BRB No. 07-0908 BLA

C.H. (Widow of H.H.) and o/b/o the Estate of H.H. Claimant-Respondent v. EXCEL MINING, LLC and MAPCO, INCORPORATED Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/29/2008 DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits in the Miner's Estate Claim and Award of Benefits in the Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits in the Miner's Estate Claim and Award of Benefits in the Survivor's Claim (05-BLA-6037, 05-BLA-6038) of Administrative Law Judge Larry S. Merck rendered on claims 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] In his decision, the administrative law judge credited the miner with at least twenty-two years of coal mine employment, as stipulated.[2] The administrative law judge found that claimant established that the miner was totally disabled due to legal pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204(b)(2), (c). Additionally, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both the miner's and survivor's claims.

On appeal, employer challenges the administrative law judge's findings that claimant established that the miner was totally disabled due to legal pneumoconiosis pursuant to Sections 718.202(a)(4), 718.204(b)(2)(iv), (c), and that the miner died due to pneumoconiosis pursuant to Section 718.205(c). Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.

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).

To establish entitlement to benefits on the miner's claim, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R.

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[1] The miner filed his claim on November 25, 2002. Director's Exhibit 2. The miner died on May 15, 2004. Director's Exhibit 33. The miner's widow filed her claim for survivor's benefits on June 18, 2004. Director's Exhibit 30. By Order dated December 6, 2004, Administrative Law Judge Rudolf L. Jansen remanded the claims to the district director for consolidation. Director's Exhibit 28 at 8-9. Consequently, the claims were consolidated.

[2] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

§§718.3, 718.202, 718.203, 718.204. To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1),(3), or 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Because the existence of pneumoconiosis was at issue in both the miner's and survivor's claims, and the parties designated the same evidence in both claims, the administrative law judge addressed this element of both claims in one discussion. Decision and Order at 7. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that the medical opinion evidence established that the miner suffered from legal pneumoconiosis[3] in the form of chronic obstructive pulmonary disease (COPD) arising out of his coal mine employment. In so finding, the administrative law judge determined that the opinion of the miner's treating physician, Dr. Arnett, attributing the miner's COPD to both his smoking and coal dust exposure, was well-reasoned and documented. By contrast, the administrative law judge found that Drs. Powell and Broudy did not adequately explain their opinions that the miner's COPD was due solely to smoking, and he found that Dr. Caffrey did not address whether the miner had legal pneumoconiosis.

Employer contends that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Powell, without considering that these physicians were highly qualified. Employer further asserts that the doctors explained their opinions by "stat[ing] that [the miner's] problems were attributable to cigarette smoking." Employer's Brief at 8. We disagree.

Contrary to employer's contention, the administrative law judge considered that Drs. Broudy and Powell are Board-certified in Internal Medicine and Pulmonary Disease.

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Decision and Order at 11, 20. However, he permissibly found that Dr. Broudy did not adequately explain the basis for his opinion that coal dust exposure did not contribute to the miner's obstructive lung disease. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483-84 (6th Cir. 2007). Substantial evidence supports this finding, as Dr. Broudy provided no explanation for his statement that the miner's obstructive airways disease was due to smoking alone and not in combination with coal dust inhalation. Director's Exhibit 12. The administrative law judge discounted Dr. Powell's opinion because Dr. Powell relied on the obstructive nature of the miner's impairment to conclude that it was due to smoking.[4] Director's Exhibits 10, 13 at 12. Since the definition of legal pneumoconiosis includes any chronic obstructive pulmonary disease arising out of coal mine employment, the administrative law judge reasonably found that Dr. Powell's opinion was not well-reasoned on the issue of whether the miner's obstructive lung disease constituted legal pneumoconiosis.[5] *See* 20 C.F.R. §718.201(a)(2); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19 (2003). We therefore reject employer's contentions.

Employer further asserts that the administrative law judge erred in crediting Dr. Arnett's opinion without identifying his qualifications beyond his status as the miner's treating physician for twenty-six years. Employer further contends that Dr. Arnett's opinion was not well-reasoned or documented. Employer essentially asks the Board to reweigh the evidence, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. The administrative law judge considered that Dr. Arnett is Board-certified in Family Medicine, and found that Dr. Arnett's opinion was well-reasoned and documented

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[4] Specifically, Dr. Powell testified by deposition on April 16, 2003, that:

> The kind of impairment that [the miner] appears to have is . . . consistent with an obstructive defect of cigarette use and not consistent with a restrictive defect that would be present if he [had] an impairment from coal-workers' pneumoconiosis.

Director's Exhibit 13 at 12.

[5] Substantial evidence supports the administrative law judge's additional findings that Dr. Caffrey's opinion that the miner did not have coal workers' pneumoconiosis addressed only whether the miner had clinical pneumoconiosis, and that the miner's medical treatment records and death certificate were not probative on the issue of the existence of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-122 (6th Cir. 2000); Director's Exhibit 34 at 21-22, 29, 40, 42; Employer's Exhibits 1-3. Moreover, no specific challenge to these findings is apparent in employer's brief on appeal.

because it was based on objective studies and took into account both the miner's smoking and coal mine employment histories. Substantial evidence supports this finding, since Dr. Arnett opined that the miner had legal pneumoconiosis based on the miner's chest x-ray showing COPD, his pulmonary function studies showing a pulmonary defect, and his blood gas studies showing hypoxia,[6] and he attributed the miner's COPD "50/50" to coal mine employment and smoking, after noting that the miner was a smoker and had a "long history" of coal mining.[7] Director's Exhibits 11, 35 at 2; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Consequently, we affirm the administrative law judge's finding that Dr. Arnett's opinion was well-reasoned and documented, as the administrative law judge provided two valid reasons for this determination.[8] *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483-84; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Additionally, we affirm the administrative law judge's decision to accord controlling weight to Dr. Arnett's opinion, as that of the treating physician, given that the administrative law judge reasonably found that Dr. Arnett's opinion was the only well-reasoned opinion on the issue of legal pneumoconiosis. *See* 20 C.F.R. §718.104(d)(5); *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483-84. We further affirm the administrative law judge's alternative finding that, even without according controlling weight to Dr.

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[6] The record reflects that, although there was some question as to the validity of the miner's pulmonary function studies, Drs. Powell and Broudy agreed that the studies reflected an obstructive impairment. Director's Exhibits 10, 12. Further, Dr. Powell indicated that the blood gas study he performed revealed mild hypoxemia. Director's Exhibit 10.

[7] As noted above, the administrative law judge credited the miner with at least twenty-two years of coal mine employment. Decision and Order at 5. The administrative law judge stated that he was unable to determine the miner's exact smoking history because there was conflicting evidence. Decision and Order at 4. Employer has not challenged this aspect of the administrative law judge's decision. The administrative law judge noted that Dr. Broudy recorded a twenty-seven pack year history, Dr. Powell recorded a twenty-year smoking history, the miner had testified at a deposition that he smoked in varying amounts over a twenty-year period, and claimant testified that the miner had smoked in his thirties, but later chewed tobacco when working in the mines. *Id.*

[8] Thus, we need not address the administrative law judge's additional statement that Dr. Arnett's opinion was "consistent with" the rebuttable presumption of 20 C.F.R. §718.203(b) that pneumoconiosis in a miner with ten or more years of coal mine employment arose out of such employment.

Arnett's opinion, the result would not change. *See* Decision and Order at 20 n.6. Consequently, we affirm the administrative law judge's finding that the existence of legal pneumoconiosis was established in both claims, pursuant to Section 718.202(a)(4).[9]

With regard to the miner's claim, employer next argues that the administrative law judge erred in finding that the miner had a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv), when "neither Dr. Broudy nor Dr. Powell were [sic] of the opinion that from a pulmonary standpoint the miner was totally disabled." Employer's Brief at 7. Employer's argument lacks merit.

Contrary to employer's contention, the administrative law judge reasonably found that Dr. Powell's opinion, that the miner was unable to perform arduous manual labor due to his moderate obstructive ventilatory defect, constituted a diagnosis of total respiratory disability, because the miner's last coal mine employment as a general laborer required him to load and unload materials, and Dr. Powell was aware of the nature of the miner's employment.[10] *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; Decision and Order at

[9] The administrative law judge further found that employer did not rebut the presumption of 20 C.F.R. §718.203(b) that the miner's pneumoconiosis arose out of coal mine employment. Decision and Order at 23-24. The administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) necessarily obviated the need for a separate inquiry under Section 718.203(b), since the definition of legal pneumoconiosis requires that the miner's chronic obstructive disease have arisen out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

[10] Dr. Powell referred to the miner's employment history form, dated November 21, 2002, which identified the miner's last coal mine employment as a general laborer, equipment operator, and a foreman. Director's Exhibit 3. In a form dated April 20, 2003, the miner's last coal mine employment was described as a section foreman, requiring sitting for thirty minutes a day, standing for three hours a day, and lifting ninety pounds, three times per day, sixty pounds eighteen times per day, and twenty pounds, fifteen times per day. Director's Exhibit 4. Additionally, the miner's last coal mine job required him to carry sixty pounds, eighteen times per day for sixty feet, ninety pounds, three times per day for ten feet, and thirty pounds, four times per day for twenty feet. *Id.* The job also required the miner to operate a roof bolter machine, a shuttle car, and a continuous miner. *Id.* At the hearing on October 12, 2006, claimant testified that the miner worked as a supervisor, operated a hand drill, "shoveled belt," drove machinery, and performed maintenance work. Decision and Order at 4; Transcript at 13-14.

27-28; Director's Exhibits 10; 13 at 11-13. Moreover, the administrative law judge reasonably found that Dr. Broudy's opinion, that it was "difficult to determine" the miner's level of pulmonary impairment, was not a "definitive opinion as to total disability." *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5-6 (1986); Decision and Order at 28; Director's Exhibit 12. We therefore reject employer's argument.

The administrative law judge reasonably found that Dr. Arnett's opinion, that the miner had a totally disabling respiratory or pulmonary impairment, was well-reasoned and documented because it was based on objective testing. *See Barrett*, 478 F.3d at 356-57, 23 BLR at 2-484-85; *Wetzel*, 8 BLR at 1-141; *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306, 1-1309 (1984); Director's Exhibit 11. We therefore affirm the administrative law judge's finding that claimant established that the miner had a totally disabling respiratory or pulmonary impairment based on the medical opinion evidence pursuant to Section 718.204(b)(2)(iv).

The administrative law judge further found that when the pulmonary function studies, blood gas studies, and medical opinions were weighed together, claimant established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*). Employer has not challenged this finding. It is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer lastly argues, with respect to the miner's claim, that the administrative law judge erred in finding that the claimant established that the miner's totally disabling respiratory or pulmonary impairment was due to pneumoconiosis pursuant to Section 718.204(c). We disagree.

Pursuant to Section 718.204(c), the administrative law judge rationally relied on the well-reasoned and well-documented December 2, 2004 report of Dr. Arnett, attributing the miner's lung disease fifty percent to smoking and fifty percent to coal mining, because it was based on objective tests, included in the miner's hospitalization and treatment records, the miner's long history of coal dust exposure, and his symptoms. *See Barrett*, 478 F.3d at 356-57, 23 BLR at 2-484-85; *Wetzel*, 8 BLR at 1-141; *Hall*, 6 BLR at 1-1309; Decision and Order at 29; Director's Exhibits 11, 34, 35 at 2. The administrative law judge permissibly found that the opinions of Drs. Broudy, Caffrey, and Powell were not probative as to disability causation because they were not well-reasoned as to the existence of legal pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 1-185-86 (6th Cir. 1997)*; Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). We, therefore, affirm

the administrative law judge's findings pursuant to Section 718.204(c), and we affirm the award of benefits in the miner's claim.

In the survivor's claim, employer argues that the administrative law judge erred by finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Employer alleges that Dr. Arnett's opinion on this point was conclusory, and that the miner's death certificate and Dr. Caffrey's opinion established that the miner's death was due to lung cancer and not pneumoconiosis. Employer's argument lacks merit.

Pursuant to Section 718.205(c), the administrative law judge rationally found that Dr. Arnett's opinion that the miner's death was due to legal pneumoconiosis was well-reasoned and documented because it was supported by the physician's treatment notes and the miner's hospitalization records, and because the physician had treated the miner for twenty-six years. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330-31 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 30-31; Director's Exhibits 34, 35 at 2; Employer's Exhibits 1, 2. Although employer alleges that Dr. Arnett's opinion was conclusory and unsupported, the administrative law judge considered that Dr. Arnett's opinion, set forth in responses to two brief medical questionnaires, was supported by the doctor's treatment notes and the doctor's "familiarity with [the] [m]iner's condition due to his special relationship with [the] [m]iner as his treating physician for twenty-six years," in addition to the miner's hospital records. Decision and Order at 13-14, 31. Further, the administrative law judge acted within his discretion in finding that Dr. Arnett had explained that the miner's COPD, or legal pneumoconiosis, played a hastening role in the miner's death by contributing to his chronic hypoxia and pneumonia. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Director's Exhibit 35 at 2. As the United States Court of Appeals for the Seventh Circuit observed in *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 335, 22 BLR 2-581, 2-588 (7th Cir. 2002), "the proposition that persons weakened by pneumoconiosis may expire quicker from other diseases *is* a medical point, with some empirical support. *See* 65 Fed.Reg. 79,920, 79,950 (Dec. 20, 2000)" (emphasis in original). The administrative law judge rationally gave the death certificate little weight on the issue of whether the miner's death was due to legal pneumoconiosis because the qualifications of Dr. Kousa, who completed the death certificate, were not in the record, and there was no apparent basis for Dr. Kousa's conclusion that the sole cause of death was lung cancer. *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Director's Exhibit 33. Additionally, the administrative law judge rationally found that, although Dr. Caffrey's opinion that clinical coal workers' pneumoconiosis did not contribute to the miner's death was well-reasoned, his opinion did not address whether the miner's legal pneumoconiosis hastened his death, and the opinion therefore merited no weight on that issue. *See Cornett*, 227 F.3d at 577, 22 BLR at 2-122; Decision and Order at 31-32; Employer's Exhibit 3 at 3-4. Based on the foregoing, we affirm the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to Section

718.205(c). Consequently, we affirm the administrative law judge's award of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order - Award of Benefits in the Miner's Estate Claim and Award of Benefits in the Survivor's Claim is affirmed.

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