BRB No. 08-0739 BLA

N.C. (Widow of J.C.) Claimant-Respondent v. POND CREEK MINING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2009 DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Wendy G. Adkins and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand – Awarding Benefits (1998 BLA-1295) of Administrative Law Judge Richard A. Morgan on a survivor's 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). This case is before the Board for a third time. In his initial 2001 Decision and Order, the administrative law judge accepted the parties' stipulation that the miner had at least eleven years of coal mine employment and found that although the existence of

pneumoconiosis was previously established in the miner's successful claim for benefits, the doctrine of collateral estoppel did not apply to preclude employer from relitigating that issue in this survivor's claim. The administrative law judge denied benefits based on his determination that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Claimant appealed, and the Board affirmed the administrative law judge's determination that the doctrine of collateral estoppel was not applicable. *Collins v. Pond Creek Mining Co.*, 22 BLR 1-228, 1-231-33 (2003). The Board specifically held that pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), there was intervening change in the law, which rendered the pneumoconiosis issue in the survivor's claim non-identical to the issue litigated in the miner's claim prior to *Compton*. *See Collins*, 22 BLR at 1-232-33. The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(1), (4), and 718.205(c) and remanded the case for further consideration. *Id*. at 2-333-34. Subsequently, the Board granted a motion filed by the Director, Office of Workers' Compensation Programs (the Director), to reconsider its holding with respect to application of the doctrine of collateral estoppel. Upon reconsideration, the Board denied the relief requested and reaffirmed its prior holding that the doctrine was not applicable. *Collins*, BRB No. 02-0329 BLA, slip op. at 1-2 (Nov. 12, 2003) (unpub. Order on Motion for Recon.).

On remand, the administrative law judge found that the x-ray evidence was inconclusive and that the medical opinions were sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Weighing all of the evidence together as required by *Compton*, the administrative law judge found that claimant failed to establish that the miner had pneumoconiosis. The administrative law judge also found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant appealed, and the Board affirmed the administrative law judge's denial of benefits. *Collins, v. Pond Creek Mining Co.*, BRB No. 04-0899 BLA (June 14, 2005) (unpub.).

Claimant next filed an appeal with the United States Court of Appeals for the Fourth Circuit. The court vacated the Board's decision, concluding that the Board erred in permitting employer to relitigate the issue of whether the miner suffered from pneumoconiosis in the survivor's claim. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). The court held that claimant established the existence of pneumoconiosis by application of the doctrine of collateral estoppel. Collins, 468 F.3d at 223, 23 BLR at 2-410. Turning to the issue of death causation, the court noted that the Board's affirmance of the administrative law judge's credibility findings at 20 C.F.R. §718.205(c) "rested squarely on the [administrative law judge's]

finding of no pneumoconiosis." *Collins*, 468 F.3d at 224, 23 BLR at 2-411. However, because the court found that claimant had established the existence of pneumoconiosis by application of collateral estoppel, the court noted that the Board should have assessed the administrative law judge's causation ruling under the standard outlined in *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995). *Id*. Although the court indicated that "the circumstances of Scott's case . . . seem to compare closely to those presented here" and also noted that *Scott* had been remanded with instructions to award benefits, the court nonetheless concluded:

> [W]e see the appropriate course here as remand for further consideration of the causation issue . . . and [thus] the [Board] will have the first opportunity to assess whether the [administrative law judge's] causation ruling meets the rigorous standards outlined in *Scott*.

Collins, 468 F. 3d at 224, 23 BLR at 2-412.

By Order dated April 27, 2007, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a) and 718.205(c), and remanded the case to the administrative law judge for further proceedings consistent with the opinion of the Fourth Circuit. In his second remand decision, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment, by application of the doctrine of collateral estoppel. The administrative law judge further found that he was "constrained" to find that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order on Second Remand at 6. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer contends that the administrative law judge erred in concluding that he was "constrained" by the Fourth Circuit's remand order to find that the miner's death was due to pneumoconiosis. Employer's Brief in Support of Petition for Review at 9, *citing* Decision and Order on Second Remand at 6. Employer argues that the administrative law judge erred in failing to consider whether claimant satisfied her burden of proof at 20 C.F.R. §718.205(c), based on a documented and reasoned medical opinion. Employer further contends that the administrative law judge's analysis of the medical opinion evidence concerning death causation fails to comply with 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). Claimant responds, urging affirmance of the award of benefits. The Director has responded to this appeal, advising that he will not file a brief unless specifically requested to do so by the Board. Employer has also filed a reply brief, reiterating its argument that claimant's evidence is insufficient to establish that the miner's death was due to

pneumoconiosis and that the administrative law judge erred in failing to render specific factual findings pursuant to the APA.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *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). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 969 F.2d 977-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), cert. denied, 506 U.S. 1050 (1993).

On remand, the administrative law judge reevaluated the death causation opinions of Drs. Younes, Gaziano, Fino, Castle, Morgan, Jarboe, Zaldivar, Dahhan, and Spagnolo, in light of the Fourth Circuit's holding that employer was collaterally estopped from relitigating whether the miner had pneumoconiosis, as well as the court's holdings in *Scott* and *Toler v. Eastern Associated Coal Co.*, 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995). Of these physicians, the administrative law judge properly found that only Drs. Young and Gaziano opined that pneumoconiosis hastened the miner's death, while Drs. Fino, Castle, Morgan, Jarboe, Zaldivar, Dahhan, and Spagnolo opined that the miner's death was unrelated to pneumoconiosis. Decision and Order on Second Remand at 6. The administrative law judge referenced his 2004 Decision and Order, stating that the "analyses of Drs. Younes and Gaziano are cursory and poorly documented." *Id.* In contrast, the administrative law judge determined that the medical opinions of Drs. Fino, Castle, Morgan, Jarboe, Zaldivar, Dahhan, and Spagnolo are "well-reasoned and documented." *Id*. The administrative law judge then stated:

> Pursuant to the Court's holdings in *Scott* and *Toler,* however, as reiterated in the Court majority opinion, I may only give weight to the causation opinions of Drs. Fino, Castle, Morgan, Jarboe, Zaldivar, Dahhan, and Spagnolo who did not diagnose pneumoconiosis, if there are "specific and

> persuasive reasons for doing so." Moreover, even if there are specific and persuasive reasons for crediting these opinions, I am constrained to only accord such opinions "little weight." Furthermore, the Court cited the compelling words of Judge Widener in which he credited a poorly documented causation opinion based on the proper diagnosis of pneumoconiosis over the two contrary opinions that may hold no weight, or at most hold the little weight allowed by *Toler*. Finally, the Court expressly stated that the circumstances in the *Scott* case seem to compare closely to those presented here.
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> In view of the foregoing, I am constrained to credit the poorly documented medical opinions of Drs. Younes and Gaziano who diagnosed pneumoconiosis over the better reasoned and documented medical opinions of Drs. Fino, Castle, Morgan, Jarboe, Zaldivar, Dahhan, and Spagnolo who did not diagnose pneumoconiosis. Accordingly, I find Claimant has established death due to pneumoconiosis under [20 C.F.R.] §718.205(c).

Decision and Order on Second Remand at 6. The administrative law judge concluded that claimant established the existence of pneumoconiosis arising out of coal mine employment by application of the doctrine of collateral estoppel. *Id*. He then stated, "[p]ursuant to the Court's instructions, I am also constrained to find that the miner's death was due to pneumoconiosis." *Id*.

Employer maintains that the administrative law judge erred in concluding from the Fourth Circuit's decision that he was constrained to award benefits in this case. Employer asserts that because the Fourth Circuit "did not make any binding determinations as to the weight that should be afforded [employer's] medical opinion evidence," the administrative law judge erred in failing to consider whether claimant established that the miner's death was due to pneumoconiosis by a preponderance of the credible evidence. Employer's Reply Brief at 5. Employer maintains that even if its medical experts were entitled to little weight on death causation, the fact that the administrative law judge also gave little weight to the opinions of Drs. Younes and Gaziano in his prior decisions, required him to conclude that the evidence was in equipoise and that claimant failed to satisfy her burden of proof. Employer further contends that the administrative law judge erred in failing to address whether the opinions of Drs. Younes and Gaziano, standing alone, are sufficiently documented and reasoned[1] to support claimant's burden of proof to establish that pneumoconiosis

[1] A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's

substantially contributed to or hastened the miner's death. Additionally, employer asserts that the administrative law judge erred in failing to render specific factual findings as to the weight accorded the conflicting evidence as required by the APA.[2] We find merit in employer's assertions.

Based on our review of the administrative law judge's Decision and Order on Second Remand, it is unclear whether the administrative law judge considers the opinions of Drs. Gaziano and Younes[3] to be sufficiently reasoned to constitute substantial, reliable and probative evidence that the miner's pneumoconiosis hastened his death. *See U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999).[4] In his Decision and Order on Second Remand, the administrative

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conclusions. Id. Whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The mere fact that an opinion is asserted to be based upon medical studies cannot, by itself, establish that it is documented and reasoned. To make that determination, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. *Clark*, 12 BLR at 151.

[2] The Administrative Procedure (the 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). requires that an administrative law judge independently evaluate the evidence and set forth the rationale underlying his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[3] Dr. Younes was the miner's treating physician prior to his death. Pursuant to 20 C.F.R. §718.104(d), in weighing the medical evidence of record relevant to whether a miner's death was due to pneumoconiosis, the administrative law judge must consider the significance of the relationship between the miner and his treating physician. *See* 20 C.F.R. §718.104(d)(5). However, "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." *Id.*

[4] In *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), the Fourth Circuit explained that an administrative law judge is required to "perform a gate keeping function while assessing the evidence to decide the merits of a claim." *Jarrell*, 187 F.3d at 389, 21 BLR at 2-647. The court stated that the administrative law judge has, under [Section] 556(d) of the [APA], the affirmative duty

law judge stated that the opinions of Drs. Younes and Gaziano are "cursory and poorly documented." Decision and Order on Second Remand at 6. The administrative law judge also specifically incorporated his prior findings from the 2004 Decision and Order on Remand. In that prior decision, the administrative law judge noted that "the frequency and extent of Dr. Younes' treatment of the miner . . . is ambiguous" and that while Dr. Younes opined that coal workers' pneumoconiosis contributed to the miner's death, he "fail[ed] to adequately address the possible role of the miner's extensive cigarette smoking history in causing the miner's severe pulmonary disability and resulting death." Decision and Order on Remand at 12, 14.

With respect to Dr. Gaziano's opinion , the administrative law judge found that Dr. Gaziano "failed to cite to any clinical test or other medical data to support his opinion" that coal workers' pneumoconiosis was a significant contributing factor in the miner's death. *Id*. at 11. The administrative law judge specifically concluded that Dr. Gaziano's opinion was "unreasoned and undocumented regarding the death causation issue." *Id*. at 14.

The administrative law judge interprets the Fourth Circuit's remand order as requiring an award of benefits regardless of the quality of claimant's evidence. We disagree. An administrative law judge may refuse to credit even an uncontradicted medical opinion if there is a legitimate reason. *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-296 (1985), *recon. denied*, 8 BLR 1-5 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Blackledge v. Director, OWCP*, 6 BLR 1-1060 (1984). A physician's statement that pneumoconiosis hastened a miner's death, without any additional support or explanation of that conclusion, is insufficient as a basis for such a finding. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-264 (4th Cir. 2000). In order to be credited, a medical opinion must be found to be both reasoned and documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Because claimant bears the burden of persuasion, the administrative law judge erred in failing to render a specific finding in this case as to whether claimant's evidence is sufficient to satisfy her burden of proof, notwithstanding the weight accorded employer's contrary evidence.[5] *See Director, OWCP v. Greenwich Collieries [Ondecko]*,

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to qualify evidence as "reliable, probative, and substantial" before relying upon it to grant or deny a claim." *Id*.

[5] Claimant asserts that the administrative law judge properly awarded benefits because "in the absence of evidence to the contrary, even a poorly reasoned opinion," may establish that pneumoconiosis hastened the miner's death. Claimant's Response

512 U.S. 267, 18 BLR 2A-1 (1994). We, therefore, vacate the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On remand, the administrative law judge must specifically address whether the opinions of Drs. Younes and Gaziano are reasoned and documented, and sufficient to satisfy claimant's burden of establishing her entitlement to benefits pursuant to 20 C.F.R. §718.205(c). *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). In so doing, the administrative law judge must explain the bases for his findings, and provide a rationale for all of his credibility determinations in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Brief at 19. Contrary to claimant's assertion, however, the medical opinions of Drs. Fino, Castle, Morgan, Jarboe, Zaldivar, Dahhan, and Spagnolo constitute contrary probative evidence, even if they are given "little weight" pursuant to *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995). Consequently, the administrative law judge must resolve whether claimant's evidence is sufficiently reasoned and documented, and persuasive to overcome even the "little weight" afforded employer's evidence that the miner's death was not hastened by pneumoconiosis. Employer correctly notes that if claimant's evidence is determined to be equally probative as employer's evidence, then claimant has not satisfied her burden of proof pursuant to 20 C.F.R. §718.205(c). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Employer's Reply Brief at 5.

Accordingly, the Decision and Order on Second Remand – Awarding Benefits of the administrative law judge is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge