BRB No. 05-0945 BLA

MARY F. BEARD (Widow of BOYD T. BEARD) Claimant-Petitioner v. U.S. STEEL CORPORATION Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/14/2006 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Larry L. Rowe, Charleston, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-6291) of Administrative Law Judge Richard A. Morgan rendered on a 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 miner died on August 5, 2002 and claimant filed her claim for survivor's benefits on April 1, 2003. Director's Exhibits 2, 7.

The administrative law judge credited the miner with "at least 22 years" of coal mine employment pursuant to the parties' stipulation.[1] Decision and Order at 4. The administrative law judge determined that because the existence of pneumoconiosis arising out of coal mine employment was established in the miner's successful claim for lifetime benefits, employer was collaterally estopped from relitigating that issue in the survivor's claim. The administrative law judge found, however, that claimant did not meet her burden to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find good cause established for claimant to submit medical evidence in excess of the evidentiary limitations at 20 C.F.R. §725.414. Claimant argues further that the administrative law judge erred in his analysis of the medical evidence. Employer responds, urging affirmance of the denial of benefits but contending that the administrative law judge erred in applying the doctrine of collateral estoppel. The Director, Office of Workers' Compensation Programs (the Director), responds agreeing with claimant that the administrative law judge erred in his analysis of the medical evidence regarding the cause of the miner's death. Specifically, the Director argues that the administrative law judge did not consider that employer's medical expert, Dr. Castle, believed that the miner did not have pneumoconiosis, contrary to the finding made in the miner's lifetime claim for benefits. Claimant has filed a reply brief reiterating her contentions.

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).

Claimant contends that the administrative law judge erred in failing to find good cause established for her to submit a medical report that exceeded the evidentiary limitations of 20 C.F.R. §725.414. Claimant was permitted to "submit, in support of [her] affirmative case . . . no more than two medical reports." 20 C.F.R.

[1] The record indicates that the miner's last coal mine employment occurred in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

§725.414(a)(2)(i). A showing of "good cause" was necessary to exceed that limit. 20 C.F.R. §725.456(b)(1).

The administrative law judge did not abuse his discretion in finding that claimant did not establish good cause. Claimant submitted three medical reports in her affirmative case from Drs. Cohen, Rasmussen, and McClung. She argued that good cause existed to admit the third report from Dr. McClung because he was in a unique position as the miner's treating physician. Hearing Tr. at 21-22. The administrative law judge reviewed Dr. McClung's report and ruled that, although a treating physician's opinion may merit "special consideration," he was not convinced that claimant's justification "rises to the level of good cause." Hearing Tr. at 25-26. Claimant then withdrew Dr. Rasmussen's report and substituted Dr. McClung's report. Hearing Tr. at 26. Claimant argues that the administrative law judge should have found good cause to admit Dr. McClung's report, thus obviating the need to withdraw Dr. Rasmussen's report. It was claimant's burden to convince the administrative law judge that good cause existed. *See Dempsey v. Sewell Coal Co*., 23 BLR 1-47, 1-62 (2004)(*en banc*). The administrative law judge considered claimant's argument, reviewed Dr. McClung's report, and found that good cause was not established. On the facts and arguments presented, we detect no abuse of discretion by the administrative law judge in finding that claimant did not establish good cause. *Dempsey*, 23 BLR at 1-62.

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, 1-87-88 (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 or that death was caused by complications of pneumoconiosis. 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); *Shuff v. Cedar Coal Co*., 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

The record indicates that in October 2001, the miner was diagnosed with small cell cancer of the lung which had spread to his liver and brain. Director's Exhibits 9, 10. He died at home on August 5, 2002. Director's Exhibit 7. No autopsy was performed. The miner's death certificate, completed by Dr. Shah, listed small cell lung cancer as the cause of his death. Director's Exhibit 7. No other causes or conditions were listed.

Three medical reports addressed whether pneumoconiosis caused or hastened the miner's death.[2] Dr. McClung, who is Board-certified in Family Practice and who treated the miner from April 1991 until his death, stated that the miner had pneumoconiosis and "had been on a steady decline from deterioration of his lung disease" in the ten years before he was diagnosed with lung cancer. Claimant's Exhibit 3 at 1. Dr. McClung opined that "had [the miner] not developed lung cancer, he would've died very close to the same time from his chronic lung disease [to] which coal dust exposure materially contributed. Therefore, I believe that coal dust exposure materially contributed to his death." *Id*.

Dr. Cohen, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the miner's medical records and stated that the miner had severe chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure, which required home oxygen therapy. Dr. Cohen indicated that although "we do not have good documentation of [the miner's] medical condition between 3/02 and 8/02 when he passed away," the miner's COPD "more likely than not hastened his death from small cell lung cancer." Claimant's Exhibit 1 at 8, 9. Dr. Cohen was deposed and explained that pneumoconiosis hastened the miner's death by reducing his ability to withstand the lung cancer. Claimant's Exhibit 4 at 17-18, 23, 28, 73, 75-78.

Dr. Castle, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the miner's medical records and concluded that his death was unrelated to pneumoconiosis. Dr. Castle opined that the miner died solely due to small cell lung cancer, an aggressive cancer caused by smoking, which progresses quickly. Employer's Exhibit 1 at 11-12. At his deposition, Dr. Castle opined that even assuming the miner had pneumoconiosis, it played no role in his death because he died exactly when expected for a patient diagnosed with small cell lung cancer. Employer's Exhibit 2 at 7, 10, 13, 15-17, 23-24, 34, 36.

In finding that claimant did not meet her burden of proof, the administrative law judge gave less weight to Dr. McClung's opinion because he was not a pulmonary expert, because his analysis was cursory and poorly reasoned, and because his statement that the miner would have died around the same time from pneumoconiosis even without the lung cancer did not establish that pneumoconiosis caused or hastened his death. Additionally, the administrative law judge found Dr. Cohen's opinion that pneumoconiosis more likely than not hastened the miner's death to be equivocal. By contrast, the administrative law judge found Dr. Castle's opinion that pneumoconiosis played no role in the miner's death

[2] No physician opined that the miner's fatal lung cancer was pneumoconiosis. Claimant's Exhibits 1, 3, 4; Employer's Exhibits 1, 2.

to be "better reasoned and less equivocal than those of Drs. McClung and Cohen." Decision and Order at 15.

Claimant argues that the administrative law judge erred in finding that Dr. McClung's opinion did not establish that pneumoconiosis caused or hastened the miner's death. However, claimant does not challenge the administrative law judge's other reasons for according less weight to Dr. McClung's opinion. As noted, the administrative law judge explained that "Dr. McClung is a family practitioner, *not* a pulmonary expert." Decision and Order at 14 (emphasis in original). Additionally, the administrative law judge found that Dr. McClung's "analysis is somewhat cursory and his conclusion is ambiguous and poorly reasoned." *Id*. The administrative law judge permissibly considered Dr. McClung's credentials and the quality of his medical reasoning in determining the weight to give his opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). Because the administrative law judge provided valid reasons for discounting Dr. McClung's opinion, we need not address claimant's other argument concerning the administrative law judge's analysis of this opinion. *See Kozele v. Rochester and Pittsburgh Coal Co*., 6 BLR 1-378, 1-382-83 n.4 (1983).

Claimant next contends that the administrative law judge erred in finding Dr. Cohen's opinion to be equivocal because the phrase "more likely than not" merely indicates a careful opinion, and is "the legal standard for proof of a prima facie case." Claimant's Brief at 53, 61 (emphasis in original). It is settled that "the meaning of an ambiguous word or phrase and the weight to give the testimony of an uncertain witness are questions for the trier of fact." *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999). Here, the administrative law judge considered both Dr. Cohen's report and deposition testimony and found that "despite Dr. Cohen's attempt to be more conclusive in his deposition testimony," his repeated written statement that pneumoconiosis "more likely than not" hastened the miner's death "demonstrates that his opinion is equivocal." Decision and Order at 14. Substantial evidence supports the administrative law judge's interpretation of Dr. Cohen's opinion, and the Board is not empowered to reweigh the medical evidence. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Therefore, we must reject claimant's allegation of error.

Because the administrative law judge permissibly discounted claimant's medical evidence, we affirm his finding that claimant did not meet her burden to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We therefore affirm the denial of benefits. Consequently, we need not address claimant's and Director's arguments that the administrative law judge did not properly weigh Dr.

Castle's opinion, and we need not address employer's argument that the administrative law judge erred in his application of the doctrine of collateral estoppel.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring and dissenting:

I agree that the administrative law judge did not abuse his discretion in finding that claimant did not establish good cause for exceeding the evidentiary limitations. I also agree that the administrative law judge provided valid reasons for according less weight to Dr. McClung's opinion.

However, I respectfully dissent from the decision to affirm the administrative law judge's analysis of Dr. Cohen's opinion that pneumoconiosis hastened the miner's death from lung cancer. I would remand this case for the administrative law judge to consider Dr. Cohen's opinion as a whole and to reweigh it against Dr. Castle's opinion, while bearing in mind that the miner had pneumoconiosis and was totally disabled by it.

Initially, I would affirm the administrative law judge's finding that employer is collaterally estopped from relitigating the existence of pneumoconiosis arising out of coal mine employment. Those issues were fully litigated and determined in the miner's successful claim for benefits, and no autopsy evidence was available in the survivor's

claim.[3] *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*). Contrary to employer's contention, unlike the situation with autopsy evidence, there is no "CT-scan" exception to the doctrine of collateral estoppel in a survivor's claim. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 890-93, 22 BLR 2-409, 2-417-22 (7th Cir. 2002)(deferring to the agency's judgment that CT-scans are not more reliable than other tests at detecting or excluding pneumoconiosis). Consequently, I would reject employer's argument and affirm the administrative law judge's application of collateral estoppel.

Regarding Dr. Cohen's opinion, claimant's brief adequately argues that the administrative law judge selectively analyzed Dr. Cohen's opinion and that substantial evidence does not support the finding that Dr. Cohen was equivocal as to the cause of the miner's death. Claimant's Brief at 21, 24, 54, 57. The record supports claimant's argument. A full reading of the doctor's entire opinion reflects his unequivocal testimony that pneumoconiosis hastened the miner's death because his lungs were severely damaged from coal dust-related COPD before he contracted cancer, requiring him to be on oxygen. Dr. Cohen explained that once tumors began to take over the miner's lung tissue, he died faster than he otherwise would have because he could not withstand the cancer as long with lungs already damaged by pneumoconiosis. Claimant's Exhibit 1; Claimant's Exhibit 4 at 17-18, 23, 28, 73, 75-78. On this record, it is difficult to understand how Dr. Cohen's opinion can be characterized as equivocal, based on a phrase of careful language in his written report, especially considering that he stated his opinion to a reasonable degree of medical certainty and indicated he was confident in his opinion. Claimant's Exhibit 4 at 32, 78. Accordingly, I would vacate the administrative law judge's finding and remand this case for him to consider Dr. Cohen's opinion as a whole in determining its credibility. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984).

I would also instruct the administrative law judge to reconsider Dr. Castle's opinion as to the cause of the miner's death in light of *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As claimant and the Director argue, Dr. Castle denied that the miner had pneumoconiosis, contrary to the finding that the miner suffered from pneumoconiosis arising out of his coal mine employment. Additionally, as the Director notes, Dr. Castle did not acknowledge that the miner was found totally disabled due to pneumoconiosis as of 1990, or that he needed oxygen for some time before his lung cancer manifested itself. Employer's Exhibit 2 at 9, 14-15, 18, 29, 58. Because of the

[3] As the administrative law judge correctly noted, the finding of pneumoconiosis in the miner's claim was made based on both the x-rays and medical opinions presented. Director's Exhibit 1.

contradiction between Dr. Castle's opinion and the findings that the miner had disabling pneumoconiosis arising out of coal mine employment, I would instruct the administrative law judge on remand that he could only give weight to Dr. Castle's opinion if he provided specific and persuasive reasons for doing so, and that Dr. Castle's opinion "could carry little weight, at the most." *Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83.

Therefore, I would vacate the denial of benefits and remand this case for the administrative law judge to reconsider Dr. Cohen's opinion as a whole, and to reconsider Dr. Castle's opinion consistent with *Scott* and *Toler*.

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BETTY JEAN HALL
Administrative Appeals Judge