

BRB No. 01-0868 BLA

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

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

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Tab R. Turano and Laura Metcoff Klauss (Greenberg Traurig), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (94-BLA-1327) of Administrative Law Judge Mollie W. Neal on a claim 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).¹ This case is before the Board for the third time. The procedural history of this case is as follows: The miner filed a living miner's claim on June 26, 1986, which the district director finally denied on October 23, 1986, having found that none of the elements of entitlement was established. Director's Exhibit 44. The miner filed a second claim on March 31, 1993, which was denied by reason of abandonment. Director's Exhibits 1, 7, 9. The miner died on July 21, 1993.² Claimant, the miner's spouse, submitted a letter to the district director explaining that the miner had been unable to attend examinations scheduled by the district director due to his illness leading up to the time of his death. Director's Exhibit 10. The district director reinstated the miner's duplicate claim and treated claimant's letter as a request for modification of the denial of the claim. Director's Exhibit 33. Claimant filed a survivor's claim on August 25, 1993. Director's Exhibit 12. The claim was consolidated with the miner's claim and transferred to the Office of Administrative Law Judges for a formal hearing.

In an initial Decision and Order, dated January 31, 1997, the administrative law judge considered the consolidated claims pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). After crediting the miner with thirty-five and three-quarters years of coal mine employment, the administrative law judge found the evidence submitted since the 1986 denial of the previous miner's claim insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4) (2000). The administrative law judge found that claimant failed to establish a material change in conditions under 20 C.F.R. §725.309 (2000), and consequently

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Dr. Sloan, the miner's treating physician, prepared a death certificate and identified the cause of the miner's death as cardiac arrest due to coronary artery disease and congestive heart failure. Director's Exhibit 14. The death certificate also lists pneumoconiosis as an "other significant condition contributing to the miner's death". *Id.*

denied the duplicate miner's claim. With regard to the survivor's claim, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3) (2000), but found the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge also found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000), and that the presumption was not rebutted. The administrative law judge then found the evidence insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1) and (3) (2000), but sufficient to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c)(2) (2000). Consequently, the administrative law judge awarded benefits. Employer appealed.

In a Decision and Order dated February 24, 1998, the Board affirmed, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, findings pursuant to Sections 718.204(c)(1)-(4) (2000) and 725.309 (2000), the consequent denial of the miner's claim, and findings under Sections 718.202(a)(1)-(3) (2000) and 718.205(c)(1) and (c)(3) (2000). *Elms v. Peabody Coal Co.*, BRB No. 97-0795 BLA (Feb. 24, 1998)(unpublished). The Board vacated the administrative law judge's findings under Sections 718.202(a)(4) (2000) and 718.205(c)(2) (2000), however, and remanded the case for further consideration of the relevant evidence in the survivor's claim. *Id.*

In a Decision and Order on Remand dated June 14, 1999, the administrative law judge found the opinions of Drs. Jones, Long and Sloan sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) (2000) and death due to pneumoconiosis under Section 718.205(c)(2) (2000). Consequently, the administrative law judge found claimant entitled to survivor's benefits. Employer appealed.

In a Decision and Order dated July 14, 2000, the Board vacated the administrative law judge's determination that the existence of pneumoconiosis was established at Section 718.202(a)(4) (2000) based upon Dr. Jones's opinion, and remanded the case for the administrative law judge to reconsider Dr. Jones's opinion. *Elms v. Peabody Coal Co.*, BRB No. 99-1060 BLA (July 14, 2000)(unpublished). The Board also vacated the administrative law judge's rejection of Dr. Renn's opinion, holding that, contrary to the administrative law judge's findings, Dr. Renn discussed the miner's medical and smoking histories and the objective evidence of record in detail, and explained why these factors supported a diagnosis of a totally disabling cardiac condition rather than pneumoconiosis. *Id.* The Board further held that the administrative law judge appeared to substitute her opinion for Dr. Renn's opinion, and erred in rejecting Dr. Renn's opinion on the basis that Dr. Renn believes that coal workers' pneumoconiosis does not progress once coal mine dust exposure ceases, since Dr. Renn provided a completely separate rationale for his opinion that the miner did not have pneumoconiosis, based upon his review of the objective evidence of the record. *Id.* With

regard to the administrative law judge's finding at Section 718.205(c)(2) (2000), the Board vacated the administrative law judge's weighing of the evidence thereunder and instructed the administrative law judge to determine on remand whether the medical reports of record are adequately reasoned and documented, and to set forth her rationale. *Id.* The Board, on remand, instructed the administrative law judge to avoid mechanically crediting the diagnoses offered by treating or examining physicians, and to consider the respective qualifications of the physicians, the extent to which the reports reflect a thorough knowledge of the miner's occupational, medical and smoking histories, and the extent to which their conclusions are supported by the underlying documentation. *Id.*

In her Decision and Order Awarding Benefits on Remand dated July 11, 2001, the administrative law judge found that Dr. Sloan's opinion, in conjunction with the reports of Drs. Jones, Long and Moore, outweighed Dr. Renn's opinion and fully support a finding that the miner suffered from pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge also found claimant entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment, and that the presumption was not rebutted. The administrative law judge further found the weight of the medical opinion evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2) and, accordingly, awarded benefits. On appeal, employer challenges the administrative law judge's findings at Sections 718.202(a)(4) and 718.205(c)(2). Claimant has filed a response brief in support of the administrative law judge's decision awarding benefits. Employer has filed a reply brief in which it reiterates arguments raised in its Petition for Review and brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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

In challenging the administrative law judge's weighing of the medical opinions under Sections 718.202(a)(4) and 718.205(c), employer first argues that Dr. Sloan's opinion is neither reasoned nor documented, but is merely a conclusory assertion, and that the administrative law judge erred in crediting the opinion as reasoned, documented, and entitled to determinative weight on the basis of Dr. Sloan's status as the miner's treating physician. Employer's contention has merit. Subsequent to the administrative law judge's Decision and Order on Remand, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, issued its decision in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2- (7th Cir. 2001), in which the court held that a treating physician's "*beliefs* must be supported by medical *reasons* if they are to be given legal effect." *McCandless*, *supra* at 470 , (emphasis in the original). We agree with employer that Dr. Sloan's opinion

in the instant case does not qualify as a reasoned medical opinion pursuant to the court's decision in *McCandless*. The administrative law judge found Dr. Sloan's opinion reasoned and documented base upon the numerous times Dr. Sloan treated the miner and "by his documentation of a respiratory condition that [Dr. Sloan] finally concluded was related to the patient's exposure to coal dust." Decision and Order on Remand at 9. As employer argues, however, Dr. Sloan did not explain his conclusions that the miner had pneumoconiosis and that the disease was a significant contributing factor in the miner's death. While hospitalization records signed by Dr. Sloan show pneumoconiosis listed as one of several diagnoses, and while the death certificate and a letter dated November 4, 1993 signed by Dr. Sloan indicate that pneumoconiosis was a significant contributing factor in the miner's death, Dr. Sloan gave no indication of what objective tests he relied upon nor explained how any objective tests supported these conclusions. Director's Exhibits 14, 16, 17. Accordingly, we reverse the administrative law judge's determination that Dr. Sloan's medical opinion is a reasoned opinion sufficient to support claimant's burden in this case. *See McCandless, supra*.

Employer also argues that the administrative law judge erred in "bootstrapping" the opinions of Drs. Long and Jones to Dr. Sloan's opinion, *i.e.*, finding Dr. Sloan's opinion supported by the opinions of these other two physicians, and finding the opinions of Drs. Long and Jones persuasive because they agree with Dr. Sloan's opinion. We agree. The Board previously instructed the administrative law judge to determine on remand whether the medical reports of record are adequately reasoned and documented, and to set forth her rationale. *Elms v. Peabody Coal Co.*, BRB No. 99-1060 BLA (July 14, 2000)(unpublished), slip op. at 7. The Board instructed that, in deciding the relative probative value of each opinion, the administrative law judge must consider the respective qualifications of the physicians, the extent to which their reports reflect a thorough knowledge of the miner's occupational, medical and smoking histories, and the extent to which their conclusions are supported by the underlying documentation. *Id.* The administrative law judge indicated that she found the opinions of Drs. Long and Jones well-reasoned and documented because Drs. Long and Jones relied upon Dr. Sloan's records and the same evidence of record which Dr. Renn reviewed in submitting his opinion that the miner did not have pneumoconiosis. Decision and Order on Remand at 7-9. In light of our holding, pursuant to the court's decision in *McCandless, supra*, that Dr. Sloan's opinion does not qualify as a reasoned medical opinion, the administrative law judge's finding that the opinions of Drs. Long and Jones are well-reasoned and documented because they are consistent with Dr. Sloan's opinion is vacated. In addition, we agree with employer that the administrative law judge improperly rejected Dr. Renn's opinion. The administrative law judge did not adequately consider Dr. Renn's qualification as a Board-certified pulmonary specialist or explain why Dr. Jones's qualification as a Board-certified pathologist put Dr. Jones in a better position to opine on the miner's respiratory and pulmonary condition in a case where no clinical pathology evidence is contained in the record.

We, therefore, vacate the administrative law judge's findings that the evidence of record is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) and death due to pneumoconiosis under Section 718.205(c), and remand for the administrative law judge to reconsider these issues. *See* 20 C.F.R. §718.205(c)(2). On remand, the administrative law judge must resolve the conflict presented by the opinions of Drs. Long and Jones on the one hand, and Dr. Renn on the other, weighing the evidence pursuant to the guidelines discussed in the Board's previous remand instructions.³

³Employer also argues that the administrative law judge mischaracterized Dr. Moore's opinion as indicative that the miner had pneumoconiosis. Employer refers to Dr. Moore's admission that he was not in a position to give an opinion on the miner's pulmonary condition, and that Dr. Moore never indicated that claimant's chronic obstructive pulmonary disease was significantly related to coal dust exposure, much less even mention a diagnosis of pneumoconiosis. We reject employer's contention. Dr. Moore actually did state that the miner "apparently" had coal workers' pneumoconiosis. Director's Exhibit 18. Dr. Moore's admission that he was not in a position to render an opinion was indicated only in the context of the cause of the miner's death. *Id.* Regardless, the administrative law judge did not base her conclusion that the miner had pneumoconiosis on Dr. Moore's opinion, but merely found that Dr. Moore's opinion on the cause of the miner's shortness of breath, *i.e.*, that it is due to a combination of his pulmonary edema and underlying chronic obstructive pulmonary disease, was "probative and appropriate for consideration along with all of the other evidence of record." Decision and Order on Remand at 7; Director's Exhibit 18.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is reversed 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

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge