

BRB No. 97-0804 BLA

BEULAH BOWERS)	
(Widow of JAMES P. BOWERS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	DATE ISSUED:
COMPANY)	
)	
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 --- Benefits Denied of Administrative Law Judge Frederick D. Neusner, United States Department of Labor.

Beulah Bowers, Helen, West Virginia, *pro se*.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order --- Benefits Denied (95-BLA-2257) of Administrative Law Judge Frederick D. Neusner on a survivor's claim¹ 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 found that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that claimant failed to sustain her burden of proof to establish that the miner's death was

¹Claimant, the miner's widow, filed the instant survivor's claim on April 22, 1994. Director's Exhibit 1. The miner's death certificate indicates that the miner died on July 10, 1990 due to cardio-respiratory arrest, due to carcinoma of the right lung with metastasis, due to chronic obstructive pulmonary disease, due to "ASCVD" with mild heart failure. Director's Exhibit 9.

due to pneumoconiosis under 20 C.F.R. §718.205(c) pursuant to *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Accordingly, benefits were denied.

Neither employer nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in response to claimant's *pro se* appeal. In a letter to the Board, the Director addresses, however, the administrative law judge's discrediting of Dr. Rasmussen's opinion in finding that the biopsy evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2). The administrative law judge indicated that the credibility of Dr. Rasmussen's opinion that the miner had coal workers' pneumoconiosis which was the primary cause of his demise, Claimant's Exhibit 5, was affected by the fact that Dr. Ahmed's Surgical Pathology report dated July 3, 1986, upon which Dr. Rasmussen relied in part, is not in the record. The Director argues that claimant still has the right to submit this report and seek modification of the administrative law judge's decision under 20 C.F.R. §725.310. (In fact, this pathology report is contained in the record, see discussion *infra*.)

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under Section 718.205(c), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case lies, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), held in *Shuff* that pneumoconiosis will be found to be a substantially contributing cause or factor in the miner's death where it is found to have actually hastened death.

In the instant case, the administrative law judge found that claimant did not sustain her burden of proof to establish that the miner's death was due to pneumoconiosis under Section 718.205(c). The relevant evidence supportive of claimant's burden consists of the opinions of Drs. Rasmussen and Salon. Dr. Rasmussen opined that the primary cause of the miner's death was his chronic disabling lung disease, including coal workers' pneumoconiosis, which was due to the consequences of both his 39-year history of exposure to coal mine dust and his cigarette smoking. Claimant's Exhibit 5. Dr. Rasmussen thus found that the miner's exposure to coal mine dust was a significant and major contributing factor in his death. *Id.* By letter dated June 1, 1993, Dr. Salon, who

treated the miner during his final hospitalization,² which terminated in his demise, and who completed the death certificate, indicated,

[The miner] had multiple medical problems, one of them being coal workers' pneumoconiosis. I cannot say however, that his life would have been enhanced had he not suffered from coal workers' pneumoconiosis because of the seriousness of his other medical problems.

Insufficient oxygen intake can cause healthy cells in the body to die and can weaken the body causing the patient to have low resistance, making him susceptible to sickness and disease. The affects of this patients' (sic) coal workers' pneumoconiosis aggravated his overall condition and I believe, was a contributing factor in his death, to what degree I have no way of knowing.

Director's Exhibit 11. Considering all the relevant evidence at Section 718.205(c), the administrative law judge found that Dr. Rasmussen's opinion is not supported by the medical documentation and that Dr. Salon did not explain the medical reasoning supportive of his opinion that pneumoconiosis contributed to the miner's death. He further noted the decision of the West Virginia Occupational Pneumoconiosis Board that the miner's death was not due to occupational pneumoconiosis, which was not a major contributing factor in the miner's death. The administrative law judge also determined that as these opinions were contradicted by the better reasoned opinions of Drs. Tuteur and Fino, both of whom, he found, were at least as well qualified as Drs. Rasmussen and Salon. The administrative law judge thus indicated that it must be concluded that the miner's pneumoconiosis did not contribute to his death. With regard to Dr. Salon's opinion, the administrative law judge noted that Dr. Salon had not included pneumoconiosis as a cause of death in the death certificate and only later opined that pneumoconiosis contributed to death. He found that

²In his Discharge Summary dated August 15, 1990, Dr. Salon diagnosed (1) Recurrent carcinoma of the right lung with metastases, complicated with heart failure and hypertension; (2) Chronic obstructive pulmonary disease with severe hypoxemia; and (3) Atherosclerotic cardiovascular disease. Director's Exhibit 10. He also indicated that the miner's chest x-ray showed no evidence of active cardiopulmonary disease and that another chest x-ray showed mild pulmonary vascular congestion. *Id.*; see also Employer's Exhibit 5.

Dr. Salon “did not explain the reasoning he followed in reaching this added conclusion.”
Decision and Order -- Benefits Denied at 5.

We vacate the administrative law judge’s findings at Section 718.205(c), and remand the case for reconsideration of the relevant evidence thereunder. The administrative law judge found that Dr. Rasmussen’s opinion that the miner had no evidence of pulmonary metastases at the time of his death, was contrary to the record. The administrative law judge did not explain, however, what effect the fact that the miner’s lung cancer had actually metastasized, has on Dr. Rasmussen’s opinion that pneumoconiosis was a major contributing factor in the miner’s death. Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Moreover, based on his finding that Dr. Rasmussen’s opinion regarding the lack of metastases was erroneous, the administrative law judge indicated, in a footnote:

For these reasons it is not necessary to address the conflict between Dr. Rasmussen’s opinion that the miner’s chronic lung disease was the primary cause of death with the forensic opinions by the Employer’s consultants that the primary cause of death was the recurrent lung cancer that metastasized to the miner’s ribs and spinal cord.

Decision and Order -- Benefits Denied at 6 n.6. Accordingly, the administrative law judge failed to weigh Dr. Rasmussen’s pertinent opinion which, if fully credited, could meet claimant’s burden at Section 718.205(c) under *Shuff*. APA.

The administrative law judge further found that the evidence of record fails to establish the existence of pneumoconiosis at Section 718.202(a)(1) - (4). We affirm the administrative law judge’s findings at Section 718.202(a)(1) and (a)(3) as they are supported by substantial evidence. Considering the x-ray evidence at Section 718.202(a)(1), the administrative law judge properly found that because employer’s physicians’ qualifications are equal to those of claimant’s experts, the weight of the expert x-ray evidence is in balance and thus claimant fails to sustain her burden of proof. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff’g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Further, the administrative law judge properly determined that the presumptions contained at Section 718.202(a)(3) are inapplicable to this claim because (1) the record contains no evidence supportive of a finding of complicated pneumoconiosis under 20 C.F.R. §718.304, (2) the claim was not filed before January 1, 1982 and thus 20 C.F.R. §718.305 is inapplicable, and (3) the presumption contained at 20 C.F.R. §718.306 is inapplicable as the miner did not die on or before March 1, 1978.

We hold, however, that the administrative law judge’s finding at Section 718.202(a)(2) contains reversible error. The biopsy evidence of record is as follows: Dr. Wills performed a needle biopsy on June 5, 1986 and Dr. Ahmed evaluated the material extracted. Director’s Exhibit 10 at 23-24. Dr. Klingensmith performed a Right Upper and Middle Lobectomy on July 1, 1986 and Dr. Ahmed evaluated the lung tissue sampled.

Employer's Exhibit 5. A fiber optic bronchoscopy was performed by Dr. Cooper on July 5, 1986. *Id.* Only Dr. Ahmed's July 3, 1986 report of the July 1, 1986 lobectomy includes a diagnosis of pneumoconiosis. Dr. Ahmed diagnosed, *inter alia*, "Non Neoplastic Pathology Including Simple Anthracopneumoconiosis (4)," *Id.* At Section 718.202(a)(2), the administrative law judge erroneously indicated that this report, contained at Employer's Exhibit 5, is not in the record. Dr. Rasmussen relied, in part, on Dr. Ahmed's report in finding that the miner had coal workers' pneumoconiosis. Claimant's Exhibit 5. Based on his mistaken finding that Dr. Ahmed's report is not of record, the administrative law judge accorded less weight to Dr. Rasmussen's opinion that the miner had pneumoconiosis, comparing it to the reports of Drs. Fino³ and Tuteur⁴ "who reviewed the miner's medical records for the Employer and failed to discover evidence of a coal mine dust-related pulmonary condition in the biopsy pathology reports." Decision and Order --- Benefits Denied at 4. In so doing, the administrative law judge compounded his error by selectively according less weight to Dr. Rasmussen's opinion when it is apparent that Drs. Fino and Tuteur also reviewed the evidence from the miner's lobectomy, *see infra* at n.3 and n.4, which the administrative law judge mistakenly believed to not be of record. Based on the administrative law judge's errors and, in particular, his failure to weigh Dr. Ahmed's July 3, 1986 Surgical Pathology report which includes a diagnosis of pneumoconiosis, we vacate the administrative law judge's finding at Section 718.202(a)(2) and remand the case for consideration of all the biopsy evidence.⁵

³Dr. Fino also reviewed the evidence relevant to the miner's July 1, 1986 lobectomy. Specifically, he refers to records from the miner's hospitalization commencing 6/30/86, including removal of the upper and middle lobes of the lung. Dr. Fino opined, "There is no objective data in this case to suggest a coal mine dust-related pulmonary condition. Specifically, the lung surgery to my knowledge did not show changes consistent with a coal mine dust-related condition." Employer's Exhibit 7 at 17.

⁴Dr. Tuteur reviewed, *inter alia*, "Pathology report associated with examination of tissue collected at the time of right upper and middle lobectomy dated July 2, 1986," Employer's Exhibit 6 at 1, *see also Id.* at 2. In finding that the miner did not have coal workers' pneumoconiosis and died with, and because of, uncontrolled lung carcinoma related to cigarette smoking, Dr. Tuteur found, "Though the pathologist appends the diagnosis of "anthracopneumoconiosis" to pulmonary parenchyma distant from the malignant process, review of the surgical pathology report does not document fulfillment of criteria for the diagnosis of coal workers' pneumoconiosis."

⁵We note that medical reports are properly considered under 20 C.F.R. §718.202(a)(4) and not under Section 718.202(a)(2), notwithstanding the fact that a report might contain a review of biopsy evidence. 20 C.F.R. §718.202(a)(4). Further, notwithstanding our affirmance of the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1), we hold that he erred in considering CT scan evidence thereunder. The Board has determined that CT scans are not x-rays. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). The CT scan evidence includes Dr. Alexander's evaluation of the chest CT scan dated May 18, 1990

Further, the administrative law judge's finding that the medical opinions fail to establish the existence of pneumoconiosis at Section 718.202(a)(4) is also not without error. Specifically, the administrative law judge erroneously found that both Dr. Salon and Dr. Klingensmith relied on positive x-ray readings rather than on a physical examination of the miner to diagnose pneumoconiosis and did not give a reasoned basis for the diagnosis.

The record reveals that while Dr. Salon noted a "history" of chronic obstructive pulmonary disease with coal workers' pneumoconiosis in diagnosing same, Dr. Salon reviewed certain x-rays. Additionally, he examined the miner, finding diminished breath sounds throughout his lung fields, with dry rales in both lung bases, a chronic cough with shortness of breath, and he also considered the miner's smoking history. Director's Exhibit 10 at 21-22. In diagnosing, *inter alia*, coal workers' pneumoconiosis, Dr. Klingensmith examined the miner, and noted his smoking history and 39 years of coal mine employment. Director's Exhibit 10 at 18. Accordingly, the record does not support the administrative law judge's factual findings upon which he relied to determine that the reports of Drs. Salon and Klingensmith are unreasoned.

The administrative law judge next found that despite Dr. Rasmussen's impressive qualifications, his reviewing opinion is less persuasive because the medical records he reviewed,

did not include the negative x-ray readings which, in addition to Employer's plethora of duplicative non-qualifying (sic) x-ray readings, also contained a biopsy report that was not made a part of this record, apparently due to oversight. In addition, because Dr. Rasmussen did not even list the miner's lung cancer as one of the causes of his disability or demise it is impossible to determine whether or how much weight he gave to the well documented medical condition, which was the miner's primary illness in the reports of his attending physicians. As a result, the weight accorded his reasoning is problematical (sic), and his opinion is insufficient to sustain the miner's burden of proof. CX 05. When the opinion of Dr. Rasmussen is weighed against the opinions of the other non-examining physicians, Drs. Tuteur and Fino, it is found that the Claimant did not sustain her burden of proof under 20 C.F.R. §718.202(a)(4). The reasons are that these consultants were equally as well qualified as Dr. Rasmussen, their opinions were consistent with the medical documentation on which they were based, and all of

which he interpreted as positive for pneumoconiosis. Claimant's Exhibit 4. In considering this case on remand at Section 718.202(a)(4), *see* discussion *infra*, the administrative law judge must determine the relevance of this evidence thereunder.

the medical documentation on which they were based was part of this record.

Decision and Order --- Benefits Denied at 4-5. We hold that the administrative law judge's weighing of Dr. Rasmussen's report cannot stand because it is tainted by the administrative law judge's erroneous belief that Dr. Ahmed's July 3, 1986 biopsy report, reviewed by Dr. Rasmussen, is not of record. Moreover, while the administrative law judge correctly noted that Dr. Rasmussen does not identify cancer as a cause of the miner's disability or demise, the administrative law judge did not explain the relevance of this fact to the issue of the existence, or absence, of pneumoconiosis at Section 718.202(a)(4). We thus vacate the administrative law judge's finding at Section 718.202(a)(4), and further remand the case. If, on remand, the administrative law judge finds that claimant has established the existence of pneumoconiosis at Section 718.202(a), he must then determine whether claimant has established the requisite etiology at 20 C.F.R. §718.203. If so, the administrative law judge must then consider whether claimant has met her burden to prove that the miner's death was due to pneumoconiosis at Section 718.205(c) pursuant to *Shuff*. See *Trumbo, supra*.

Accordingly, we affirm in part and vacate in part the administrative law judge's Decision and Order --- Benefits Denied, and remand the case for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge