BRB No. 05-0402 BLA

RUTH MCKEE (Widow of MARION MCKEE)	)	
Claimant-Petitioner	)	
v.	)	
PAT WHITE FUELS, INCORPORATED	)	
	)	DATE ISSUED: 02/21/2006
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

David H. Neeley (Neeley Law Office, P.S.C.), Prestonburg, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denial of Benefits (04-BLA-5091) of Administrative Law Judge Daniel J. Roketenetz rendered on a survivor's claim filed

[1] Claimant is the widow of the deceased miner, Marion McKee, who died on March 2, 2001. Director's Exhibit 7. Claimant filed the instant survivor's claim on June 11, 2001. Director's Exhibit 3. Benefits were awarded by the district director on May 6, 2003. Director's Exhibit 25. Employer requested a hearing before an administrative law judge. Director's Exhibits 26, 32. The miner previously filed his first claim on October

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 administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment.[2] 20 C.F.R. §§718.202(a)(1)-(a)(4), 718.203. The administrative law judge, however, found the evidence of record insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. § 718.205(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that the record contains no evidence of complicated pneumoconiosis. Claimant also asserts that the administrative law judge erred in finding that the opinions of Drs. Fino and Westerfield support a finding that pneumoconiosis did not cause, contribute to, or hasten the miner's death. Employer responds, urging affirmance of the administrative law judge's finding that the miner's simple pneumoconiosis did not cause, contribute to, or hasten his death. Employer further argues that the administrative law judge did not err in failing to consider the evidence of complicated pneumoconiosis. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that 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 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).

10, 1984. Director's Exhibit 1. The Office of Workers' Compensation Programs denied the claim on August 5, 1985. *Id.* The miner filed a second claim on January 21, 1998, and it was finally denied by the Decision and Order of this Board, which affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis. *See McKee v. Pat White Fuels, Inc.*, BRB No. 00-0892 BLA (Aug. 31, 2001) (unpub.).

[2] The administrative law judge determined that the parties stipulated to "timeliness, the claimant['s husband] being a miner, post-1969 employment, the named Employer as the responsible operator, and eleven years of coal mine employment." Decision and Order at 2, n.3. The administrative law judge's findings that claimant established simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203 are not challenged on appeal, and thus we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(2), (c)(5); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).[3]

Section 411(c)(3) of the Act provides an irrebuttable presumption of death due to pneumoconiosis, if the miner suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). All relevant evidence must be weighed prior to invocation; where the record contains evidence in more than one category, the various categories of evidence must be weighed against each other before the presumption can be invoked. 20 C.F.R. §718.304; *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Corp.*, 16 BLR 1-31 (1992).

Claimant argues that the administrative law judge failed to consider whether the evidence establishes invocation of the irrebuttable presumption of death due to pneumoconiosis, and erred in finding that "the record contains no evidence of complicated pneumoconiosis." Decision and Order at 5. Employer responds that, in the miner's claim, evidence of large opacities was considered, and, after weighing, was determined by the administrative law judge not to be sufficient to establish complicated pneumoconiosis. Employer, noting the Board's decision affirming the administrative law judge's finding of no complicated pneumoconiosis, further asserts that "[n]othing occurred in the interim." Employer's Brief at 12. Thus, employer argues, there is no

[3] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

need to consider the x-ray evidence of complicated pneumoconiosis in this survivor's claim.

The x-ray evidence consists of Dr. Sargent's interpretation of an x-ray dated February 13, 1998 as positive for simple pneumoconiosis, 1/0, and "C" opacities. Director's Exhibit 12. Dr. Barrett read the same x-ray (February 13, 1998) as positive for pneumoconiosis, 1/1, and large "C" opacities. *Id.* Drs. Sargent and Barrett are dually qualified as both B readers and Board-certified radiologists *Id.* Two negative interpretations by Dr. Fino, of x-rays dated January 26, 1999 and February 25, 1999, were also submitted. Director's Exhibit 24. Dr. Fino is a B reader. *Id.* Finding that Drs. Sargent and Barrett possessed superior credentials, the administrative law judge accorded greater weight to their positive interpretations of simple pneumoconiosis. Decision and Order at 7. The administrative law judge noted that Dr. Sargent "also indicated large "C" opacities." Decision and Order at 6. Although Dr. Barrett also marked large "C" opacities, the administrative law judge did not address that notation. Director's Exhibit 12.

In the miner's claim, Administrative Law Judge Robert L. Hillyard stated:

> Based on a review of the record evidence, I find that the evidence weighing against a finding of complicated pneumoconiosis is at least as strong as the evidence weighing in favor of such a finding. Consequently, the claimant has failed to prove by a preponderance of the evidence that he suffers from complicated pneumoconiosis…

Administrative Law Judge's Decision and Order - Denial of Benefits dated May 18, 2000 (miner's claim). Judge Hillyard, however, did not consider the same evidence as is present in the instant case. Rather, he considered fifty-two interpretations of sixteen x-rays and he also found that the evidence of record did not establish the existence of simple pneumoconiosis. *Id.* We reject employer's assertion that the evidence of record cannot be sufficient to establish complicated pneumoconiosis in this survivor's claim, which was filed after January 19, 2001, and thus is subject to new limitations on evidence. *See* 20 C.F.R. §725.414. Because the administrative law judge failed to consider the evidence of complicated pneumoconiosis, and mischaracterized the record as containing no such evidence, we remand the case to the administrative law judge to consider such evidence at 20 C.F.R. §§718.202(a)(3); 718.304. If the administrative law judge finds that the evidence of record establishes the existence of complicated pneumoconiosis, then claimant is entitled to the irrebuttable presumption that death was due to pneumoconiosis, and the administrative law judge need not make specific findings at 20 C.F.R. §718.205(c). *See Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988).

Claimant also argues that other notations on x-rays support a finding of complicated pneumoconiosis; i.e., pleural thickening, chronic inflammatory changes, heavy densities and heavy scarring. Director's Exhibit 9. However, none of these notations constitutes evidence of large opacities greater than one centimeter in diameter, as required by Section 718.304(a). Moreover, they do not constitute biopsy or autopsy evidence to be considered pursuant to Section 718.304(b). Nor do these notations diagnose, by other means, a condition which could reasonably be expected to yield results as described in paragraph (a) or (b). *See* 20 C.F.R. §718.304(c). Because these notations are insufficient to establish complicated pneumoconiosis, the administrative law judge need not consider them at Section 718.304 on remand.

Claimant next asserts that the administrative law judge erred in relying on the opinion of Dr. Fino to find that pneumoconiosis did not cause, contribute to, or hasten death pursuant to Section 718.205(c). Claimant asserts that Dr. Fino found that the miner did not have pneumoconiosis, as he read x-rays as negative, and thus his opinion as to cause of death is entitled to little or no weight. Claimant cites *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) in support of her position. The United States Court of Appeals for the Sixth Circuit has held that medical opinions which fail to find that a miner had pneumoconiosis, when the administrative law judge has found the existence of pneumoconiosis established, are of little help to the analysis at causation. *See generally Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1231, 114 S.Ct. 2732, 19 BLR 2-44 (1994). In the instant case, Dr. Fino read two x-rays as negative for the existence of pneumoconiosis, and opined that coal workers' pneumoconiosis did not cause, contribute to, or hasten the miner's death. Director's Exhibits 11, 24. Since the administrative law judge found that the x-ray evidence establishes the existence of pneumoconiosis, Dr. Fino's opinion that the miner did not have pneumoconiosis should have been accorded little weight on the issue of whether the miner's death was due to pneumoconiosis. *Id.* Based on the administrative law judge's erroneous consideration of Dr. Fino's opinion, we vacate the administrative law judge's finding at Section 718.205(c), and instruct the administrative law judge, on remand, to reconsider the medical opinion evidence, if the issue of causation at Section 718.205(c) is reached.

Further, at Section 718.205(c), claimant argues that the opinion of Dr. Westerfield, who only reviewed medical records in this claim, should be accorded little weight. Dr. Westerfield reviewed the miner's records and opined that coal workers' pneumoconiosis did not cause, contribute to, or hasten the miner's death.[4] The administrative law judge

[4] Claimant asserts that Dr. Westerfield did not render an opinion as to the existence of pneumoconiosis, except by reference in his deposition. Director's Exhibit 15. Claimant concedes that Dr. Westerfield stated in his deposition that he had

credited Dr. Westerfield's opinion both because of his credentials as a physician Board-certified in Internal Medicine and Pulmonary Diseases, and because he found this physician's opinion well-reasoned and well-documented. In support of her position, claimant cites *McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988), wherein the United States Court of Appeals for the Eleventh Circuit held that an administrative law judge was entitled to accord greater weight to the opinion of an examining physician than to the opinion of a physician who only reviewed the miner's records after his death. Claimant's reliance upon *McClendon* is inapposite; *McClendon* only finds it within an administrative law judge's discretion to accord less weight to a physician who never examined the miner. However, it does not require that an administrative law judge do so. The United States Court of Appeals for the Sixth Circuit has held that, although an administrative law judge has the discretion to disregard opinions that are unsupported by medical evidence and sufficient reasoning, he or she may not simply reject an opinion because the doctor did not examine the claimant. *See Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989). Therefore, on remand, the administrative law judge should reconsider the weight to be given Dr. Westerfield's opinion, if the issue of causation at Section 718.205(c) is reached.

Claimant further argues that the administrative law judge should have credited the opinions of Drs. Turner and Vaezy, the miner's treating physicians. The administrative law judge found the reports by Drs. Turner and Vaezy were not well-reasoned, because they did not specify the medical tests, symptoms, or x-rays upon which they relied. Decision and Order at 9. The administrative law judge accorded the opinions of Drs. Turner and Vaezy less weight than the contrary opinions of Drs. Fino and Westerfield, whose reports he found were better reasoned and whose credentials were superior. The United States Court of Appeals for the Sixth Circuit has held that administrative law judges are required to examine the medical opinions of treating physicians on their merits and make reasoned judgments as to their credibility. The Sixth Circuit also concluded that there is no rule requiring deference to the opinion of a treating physician in black lung claims, and indicated that, rather, "the opinions of treating physicians get the

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interpreted an x-ray as positive. Claimant's Brief at 7; Director's Exhibit 15 p.18. But, claimant asserts, there is no evidence of such an x-ray in the record in this claim. Thus, claimant argues, Dr. Westerfield's opinion is without the necessary underlying documentation. Dr. Westerfield, however, also reviewed the positive x-ray interpretations of the February 13, 1998 x-ray by Drs. Barrett and Sargent, and submitted into the record by claimant. *See* Director's Exhibits 12, 15, at 26-27. Accordingly, Dr. Westerfield's diagnosis is supported by his review of admissible x-ray evidence. Section 725.414(a)(1) provides that "A medical report may be prepared by a physician who…reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1).

deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003). In determining the level of deference that is proper, the Sixth Circuit considered 20 C.F.R. §718.104(d)(5), which delineates the criteria for determining the weight to be accorded to treating physicians.[5] Since the administrative law judge did not consider the treating physicians' opinions in light of the factors set forth in Section 718.104(d)(5), on remand the administrative law judge must do so.

In light of the foregoing, we remand the case to the administrative law judge to address the evidence relevant to invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. *See* 20 C.F.R. §§718.205(c)(3); 718.304. If, on remand, the administrative law judge finds claimant entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304, then the administrative law judge need not make any other findings at Section 718.205. Alternatively, if the evidence is insufficient to invoke the irrebuttable presumption, then the administrative law judge must redetermine whether claimant has met his burden to establish death due to pneumoconiosis at Section 718.205(c). We thus further remand the case for the administrative law judge to reconsider the weight and credibility of the evidence relevant to death due to pneumoconiosis, and determine whether claimant has met her burden thereunder.

[5] Revised Section 718.104 provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d at 710, 22 BLR at 2-537 (6th Cir. 2002).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge