

BRB No. 97-0795 BLA

WILMA ELMS	)	
(Widow of NORVELL ELMS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (S.I.U. Legal Clinic), Carbondale, Illinois, for claimant.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (94-BLA-1327) of Administrative Law Judge Mollie W. Neal awarding benefits on a claim for survivor's benefits 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 administrative law judge credited the miner with thirty-five and three-quarter years of coal mine employment, found that the

medical opinion evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and concluded that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, she awarded benefits.

On appeal, employer contends that the administrative law judge mechanically credited the opinion of the miner's treating physician pursuant to Sections 718.202(a)(4) and 718.205(c)(2). Employer further asserts that the administrative law judge improperly accorded additional weight to the opinion of a consulting physician merely because that physician was retained by the Department of Labor (DOL). Employer also alleges that the administrative law judge treated the medical opinions inconsistently. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.<sup>1</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. For survivor's claims filed after January 1, 1982, death will be considered due to pneumoconiosis if the

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<sup>1</sup> The parties allege no error concerning the administrative law judge's denial of the miner's duplicate claim pursuant to 20 C.F.R. §725.309(d), or concerning her award of an attorney's fee and expenses to claimant's counsel pursuant to 20 C.F.R. §725.366. We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, and pursuant to Sections 718.202(a)(1)-(3), 718.204(c), 718.205(c)(1), (3), 725.309(d), 725.366. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). No fee award is effective until there is a successful prosecution of the claim and all appeals are exhausted. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Employer challenges the administrative law judge's threshold finding that the miner suffered from pneumoconiosis. See 20 C.F.R. §718.202(a)(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). The administrative law judge found pursuant to Section 718.202(a)(1) that the multiple x-ray readings conflicted to such a degree that they were "equally probative," and thus "neither prove[d] nor disprove[d] the presence of pneumoconiosis." Decision and Order at 13. The administrative law judge then turned to Section 718.202(a)(4), under which the existence of pneumoconiosis may be established by a physician's opinion. Section 718.202(a)(4) provides:

[a] determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

20 C.F.R. §718.202(a)(4).

The administrative law judge weighed the opinions of four physicians. Dr. Grover G. Sloan, the miner's treating physician, responded to DOL's request for his "reasoned medical opinion regarding the cause of the miner's death."<sup>2</sup> Director's Exhibit 16 at 1. Dr. Sloan submitted a two-sentence letter stating that "I feel that [p]neumoconiosis was a contributing cause of Mr. Elms[']s death. He had many years of [c]oal [m]ine work and pulmonary resistance contributed to his circulatory resistance and eventually to [c]ongestive [h]eart [f]ailure." Director's Exhibit 17. This letter makes no reference to any medical tests or clinical observations. Dr. Sloan also forwarded copies of hospitalization records. These records relate to the miner's treatment for congestive heart failure, but also contain diagnoses of pneumoconiosis, the objective bases for which are unclear.<sup>3</sup> Many of the

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<sup>2</sup> DOL did not ask Dr. Sloan whether the miner suffered from pneumoconiosis. Director's Exhibit 16.

<sup>3</sup> As the administrative law judge noted, chest x-rays were taken during the miner's several hospitalizations, but these x-rays were not taken or read for the purpose of diagnosing pneumoconiosis, but rather for diagnosing and monitoring the course of the miner's recurrent pulmonary edema. Decision and Order at 6 n.2; Director's Exhibit 16;

diagnoses appear as notations in the history section of the hospital admission records, while some are listed as discharge diagnoses.<sup>4</sup> Director's Exhibit 16; Employer's Exhibit 4. Dr. Sloan's qualifications are not of record.

DOL sent a "Request for Reasoned Medical Opinion" form along with medical evidence and work histories to Dr. Sarah B. Long and asked her to opine whether the miner's death was due to pneumoconiosis.<sup>5</sup> Director's Exhibit 23. Dr. Long returned a one-paragraph report stating that the miner "had arteriosclerotic heart disease as well as COPD which was due, at least in part to pneumoconiosis caused by his coal mine employment," and that the pneumoconiosis significantly contributed to his death. Director's Exhibit 23 at 2. This report refers to no specific medical evidence. The record indicates that Dr. Long is Board-eligible in Internal Medicine. Director's Exhibit 23 at 3.

Dr. Miles J. Jones reviewed the medical evidence on behalf of claimant and in a detailed, explained report concluded that the miner had pneumoconiosis which hastened his death by deteriorating his medical condition. Claimant's Exhibit 9. The record indicates that Dr. Jones is Board-certified in Anatomical and Clinical Pathology. *Id.* Dr. Joseph J. Renn reviewed the medical evidence and was deposed on behalf of employer. In a detailed, explained opinion he concluded that the miner did not have pneumoconiosis, and that his death was due solely to heart disease from smoking and coronary artery disease. Employer's Exhibits 16, 28. Dr. Renn is Board-certified in Internal and Pulmonary Medicine

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Employer's Exhibits 4, 6. Dr. Sloan noted in some of the discharge summaries that electrocardiograms revealed atrial fibrillation, and he briefly summarized chest examination and blood gas study results. Director's Exhibit 16.

<sup>4</sup> Employer submitted Dr. Sloan's office notes relating to treatment of the miner between 1972 and 1993. Employer's Exhibit 4. These brief entries indicate treatment for shortness of breath, coronary artery disease, atrial fibrillation, congestive heart failure, arthritis, and diabetes. *Id.* Dr. Sloan listed pneumoconiosis as a diagnosis twice in these notes.

<sup>5</sup> DOL did not ask Dr. Long to address whether the miner suffered from pneumoconiosis. Director's Exhibit 23.

and is a B-reader. *Id.* The record indicates that Dr. Renn was the only physician to discuss the miner's smoking history, which Dr. Renn estimated at twenty-five to thirty pack-years. Director's Exhibit 44; Employer's Exhibits 4-6; Hearing Transcript at 34-35.

Pursuant to Section 718.202(a)(4), the administrative law judge found Dr. Sloan's opinion to be "well reasoned" and accorded it "great weight" because 1) Dr. Sloan was the treating physician; 2) his diagnosis was supported by his notes and by the hospital records; 3) his diagnosis was supported by the positive x-ray readings of record; and 4) his opinion was supported by the consulting reports of Drs. Long and Jones. Decision and Order at 18-19.

A reasoned medical opinion rests on documentation adequate to support the physician's conclusions. *Migliorini v. Director, OWCP*, 898 F.2d 1292, 1295, 13 BLR 2-418, 2-423 (7th Cir. 1990); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). In light of the brevity of the treating physician's opinion in this case, we hold that the administrative law judge has not explained with sufficient specificity her finding that Dr. Sloan's report is a reasoned medical opinion diagnosing the existence of pneumoconiosis pursuant to Section 718.202(a)(4). See *Freeman United Coal Min. Co. v. Cooper*, 965 F.2d 443, 16 BLR 2-74 (7th Cir. 1992); *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Trumbo, supra*. Dr. Sloan made no specific references to any of the medical documentation cited by the administrative law judge. The administrative law judge found that Dr. Long's report "len[t] strong support to Dr. Sloan's findings," but without analyzing whether Dr. Long supported her opinion with reference to the underlying documentation. Moreover, the administrative law judge found that Dr. Long's report bolstered Dr. Sloan's opinion largely because Dr. Long "reviewed the medical reports on behalf of the Department of Labor rather than on behalf of the claimant or employer." Decision and Order at 19. The Board has held that, without specific evidence indicating that a report prepared for employer is unreliable, an administrative law judge should consider that report as equally reliable as the other reports of record. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991)(*en banc*). Further, unless the opinions of the physicians retained by the parties are properly held to be biased, based on evidence in the record, the opinions of Department of Labor physicians should not be accorded greater weight due to their impartiality. *Id.* The administrative law judge might reasonably have decided to place primary reliance on Dr. Jones's opinion, but she did not do so, and the Board is not empowered to weigh the evidence.<sup>6</sup> See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR

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<sup>6</sup> The administrative law judge stated that she found Dr. Jones's opinion to be supportive of the treating physician's opinion because Dr. Jones reasonably relied "on the diagnoses of chronic obstructive pulmonary disease, and the conclusions of the miner's treating physicians . . . ." Decision and Order at 19.

1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand this case for further consideration.

Pursuant to Section 718.205(c)(2), the administrative law judge credited the same medical opinions for the same reasons,<sup>7</sup> with the additional rationale that Dr. Renn's opinion that the miner's death was unrelated to pneumoconiosis merited less weight because it was "based primarily on his finding that pneumoconiosis was not present." Decision and Order at 25; see *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Because the administrative law judge's finding of the existence of pneumoconiosis is not affirmable, and her analysis at Section 718.202(a)(4) affected her weighing of the evidence at Section 718.205(c)(2), we must vacate her finding that pneumoconiosis hastened the miner's death.

On remand, the administrative law judge must make specific findings to determine whether the reports of Drs. Sloan and Long constitute reasoned medical opinions diagnosing the existence of pneumoconiosis. See *Trumbo, supra*; *Clark, supra*. The administrative law judge should then reweigh all of the medical opinions pursuant to Section 718.202(a)(4). In assessing their probative value, the administrative law judge should consider the miner's smoking history.<sup>8</sup> If the administrative law judge finds the existence of pneumoconiosis established, she must then determine whether pneumoconiosis hastened the miner's death. See *Railey, supra*.

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<sup>7</sup> Dr. Sloan completed the miner's death certificate, indicating that death was due to cardiac arrest due in turn to coronary artery disease and congestive heart failure. Director's Exhibit 23. He listed pneumoconiosis as a significant condition contributing to death. *Id.* The certificate indicates that no autopsy was performed.

<sup>8</sup> In light of the administrative law judge's apparent conclusion that the x-ray readings were not probative either for or against the existence of pneumoconiosis, the administrative law judge should carefully explain whether and how a physician's reliance on positive or negative x-ray readings affects her weighing of that opinion. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge