does not contain any medical evidence submitted by Dr. Mackrell. Thus, we reject claimant=s argument that this Aevidence@ establishes the existence of pneumoconiosis pursuant to 20 C.F.R ' 718.202(a)(4).

With respect to Dr. Marmo=s opinion, the administrative law judge recognized that Dr. Marmo was one of the miner=s treating physicians, but nonetheless discounted his opinion that the miner had clinical pneumoconiosis, on the basis that the opinion was not well reasoned.[7] The administrative law judge found that Dr. Marmo provided conclusions, without any supporting basis for those conclusions. Decision and Order at 9; Director=s Exhibits 10, 16. The administrative law judge may, within his discretion, discount an opinion on the basis that it is not well reasoned. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Further, the administrative law judge discounted Dr. Marmo=s opinion on the basis that it was not well documented, having found that Dr. Marmo relied only upon an x-ray reading by Dr. McGuire and an invalid pulmonary function study. Decision and Order at 9. The administrative law judge may discount an opinion that is not well documented. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry, v. Director, OW CP,* 9 BLR 1-1 (1986). We affirm, therefore, the administrative law judge=s decision to discount Dr. Marmo=s opinion at Section 718.202(a)(4).

Claimant next challenges the administrative law judge=s decision to discount Dr. Gentile=s opinion.[8] Recognizing that Dr. Gentile treated the miner, the administrative law judge nonetheless properly discounted Dr. Gentile=s opinion because he found that it was based on a single x-ray interpretation, and thus, it was not well documented. Decision and Order at 9; Director=s Exhibit 16. We affirm, therefore, the administrative law judge=s determination to discount Dr. Gentile=s opinion pursuant to Section 718.202(a)(4) on the basis that it is not well documented, as a finding within the administrative law judge=s discretion. *See Balsavage*, 295 F.3d at 399-400, 22 BLR at 2-396 ; *Lango*, 104 F.3d at 581-82, 21 BLR at 2-20-21; *Trumbo*, 17 BLR at 1-88-89; *Anderson*, 12 BLR at 1-113; *Perry*, 9 BLR at 1- 3.

The administrative law judge next discounted Dr. Biancarelli=s opinion that the miner

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[7] Dr. Marmo opined that the miner suffered from pneumoconiosis, and that he was Adisabled and died of [sic] Black Lung due to his employment in the anthracite mines.@ Director=s Exhibit 10.

[8] Dr. Gentile diagnosed anthracosilicosis due to exposure to silica during the miner=s employment in the anthracite mines. Director=s Exhibit 16. Like Dr. Marmo, Dr. Gentile relied upon a positive x-ray by Dr. McGuire, but it is not possible to discern from Dr. Gentile=s report which of two x-rays he relied upon. *Id.*

suffered from legal pneumoconiosis.[9] The administrative law judge found that the signature on the death certificate was illegible, but acknowledged that Dr. Biancarelli certified the cause of death as, *inter alia*, Acopd (Black lung).@ Decision and Order at 8-9; Director=s Exhibit 5. The administrative law judge rejected Dr. Biancarelli=s conclusion contained in the death certificate because it was not explained at all. Decision and Order at 9*;* Director=s Exhibit 12; *see*. The administrative law judge, within his discretion, also rejected Dr. Biancarelli=s four-sentence opinion, wherein she stated that the miner had chronic obstructive pulmonary disease because the doctor failed to explain her opinion. Decision and Order at 9*; see Lango*, 104 F.3d at 581-82, 21 BLR at 2-20-21; *Pettry*,, 14 BLR at 1-100; *Wilt*, 14 BLR at 1-78-79. We affirm, therefore, the administrative law judge=s decision to reject Dr. Biancarelli=s opinion at Section 718.202(a)(4).

[9] Dr. Biancarelli opined that the miner suffered from chronic obstructive pulmonary impairment Asecondary to Black Lung from working in the mines.@ Director=s Exhibits 5, 12.

Finally, claimant challenges the administrative law judge=s consideration of Dr. Gusek=s opinion. Prior to weighing the opinions of Drs. Marmo, Gentile, and Biancarelli, the administrative law judge rejected Dr. Gusek=s opinion because he found that it was not a diagnosis of pneumoconiosis. Rather, the administrative law judge found that Dr. Gusek merely noted anthracosilicosis in the miner=s medical history. Decision and Order at 9; Director=s Exhibit 16. The administrative law judge stated that A[w]hile he [Dr. Gusek] diagnosed COPD, he did not relate it to coal dust exposure. Therefore, I do not consider Dr. Gusek=s diagnosis equivalent to a finding of pneumoconiosis.@ Decision and Order at 9. A review of the record indicates that on page 1 of Dr. Gusek=s report dated November 7, 1991, he noted a *history* of anthracosilicosis. Director=s Exhibit 16. In a separate discharge summary by Dr. Gusek dated November 11, 1991, he listed nine discharge diagnoses, including chronic obstructive pulmonary disease, to which the administrative law judge referred. *Id.* However, on pages 2 to 3 of the November 7, 1991 report, Dr. Gusek also included in the AImpression@ section of his report, a finding of AAnthracosilicosis.@ *Id.* Such a finding may constitute a diagnosis of pneumoconiosis under the Act.[10] 20 C.F.R. ' 718.201(a)(1); *see Kline v. Director, OWCP,* 877 F.2d 1178, 12 BLR 1-346 (3d Cir. 1989); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001) (Smith and Dolder, JJ., dissenting in part and concurring in part); *Adamson v. Director, OWCP,* 7 BLR 1-229 (1984).

Inasmuch as the administrative law judge failed to consider Dr. Gusek=s diagnosis of anthracosilicosis as a possible diagnosis of pneumoconiosis and to weigh it as such, he erred. *Id*. We vacate, therefore, the administrative law judge=s finding with respect to Section 718.202(a)(4). On remand, the administrative law judge is instructed to reconsider Dr. Gusek=s opinion and weigh it against Dr. Sherman=s opinion, if necessary, to determine whether claimant has established the existence of pneumoconiosis at Section 718.202(a)(4). If, on remand, the administrative law judge finds that the medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4), he must then weigh all of the relevant evidence at Section 718.202(a) together, pursuant to *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). If the administrative law judge finds the existence of pneumoconiosis established at Section 718.202(a), he must then make findings at 20 C.F.R. ' 718.203. Finally, the administrative law judge must render a finding, if necessary, as to whether the evidence establishes that the miner=s death was due to pneumoconiosis at 20 C.F.R. ' 718.205. *See Lango*, 104 F.3d at 576, 21 BLR at 2-18.

[10] The record reflects that Dr. Gusek prepared three medical reports dated November 7, 1991, November 11, 1991 and December 4, 1991, respectively. Director=s Exhibit 16. Only the November 7, 1991 report includes the cited reference to anthracosilicosis. *Id*. The two other reports fail to contain any reference to anthracosilicosis or pneumoconiosis. *Id.*

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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge