BRB No. 98-1518 BLA

JANET R. ELKINS (o/b/o and Widow of BOBBY L. ELKINS) Claimant-Petitioner v. CLINCHFIELD COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (97-BLA-1531) of Administrative Law

[1] Claimant, Janet R. Elkins, is the widow of Bobby L. Elkins, the miner, who died on May 28, 1996. Director's Exhibit 7 [survivor's exhibit (S)]. (Apparently, the exhibits for both claims were placed in the same file but were not consolidated into one entire evidentiary record. For purposes of this decision, therefore, the exhibits associated with the miner's claim are noted by "M" and those associated with the survivor's claim are noted by "S"). The miner filed his application for benefits on May 12, 1987. M-Director's Exhibit 1. The

Judge Edward J. Murty, Jr. denying benefits on both miner's and survivor's 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). In the initial Decision and Order, Administrative Law Judge John S. Patton adjudicated the miner's claim pursuant to 20 C.F.R. Part 718, credited the miner with "at least" twenty-five years of qualifying coal mine employment, and found that the miner established all requisite elements of entitlement. Accordingly, benefits were awarded. M-Director's Exhibit 34. Employer appealed and the Board affirmed Administrative Law Judge Patton's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2), but remanded the case for him to determine whether the miner's lung cancer would satisfy the definition of pneumoconiosis pursuant to 20 C.F.R. §718.201, and to make findings pursuant to 20 C.F.R. §§718.203(b), 718.204(c), and if reached, 718.204(b). *Elkins v. Clinchfield Coal Co.*, BRB No. 90-717 BLA (May 21, 1991)(unpub.); M-Director's Exhibit 37. Due to Administrative Law Judge Patton's retirement, the case was reassigned to Administrative Law Judge Aaron Silverman, who found that the miner's lung cancer did not satisfy the definition of statutory pneumoconiosis under Section 718.201. Administrative Law Judge Silverman also found, however, that the miner's clinical pneumoconiosis that was previously established pursuant to Section 718.202(a)(2) arose out of coal mine employment pursuant to Section 718.203(b), but that his total disability was not due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, benefits were denied. M-Director's Exhibit 39. The miner appealed and the Board affirmed Administrative Law Judge Silverman's denial of benefits. *Elkins v. Clinchfield Coal Co.*, BRB No. 92-1925 BLA (Feb. 8, 1994)(unpub.); M-Director's Exhibit 42. Subsequently, the Board denied the miner's request for reconsideration. *Elkins v. Clinchfield Coal Co.*, BRB No. 92-1925 BLA (Jun. 27, 1996)(unpub. Order); M-Director's Exhibit 47. Thereafter, the miner filed a petition for modification, M-Director's Exhibit 48, but died on May 28, 1996, before a decision was rendered. S-Director's Exhibit 7. Claimant filed her survivor's claim on July 24, 1996. S-Director's Exhibit 1. The claims were consolidated and a hearing was held by Administrative Law Judge Murty (administrative law judge) who issued the Decision and Order currently under review. He determined that neither the miner's disability nor his death was due to pneumoconiosis under Sections 718.204(b) and 718.205(c).[2] Accordingly, the administrative law judge denied benefits on both the miner's and survivor's claims.

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widow filed her application for benefits on July 24, 1996. S-Director's Exhibit 1. Both claims are presently pending.

[2] The administrative law judge, however, did not make separate findings under Section 718.204(b) relative to the miner's claim and Section 718.205(c) relative to the survivor's claim, but rather combined his analyses of the medical evidence for each issue.

On appeal, claimant argues that the administrative law judge erroneously failed to find that the miner's coal dust exposure contributed to the progression of his lung cancer, resulting in his total disability and death. Employer responds, urging affirmance of the denials on both claims. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he will not participate in this appeal.

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 the applicable law, they are binding upon this Board and may not be disturbed. 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 argues that the administrative law judge erroneously failed to accord determinative weight to the opinion of Dr. Robinette, the miner's treating physician, that the miner's totally disabling respiratory impairment was coal dust related and that his pneumoconiosis hastened death.[3] Contrary to claimant's argument, however, although the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, and the Benefits Review Board have held that the opinions of treating physicians may be accorded special weight based on that status, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Revnak v. Director, OWCP*, 7 BLR 1-771 (1985) neither "has ever fashioned either a requirement or a presumption that treating or examining physicians' opinions be given greater weight than opinions of other expert physicians." Therefore, we reject claimant's contention that Dr. Robinette's status as a treating physician alone entitles his opinion to dispositive weight. *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-128-189 (4th Cir. 1993); *see also Grigg v. Director, OWCP*, 28 F.3d 416, 420, 18

[3] Dr. Robinette treated the miner when he was hospitalized in 1995 up until the miner's death in 1996 and wrote several hospital reports. S-Director's Exhibit 19. In a report dated November 18, 1996, Dr. Robinette reviewed all of the medical records and opined that the miner "suffered as a result of complications from his pulmonary disease and coal workers' pneumoconiosis with associated emphysematous change contributing significantly to his demise." S-Director's Exhibit 12.

BLR 2-299, 2-307 (4th Cir. 1994). Rather, this is one factor the administrative law judge may consider in weighing the medical opinion evidence. *See Grigg*, *supra*; *Revnak, supra*.

Claimant additionally argues that the administrative law judge mischaracterized Dr. Robinette's opinion by finding that Dr. Robinette did not consider the miner's cigarette smoking history when determining whether the miner's condition was related to coal dust exposure.[4] In according little weight to Dr. Robinette's opinion, the administrative law judge stated that:

> ...Dr. Robinette seemed to avoid consideration of the miner's smoking abuse in fixing responsibility for the miner's pulmonary problems. Mr. Elkins had one of the more egregious smoking habits which I have seen in my nineteen years as a black lung judge. I have no doubt that it caused him to lose his lung and ultimately his life. To read the reports of Drs. Vanover and Robinette, you would never know he was a smoker. These doctors are less than candid. Similar behavior has led me to disregard the findings of Dr. Robinette in the past [citations omitted]. I do so again.

[4] During the formal hearing held before Administrative Law Judge Patton on April 24, 1989, the miner testified that he smoked at least one pack of cigarettes per day for forty years. M-Director's Exhibit 32 at 23-25. The miner additionally testified that he informed Dr. Prince that he had a seventy pack year history. M-Director's Exhibit 32 at 24.

Decision and Order at 4. Although it is a permissible exercise of the administrative law judge's discretion to find less persuasive a physician's opinion on the cause of disability because the physician relied upon an understated cigarette smoking history, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985), there is no evidence of record to suggest that Dr. Robinette's notation that the miner "smoked in the past" and was a non-smoker during the course of his treatment constituted either a failure to adequately consider the smoking history or an effort to evade this issue. *See* S-Director's Exhibit 19. Therefore, the administrative law judge's proffered ground does not support his rejection of Dr. Robinette's opinion on the effect of pneumoconiosis on the miner's respiratory condition. *See Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 362, 16 BLR 2-57, 2-61 (7th Cir. 1992). Furthermore, the administrative law judge engaged in medical speculation without foundation in the evidence of record by concluding that the miner's smoking habits "caused him to lose his lung and ultimately his life." *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *Wetherill v. Director, OWCP*, 812 F.2d 376, 382, 9 BLR 2-239, 2-247 (7th Cir. 1987); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986) (administrative law judge "cannot substitute his expertise for that of qualified physician, and, absent countervailing clinical evidence, or a valid legal basis for doing so, cannot simply disregard medical conclusions of a qualified physician."); *Dolzanie v. Director, OWCP*, 6 BLR 1-865, 1-867 (1984).[5] Moreover, because the administrative law judge is required to conduct a *de novo* review of the evidence of record in its entirety and to adjudicate each case independently, the administrative law judge impermissibly relied on analogous cases in which he had previously rejected Dr. Robinette's opinion for similar reasons. Decision and Order at 4. *See* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Claimant additionally avers that the administrative law judge improperly rejected the opinions of Drs. Vanover and Abrenio by relying on a statement made by United States Supreme Court Justice Marshall in *Usery v. Turner-Elkhorn Mining Co.*, 96 S.Ct. 2882, 3 BLR 2-36 (1976), that simple pneumoconiosis is generally regarded as seldom productive of significant respiratory impairment. The administrative law judge specifically noted that the statements of Drs. Vanover and Abrenio that persons suffering from pneumoconiosis have markedly abnormal pulmonary function are difficult to accept in the face of Justice Marshall's statement in *Usery*, that simple pneumoconiosis is seldom productive of respiratory impairment. Decision and Order at 4.

[5] A review of the record reveals that Drs. Fino and Scott were the only two out of twelve physicians of record rendering opinions regarding total disability causation who listed the miner's cigarette smoking history as one of the factors contributing to his pulmonary impairment. M-Director's Exhibit 29; S-Employer's Exhibit 4.

We agree with claimant. An examination of *Usery* indicates that while the administrative law judge has accurately cited this case, this passage does not preclude the possibility that simple pneumoconiosis can cause a respiratory impairment. *See Usery*, 3 BLR at 38; Decision and Order at 4. Consequently, this statement alone is an insufficient basis upon which to support a rejection of the reports of Drs. Abrenio and Vanover. Since the administrative law judge's analysis of the evidence is unsound, we vacate the administrative law judge's discrediting of the opinions of Drs. Vanover and Abrenio for the reason given.

Finally, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) claimant contends that, the administrative law judge erred in crediting employer's physicians who assumed that only clinical pneumoconiosis can be disabling and ignored the definition of legal pneumoconiosis at 20 C.F.R. §718.201 which includes any chronic pulmonary disease resulting in respiratory ... impairment ... substantially aggravated by dust exposure in coal mine employment. Claimant, however, cites no specific error. Accordingly, we have no basis upon which to review the administrative law judge's findings regarding this issue. *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Further, claimant contends administrative law judge erred in incorporating by reference Judge Patton's discussion of the medical evidence in pages 6-9 of his Decision and Order at 2; Brief for claimant at 3-4, but claimant cites no specific error made by Judge Patton. *Fish*, *supra*.

Consequently, we vacate the administrative law judge's determinations that claimant failed to demonstrate that the miner's total disability was due to pneumoconiosis, *see Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), and that his death was due to pneumoconiosis, *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), inasmuch as these findings are unsupported by substantial evidence, and we remand this case for the administrative law judge to reconsider and weigh all the evidence of record, and render separate, specific findings of fact with respect to the aforementioned issues. Moreover, as the miner filed a petition for modification on his claim prior to his death, M-Director's Exhibit 48, on remand the administrative law judge must consider whether modification has been established in the miner's claim. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6-11 (1994)(*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Accordingly, the Decision and Order of the administrative law judge denying benefits on both the miner's and survivor's claims is vacated and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge