BRB No. 04-0460 BLA

NORA L. HORNE (Widow of DAVID HORNE)	)	
Claimant-Respondent	)	
v.	)	
BISHOP COAL COMPANY	)	DATE ISSUED: 02/24/2005
and	)	
CONSOL ENERGY, INCORPORATED	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Dorothea J. Clark and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Barry H. Joyner (Howard M. Radzely, 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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (03-BLA-5221) of Administrative Law Judge Alice M. Craft on a survivor's claim[1] 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that the miner worked for thirty-four years in qualifying coal mine employment. Applying *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), the administrative law judge concluded that employer was not precluded from contesting the existence of pneumoconiosis in the survivor's claim even though the existence of pneumoconiosis had been established in the miner's claim because the law applied in the miner's claim was changed by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) (all relevant medical evidence must be considered together rather than merely within discrete subsections of Section 718.202(a) in determining presence of pneumoconiosis).

Turning to the merits of the case, the administrative law judge found that claimant established that the miner suffered from pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment and that the miner's pneumoconiosis substantially contributed to his death. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(c). Accordingly, the administrative law judge awarded benefits to commence from February 2002, the month in which the miner died.

On appeal, employer/carrier argue that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis and death due to pneumoconiosis. Additionally, for appellate purposes, employer maintains that all the evidence which was excluded pursuant to the "arbitrary and capricious limitations" set forth in the amended regulation at 20 C.F.R. §725.414 is admissible since all relevant evidence should be considered. Employer's Brief in Support of Petition for Review at 1 n.2. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a limited response letter taking no position on the question of entitlement, but urging that employer's arguments regarding the provision at 20 C.F.R. §725.414 be rejected. Disagreeing with employer's "implicit" argument that 20 C.F.R. §725.414 is invalid, the Director argues that Section 725.414 is consistent with the Act and the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), because evidentiary limitations are a valid exercise

[1] Claimant, Nora L. Horne, is the widow of David Horne, the miner who died on February 17, 2002. Director's Exhibit 3. Claimant filed her application for benefits on February 28, 2002. Director's Exhibit 2.

of the rulemaking authority of the Secretary of the Department of Labor.[2] Employer filed a reply brief responding to claimant's arguments and reiterating its arguments on 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis without first weighing it against the contrary negative x-ray evidence in accordance with *Compton*. We disagree.

A review of the Decision and Order reveals that the administrative law judge's consideration of the evidence satisfies the holding in *Compton*. Considering the x-ray evidence at Section 718.202(a)(1), the administrative law judge found that while numerous x-rays taken between 1974 and 1998 in connection with the miner's claims were read as both positive and negative, the only classified x-rays submitted in connection with the survivor's claims were read as negative; however, the administrative law judge concluded that the existence of pneumoconiosis could not be established by x-ray evidence alone. Decision and Order at 29. Turning to the medical opinion evidence, the administrative law judge credited the opinions of Drs. Mack and Motos, the miner's treating physicians, as well as the opinions of Drs. Piriz, Abernathy, Taylor, Fino, Iosif, Perper, Robinette, and Forehand who found the existence of pneumoconiosis and, concluded that this evidence established that the miner suffered from pneumoconiosis during his lifetime because these opinions were better reasoned and documented than the contrary opinions of Drs. Bush, Spagnolo and Tuteur. The administrative law judge stated that the physicians who diagnosed the existence of pneumoconiosis found support in the objective medical evidence, including many of the x-ray readings that were read as positive by numerous B-readers and/or board-certified radiologists. Hence, the administrative law judge concluded that the opinions of the physicians who found the existence of pneumoconiosis were worthy of determinative weight and that the contrary evidence was insufficient to outweigh that evidence. Decision and Order at 31. This finding was reasonable and complies with the holding in *Compton* that all evidence relevant to the existence of pneumoconiosis must be considered and weighed together. Accordingly, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis. *See Compton,* 211 F.3d at 211, 22 BLR at 2-174.

[2] Because employer raises its argument regarding the evidentiary limitations at 20 C.F.R. §725.414 purely to preserve it for appeal purposes, we will not address it or the Director's response thereto. *See* Employer's Brief in Support of Petition for Review at 1 n.2.

Employer also contends that the administrative law judge erred in granting an automatic preference to the miner's treating physicians to find that the medical opinion evidence established the existence of pneumoconiosis. Employer argues that the administrative law judge not only improperly accorded greater weight to the opinions of the treating physicians based on their treating physician status but also impermissibly failed to consider their opinions in light of the factors set forth in Section 718.104(d), the regulation that governs consideration of the opinions of treating physicians. Employer argues further that in assessing the credibility of the conflicting medical opinions, the administrative law judge failed to weigh and consider the "excellent" credentials of the physicians who opined that the miner did not suffer from pneumoconiosis.

Contrary to employer's argument, the administrative law judge did not mechanically accord greater weight to the opinion of the treating physicians. Rather, the administrative law judge acknowledged the fact that whether a physician treated the miner was only one factor to be taken into consideration in weighing the medical opinions, but that the credibility of each opinion considered as a whole, in light of their reasoning and documentation, must be taken into consideration in weighing the medical opinion evidence. Decision and Order at 30.

In this case, the administrative law judge conducted both a quantitative and qualitative assessment of the medical opinions and determined that the opinions of those physicians who found the existence of coal workers' pneumoconiosis, Drs. Mack, Motos, Iosif, Piriz, Abernathy, Taylor, Fino, Robinette, Forehand, and Perper, were more probative and entitled to greater weight than the opinions of the physicians who did not, Drs. Bush, Tuteur, and Spagnolo. The administrative law judge found the opinions of Drs. Mack and Motos, the miner's treating physicians, entitled to significant weight based on their detailed and extensive records during the miner's numerous hospitalizations, their detailed description of the miner's significant lung disease through their years of treating the miner, and their knowledge of the miner's smoking history. The administrative law judge's determination that their opinions were entitled to greater weight was, therefore, rational. *See Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-128-129 (4th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 30. Likewise, we reject employer's contention that the administrative law judge failed to consider the treating physicians' opinions in light of the factors articulated in Section 718.104(d) since the administrative law judge cited to Section 718.104(d) in assessing the weight to accord the treating physicians' opinions, specifically referring to the "many years" that Drs. Mack and Motos treated the miner for lung disease. 20 C.F.R. §718.104(d)(1)-(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-188, 22 BLR 2-564, 2-571 (4th Cir. 2002); *Grizzle*, 994 F.2d at 1097, 17 BLR at 2-128-129; *accord Lango v. Director, OWCP*, 104 F.3d 573, 21

BLR 2-12 (3d Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-6 (1989); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984); Decision and Order at 30-31.

Further, contrary to employer's argument, the administrative law judge may, but is not required to, accord greater weight to the opinions of physicians with superior expertise or qualifications.[3] In this case, the administrative law judge was aware of the credentials of Drs. Spagnolo, Bush, and Tuteur, the physicians who opined that the miner did not have pneumoconiosis, but nonetheless accorded greater weight to the opinions of Drs. Iosif, Piriz, Abernathy, Taylor, Fino, Robinette, Forehand and Perper, who diagnosed the existence of pneumoconiosis, as she found them to be better reasoned and documented. Decision and Order at 31. This was permissible. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998) (in weighing medical opinions, administrative law judge should consider quality of experts, opinion's reasoning, physician's reliance on objectively determinable symptoms and established science, detail of analysis, and freedom from irrelevant distractions and prejudices); *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997) (administrative law judge may weigh medical evidence and draw her own conclusions); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).

Employer also asserts that the administrative law judge erred in finding that the opinions of Drs. Robinette, Forehand, and Perper, supported a finding of simple pneumoconiosis when these doctors found that the miner had complicated pneumoconiosis, a diagnosis the administrative law judge had rejected. Employer contends that because the administrative law judge did not find the existence of complicated pneumoconiosis, she should not have credited the opinions of Drs. Perper, Robinette, and Forehand. The administrative law judge did not, however, specifically discount or discredit the diagnoses of complicated pneumoconiosis rendered by Drs. Perper, Robinette and Forehand; rather, the administrative law judge found that the relevant evidence, as a whole, was not sufficient to establish the existence of complicated pneumoconiosis at Section 718.304, *i.e.*, the

[3] Although the administrative law judge did not specifically address the physicians' credentials under her analysis of the medical opinions, Decision and Order at 27-31, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), any error is harmless in light of the administrative law judge's valid, alternative reasons for according less weight to the opinions of Drs. Bush, Tuteur, and Spagnolo. Moreover, the administrative law judge listed the physicians' credentials when she summarized and described their findings. Decision and Order at 11-27. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5; *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

administrative law judge accorded greater weight to the x-ray readings of the better qualified physicians, who did not find the existence of complicated pneumoconiosis. Such a finding does not, as employer contends, render a diagnosis of simple pneumoconiosis suspect or mitigate against a finding of simple pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4).

Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis because it was supported by x-ray evidence when, in fact, the administrative law judge found that the x-ray evidence failed to establish the existence of pneumoconiosis. A finding that x-ray evidence alone does not establish the existence of pneumoconiosis, does not, however, preclude a finding that the medical opinion evidence, when weighed with the x-ray evidence, establishes the existence of pneumoconiosis. *See Compton*, 211 F.3d 203, 22 BLR 2-162; *see also Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 -14 (1996); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986).

In this case, the administrative law judge found that the medical opinions diagnosing the existence of pneumoconiosis were supported by "many" of the x-ray interpretations of record. This is not inconsistent with her finding that the x-ray evidence as a whole failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). In her analysis of the x-ray evidence under Section 718.202(a)(1), the administrative law judge found that while the record contained numerous x-rays taken between 1974 and 1998, submitted in support of the miner's two claims, that were read as both positive and negative for the existence of pneumoconiosis, the only "classified" x-ray interpretations submitted in support of the survivor's claim were read as negative for the existence of pneumoconiosis. She concluded, therefore, that she could not find that "the x-ray evidence alone" established the existence of pneumoconiosis. Decision and Order at 29. The administrative law judge concluded that the opinions of the physicians who found evidence of pneumoconiosis were supported by "objective medical evidence, including many of the x-ray readings." Decision and Order at 31. Hence, contrary to employer's assertion, the administrative law judge did not render an inconsistent determination. *See Church*, 20 BLR at 1-13-14; *Taylor*, 9 BLR at 1-24. Accordingly, we affirm the administrative law judge's finding that the existence of pneumoconiosis was established in this survivor's claim.

We turn next to employer's argument that the administrative law judge erred in finding that claimant established that the miner's death was due to pneumoconiosis. Employer avers that the administrative law judge erred by failing to provide a rationale for her determination that the miner's death was due to pneumoconiosis in accordance with the APA. Specifically, employer argues that the administrative law judge irrationally relied on the miner's treating records and examining physicians' opinions because these records were obtained during the miner's lifetime and, therefore, fail to address the cause of death. Consequently, employer asserts that the administrative law judge erred in crediting the

opinions of Drs. Perper, Motos, and Iosif over the contrary opinions of Drs. Bush, Spagnolo, and Fino, who opined that pneumoconiosis neither caused nor contributed to the miner's demise.

Contrary to employer's contention, however, the administrative law judge fully explained her findings of fact and conclusions of law and provided a complete analysis of the conflicting evidence under Section 718.205(c) that comports with the APA. In finding that the miner's death was caused by a progressive and relentless deterioration of his respiratory status due to coal workers' pneumoconiosis, the administrative law judge relied on the consulting opinion of Dr. Perper who reviewed all the medical records, the death certificate of Dr. Motos, and the diagnosis by Dr. Iosif of terminal advanced coal workers' pneumoconiosis because these physicians' opinions were supported by the voluminous treatment records detailing the miner's severe pulmonary condition that ultimately resulted in his death and were further bolstered by the opinion of Dr. Forehand. Finding that the "vast majority of physicians" opined that the miner suffered from a severe pulmonary condition arising out of dust exposure in coal mine employment, the administrative law judge reasonably found that the contrary opinions of Drs. Bush, Spagnolo, and Fino were not persuasive because these physicians failed to adequately explain or to effectively rule out the role of the miner's thirty-four years of underground coal mine dust exposure, given the clear evidence in this case demonstrating the history of the miner's treatment for severe lung disease which progressively worsened and, eventually caused his death. This was rational. *See Underwood*, 105 F.3d at 951, 21 BLR at 2-32 (administrative law judge must determine whether medical opinion contains adequate explanation for its conclusions); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 1189, 7 BLR 2-202, 2-207 (4th Cir. 1985); *Fagg*, 12 BLR at 1-77; *Tackett v. Cargo Mining Co.*,12 BLR 1-11, 1-14 (1988) (*en banc*); Decision and Order at 32. Recognizing that Dr. Fino, unlike Dr. Bush and Dr. Spagnolo, conceded the existence of pneumoconiosis and opined that the miner died a pulmonary death, the administrative law judge found that Dr. Fino's opinion was undermined because he insisted that cigarette smoking was the sole cause of death notwithstanding his admission that he could not rule out pneumoconiosis as a contributor to the miner's chronic obstructive pulmonary disease. Accordingly, the administrative law judge's discounting of the opinions of Drs. Bush, Spagnolo, and Fino was rational and supported by substantial evidence. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989) (administrative law judge need not accept opinion of any particular medical expert, but must weigh all evidence and draw her own conclusions and inferences). Hence, we reject employer's arguments because credibility determinations are matters of consideration for the administrative law judge, and if rational and supported by substantial, shall not be disturbed. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trumbo*, 17 BLR at 1-88-89; *Clark*, 12 BLR at 1-149; *Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984);

Decision and Order at 32. Thus, because the administrative law judge's analysis constitutes a proper evaluation of the medical evidence, we affirm her determination that the credible evidence of record is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Accordingly, the Decision and Order Granting Benefits of the administrative law judge is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge