BRB No. 05-0322 BLA

DELTA BREEDING (Widow of CLYDE BREEDING) Claimant-Respondent v. COLLEY & COLLEY COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/26/2005 DECISION and ORDER

Appeal of the Decision and Order on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Gregory R. Herrell (Arrington Schelin & Herrell, P.C.), Bristol, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

Employer appeals the Decision and Order (2000-BLA-0386) of Administrative Law Judge Stuart A. Levin awarding benefits with respect to a miner's claim and 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] This case

[1] Claimant is Delta Breeding, the surviving spouse of Clyde Breeding. Mrs. Breeding is pursuing her own claim, filed on April 21, 1992, as well as the claim filed by her husband on September 29, 1980. Mr. Breeding died on March 25, 1992. Director's Exhibits 1, 96. The death certificate identified the causes of death as cardiorespiratory

has a lengthy procedural history. In its most recent Decision and Order, the Board affirmed the administrative law judge's award of benefits in the miner's claim and the award of benefits in the survivor's claim based upon the derivative entitlement provisions set forth in 20 C.F.R. §725.212 (2000). *Breeding v. Colley & Colley Coal Co.*, BRB No. 01-0291 BLA (Feb 8, 2002)(unpub.). Specifically, the Board affirmed the administrative law judge's crediting of the miner with sixteen and three-quarters years of coal mine employment and the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2) (2000). The Board further affirmed the administrative law judge's determination that the miner was entitled to the presumptions that his pneumoconiosis arose out of coal mine employment and that his pneumoconiosis was totally disabling, and that these presumptions had not been rebutted. 20 C.F.R. §§718.203(b), 718.305 (2000).

Employer appealed to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, contending that the Board erred in affirming the administrative law judge's finding of at least fifteen years of coal mine employment, thus entitling him to the regulatory presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305, and further contending that the Board erred in affirming the administrative law judge's finding that employer's medical evidence failed to rebut that presumption. In an unpublished decision dated March 11, 2003, the Court affirmed the Board's conclusion that the miner worked in coal mine employment at least fifteen years, but remanded the case for further consideration of the medical opinion evidence at Section 718.305 rebuttal. Specifically, the Court held that the administrative law judge improperly relied on a distinction between medical and legal pneumoconiosis as justification for disregarding certain opinions, and for ultimately crediting the opinions of Drs. Buddington, Garzon, Kanwal, O'Neill and Schmidt over the contrary opinions of Drs. Castle, Dahhan, Hansbarger and Tomashefski. The Court instructed the administrative law judge to reconsider the medical opinion evidence at Section 718.305 rebuttal, specifically whether each physician found that the miner's disability was caused by coal dust exposure, in determining whether the evidence is sufficient to overcome the presumption of causation.

On remand, in a decision dated December 14, 2004, currently before the Board, the administrative law judge reconsidered all of the medical opinion evidence of record, as instructed, and again found the evidence insufficient to establish rebuttal at Section 718.305. Accordingly, the administrative law judge again awarded benefits in both the miner's claim and the survivor's claim.

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failure, chronic obstructive disease, pneumoconiosis, and cor pulmonale. Director's Exhibit 95.

On appeal, employer contends that the administrative law judge again erred in his evaluation of the medical opinion evidence pursuant to 20 C.F.R. §718.305. Employer specifically contends that in finding the evidence insufficient to establish rebuttal at Section 718.305, the administrative law judge erred in according little weight to the earlier opinions Drs. Garzon, O'Neill, Dahhan and Castle, developed during the miner's lifetime, and further erred in according little weight to the later opinions of Drs. Dahhan, Castle, Tomashefski and Hansbarger, offered after reviewing the autopsy results. Claimant responds urging affirmance of the award of benefits. The Director has not filed a brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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 initially asserts that the administrative law judge erred in according less weight to the opinions of Drs. Garzon,[3] O'Neill,[4] Dahhan[5] and Castle,[6] developed during

[2] The administrative law judge accorded diminished weight to the remaining physicians' opinions of record, finding that Dr. Sutherland's 1980 opinion did not offer sufficient basis for his conclusion that the miner was totally disabled from performing coal mine work due to his chronic obstructive pulmonary disease, that Dr. Kanwal's 1981 opinion did not include a discussion of the etiology of the miner's disability, and that Dr. Rosser, claimant's treating physician, did not offer any opinion on the issue of disability causation. Decision and Order at 3-4; Claimant's Exhibits 2, 3; Director's Exhibits 10, 11. The administrative law judge further accorded little weight to Dr. Schmidt's 1984 opinion on the grounds that the physician did not discuss the etiology of the ventilatory defects he noted, and found that Dr. Buddington's 1983, 1985 and 1999 reports did not offer any opinion on disability causation. The administrative law judge mischaracterized the opinions of Drs. Schmidt and Buddington, as Dr. Schmidt actually stated that "exposure to coal dust caused [the miner's] illness" and that "smoking could not be blamed for his entire problem", and Dr. Buddington opined in 1985 that the miner had a severe chronic respiratory impairment and that his primary pulmonary disorder was coal workers' pneumoconiosis due to coal mine employment. Decision and Order at 3-4; Director's Exhibits 36, 37, 39. However, these additional findings are not contested on appeal by any party to this claim.

[3] Dr. Garzon is a Board-certified internist.

[4] Dr. O'Neill is an internist and pulmonologist.

the miner's lifetime, that the miner's respiratory impairment was due to chronic obstructive pulmonary disease and emphysema due to cigarette smoking, contending that these physicians offered well-documented and reasoned opinions based on the evidence available at the time. Employer's Brief at 25-27. Contrary to employer's arguments, the administrative law judge properly accorded less weight to the early opinions of Drs. Garzon, O'Neill, Dahhan and Castle, in part because they each opined that the miner did not have pneumoconiosis, which was later proven to exist by autopsy. Decision and Order at 3-4. An administrative law judge may reasonably discredit a medical report after concluding that the physician's underlying premise was incorrect. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

Employer also asserts that the administrative law judge erred in according little weight to the subsequent opinion of Dr. Dahhan, developed after the autopsy, that the miner had simple pneumo based on pathological material, but that the miner's disability was due to chronic bronchitis and emphysema due to smoking. Employer's Brief at 29-30; Employer's Exhibit 4; Decision and Order at 6. In explaining that the miner's "emphysema did not result from his simple coal workers' pneumoconiosis," Dr. Dahhan stated that coal worker's pneumoconiosis results in focal emphysema, a condition associated with the simple dilation of the alveolar ducts and not associated with the destruction of the alveolar structure, or with any alteration in the blood gas exchange mechanisms or respiratory mechanics. Employer's Exhibit 4. Dr. Dahhan opined that because the miner's pulmonary function studies demonstrated significant alteration in his respiratory mechanics and impairment of blood gas exchange mechanisms, the studies indicated that the miner had true emphysema, of the centriacinar and panacinar variety, which is seen secondary to a lengthy smoking habit. Employer's Exhibit 4.

In finding Dr. Dahhan's opinion insufficient to rebut the presumption of total disability due to pneumoconiosis, the administrative law judge stated that "[w]hile Dr. Dahhan may assert that changes on pulmonary tests show the presence of emphysema and may opine that simple pneumoconiosis does not cause alteration in blood gas mechanism or respiratory mechanics, his opinion appears at odds with the Act and regulations" which "recognize that simple pneumoconiosis can cause a pulmonary disability." Decision and Order at 6. The administrative law judge further found that Dr. Dahhan did not explain, beyond this contention, why the pneumoconiosis and

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[5] Dr. Dahhan is a Board-certified internist and pulmonologist.

[6] Dr. Castle is a Board-certified internist and pulmonologist.

emphysema established by autopsy do not both contribute to claimant's pulmonary disability. Decision and Order at 6.

Employer specifically contends that, contrary to the administrative law judge's findings, when all Dr. Dahhan's reports are taken together in context they do contain the requisite explanation on disability causation. Employer's Brief at 30. In his 2000 report, Dr. Dahhan acknowledged that claimant had simple coal workers' pneumoconiosis, and that he was totally disabled by a combination of emphysema and chronic bronchitis. The doctor opined that the emphysema was caused by smoking, not coal mine employment; however, he did not opine on whether coal dust exposure contributed to or aggravated the chronic bronchitis. Employer's Exhibit 4. Contrary to employer's arguments, Dr. Dahhan's 2000 report does not contain any explanation as to why pneumoconiosis could not have contributed to the miner's disability, and while Dr. Dahhan's 1985 and 1987 reports do contain more explanation as to why he felt the miner's impairment was caused by smoking and was not caused by coal dust exposure, these prior opinions on causation were permissibly accorded less weight previously as based in part on the mistaken premise that the miner did not have pneumoconiosis. Director's Exhibits 34, 38, 65; Decision and Order at 4. Thus, the administrative law judge permissibly accorded less weight to Dr. Dahhan's opinion on the ground that it is inadequately explained.[7] *Clark*, 12 BLR at 1-149.

Employer also asserts that the administrative law judge erred in according diminished weight to the opinion of Dr. Castle, that the miner's disability was due to chronic obstructive pulmonary disease and emphysema due to smoking, on the grounds that Dr. Castle stated in his deposition that he based his opinion in part on the fact that the pulmonary function studies showed a pure obstructive defect, which was contrary to the administrative law judge's finding that the weight of the pulmonary function studies showed a mixed restrictive and obstructive defect. Employer's Brief at 31-32; Employer's Exhibit 6, 8; Decision and Order at 6. Employer specifically asserts that in doing so, the administrative law judge substituted his own judgment for that of the

[7] We note, however, that employer's additional argument, that the administrative law judge erred in finding Dr. Dahhan's opinion hostile to the Act and regulations, is not without some merit. A medical report is deemed contrary to the Act if a physician forecloses all possibility that simple pneumoconiosis can be totally disabling. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). As employer correctly asserts, Dr. Dahhan never stated that simple pneumoconiosis could not cause disability, but rather spoke to the relationship between pneumoconiosis, focal emphysema and disability. Employer's Exhibit 4. Ultimately, however, the administrative law judge permissibly accorded less weight to Dr. Dahhan's opinion on other grounds. *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983).

physician, and further, did not explain his basis for finding that the weight of the pulmonary function studies show both restrictive and obstructive changes. Contrary to employer's arguments, in his prior decision, which the administrative law judge incorporated to the extent it was not overturned, the administrative law judge weighed the pulmonary function studies of record and concluded, based on the preponderance of the medical opinions, that Dr. Castle was largely alone in his belief that the 1981, 1983 and 1984 pulmonary function studies showed purely obstructive results. Administrative Law Judge's October 30, 2000 Decision and Order at 14-15. Drs. Garzon, O'Neill, Kanwal, Buddington and Schmidt all interpreted pulmonary function studies as showing mixed obstructive and restrictive defects. This finding was affirmed by the Board on appeal, and was not criticized or otherwise disturbed by the Fourth circuit. *Breeding v. Colley & Colley Coal Co.*, BRB No. 01-0291 BLA (Feb 8, 2002)(unpub.). Thus, the administrative law judge did not substitute his opinion for that of the physician, but rather permissibly found that Dr. Castle's opinion was not supported by the weight of the objective studies, and, thus, was entitled to diminished weight. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *see Clark*, 12 BLR at 1-149.[8]

Employer additionally contests the administrative law judge's weighing of Dr. Hansbarger's[9] opinion, that the miner's coal workers' pneumoconiosis was too mild to have contributed to any impairment or death and that the miner's disability was due to his

[8] We note that employer's additional allegations of error have merit. In addition to finding Dr. Castle's opinion unsupported by the weight of the objective studies of record, the administrative law judge also accorded Dr. Castle less weight because he based his disability causation opinion on the fact that the chest x-ray evidence was negative and the fact that the miner was receiving bronchodilator treatment. Decision and Order at 6; Castle Deposition at 15, 18-19, 23. The administrative law judge found that the autopsy evidence of pneumoconiosis supported the positive x-ray readings of record and thus cast doubt on Dr. Castle's assertion that the miner's pneumoconiosis was so mild it was not demonstrated on x-ray films. As employer asserts, this is irrational as the autopsy *confirmed* that the miner's pneumoconiosis was very mild, which explained why it did not show up on the majority of the x-ray readings. Also, we hold that the administrative law judge mischaracterized Dr. Castle's opinion regarding the miner's bronchodilator treatment. Dr. Castle did not offer this as support for his causation opinion, but rather, in response to an inquiry by counsel, Dr. Castle simply confirmed that bronchodilators were not a common treatment for respiratory impairment caused by coal dust. Castle Deposition at 23-24. Ultimately, however, the administrative law judge permissibly accorded less weight to Dr. Castle's opinion on other grounds. *Kozele*, 6 BLR at 1-382 n. 4.

[9] Dr. Hansbarger is a Board-certified pathologist.

severe bullous centrilobular emphysema, which was not related to coal workers' pneumoconiosis in any way. Employer's Brief at 34-35; Employer's Exhibit 4. Contrary to employer's arguments, the administrative law judge permissibly accorded little weight to the disability causation opinion of Dr. Hansbarger because he based his opinion primarily on the autopsy slides and did not address the pulmonary function studies of record which were interpreted by several physicians as showing both restrictive and obstructive changes. Decision and Order at 7. An administrative law judge may accord less weight to the opinion of a physician which fails to adequately consider the significance of relevant evidence of record. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). Thus, we affirm the administrative law judge's findings with respect to Dr. Hansbarger.

Finally, we turn to employer's arguments regarding the administrative law judge's evaluation of Dr. Tomashefski's[10] opinion, developed after the miner's death, that the miner's disability was due to smoking and was not contributed to by coal workers' pneumoconiosis or coal dust exposure. Employer specifically asserts that the administrative law judge erred in mischaracterizing and selectively analyzing Dr. Tomashefski's opinion to find it based solely on the negative x-ray readings of record, and, thus, contrary to the regulations. Employer's Brief at 32-34; Employer's Exhibit 2. We agree.

In according little weight to Dr. Tomashefski's opinion, that the miner's respiratory failure was due to his smoking induced severe emphysema and chronic bronchitis, that his simple coal workers' pneumoconiosis was too minimal to have caused any impairment, and that neither coal dust nor minimal coal workers' pneumoconiosis contributed to the miner's chronic bronchitis, emphysema, impairment or death, the administrative law judge stated that Dr. Tomashefski based his opinion on the fact that almost all the B-readings were negative and, thus, the coal workers' pneumoconiosis present was so minimal it would cause no respiratory symptoms, impairment or limitation. Decision and Order at 6-7. The administrative law judge found that "accepting Dr. Tomashefski's rationale would necessarily result in the denial of benefits in every case in which the x-ray evidence is negative, because negative x-rays, in Dr. Tomashefski's view, indicate that the impairment 'is so minimal it would cause no respiratory symptoms, respiratory impairment, or limitation.'" Decision and Order at 6-7. The administrative law judge determined that Dr. Tomashefski's opinion was thus contrary to the regulations at 20 C.F.R. §718.202(b) which specifically provide that no claim shall be denied solely on the basis of a negative x-ray. Decision and Order at 7. As employer correctly asserts, however, in preparing his opinion, Dr. Tomashefski reviewed all of the relevant medical evidence of record, including the autopsy report and

[10] Dr. Tomashefski is a Board-certified pathologist.

twenty-six slides of lung tissue which he personally examined. Dr. Tomashefski's sole discussion of the x-ray evidence is contained in his review of the medical evidence, in which he stated: "Re-readings of chest x-ray reports by experienced B-readers were almost all negative for changes of pneumoconiosis. A small minority of x-ray reports indicated small round or irregular opacities of low profusion, consistent with coal workers' pneumoconiosis." Employer's Exhibit 2. In coming to his conclusion that the miner's pneumoconiosis was too mild to have caused any impairment during life, he stated that his opinion was based upon a "review of the medical records, autopsy report, and slides" and at no point emphasized the negative x-ray readings; furthermore, the doctor offered this opinion in the paragraph in which he discussed the "documentation of

sparse coal macules and micronodules…" in the miner's lung. Employer's Exhibit 2. Consequently, as the administrative law judge mischaracterized Dr. Tomashefski's report as based solely on the negative x-rays and thus contrary to the regulations, and, as noted above, further mischaracterized, to varying degrees, the opinions of Drs. Buddington, Schmidt, Dahhan and Castle, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.305, and remand this case for further consideration of all of the medical evidence of record. *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Goode v. Eastern Associated Coal Co.*, 6 BLR 1-1064 (1984); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); Employer's Brief at 32-34; Employer's Exhibit 2; Decision and Order at 6-7. In addition, while we note employer's request that this case be remanded to a different administrative law judge in order to obtain a "fresh perspective," we hold that under the facts of this case, reassignment is not warranted. *See United States v. Lentz*, 383 F.3d 191, 221 (4th Cir. 2004); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated, and this 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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge