BRB No. 02-0669 BLA

CARRIE E. DEVINE (Widow of GEORGE M. DEVINE, JR.) Claimant-Petitioner v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denial of Benefits (00-BLA-

0059) of Administrative Law Judge Robert L. Hillyard 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).[2] The instant case involves the appeal of the denial of benefits on claimant's survivor's claim, in addition to the appeal of the denial of benefits on the miner's duplicate claim.

The miner filed an application for benefits on December 16, 1982. Director's Exhibit 1. On February 23, 1987, in a Decision and Order – Denying Benefits, Administrative Law Judge V. M. McElroy found the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000), using the "true doubt" rule, but found the evidence insufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(c) (2000).[3] Accordingly, benefits were denied.

On July 13, 1998, the miner filed another application for benefits. Director's Exhibit 27. On January 30, 1999, the miner died. Director's Exhibits 7, 9. Claimant filed her application for survivor's benefits on February 8, 1999. Director's Exhibit 1.

On May 29, 2002, Administrative Law Judge Robert L. Hillyard (the administrative law judge), issued his Decision and Order – Denial of Benefits. The administrative law judge found that claimant had not established a material change in conditions. Accordingly, benefits were denied on the miner's claim. Turning to the survivor's claim, the administrative law judge found the evidence insufficient to establish both 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). The administrative law judge therefore denied benefits on the survivor's claim.

On appeal, claimant asserts that the administrative law judge erred by admitting employer's cumulative medical reports. Claimant further contends that the administrative law judge erred in his material change in conditions finding. In addition, claimant alleges error in the administrative law judge's existence of pneumoconiosis finding, and his finding that the evidence does not establish that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not submitted a brief 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

As an initial matter, we consider claimant's assertion regarding the administrative law judge's admission of employer's evidence. Claimant asserts that the administrative law judge erred by admitting Employer's Exhibits 2-5, claiming that they are unduly repetitious consultative reports based on reviews of the same medical data and that the administrative law judge erred by not providing a basis for his decision to admit this evidence over claimant's objections.

At the hearing, claimant objected to the admission of Employer's Exhibits 2-5 as repetitive and unnecessary; however, the administrative law judge admitted this evidence.[4] The administrative law judge stated "[t]he objection to 2, 3, 5 and part of 4 – the objection on the part of 4 will be given to the weight of the evidence. Therefore, Employer's Exhibits 1, 2, 3, 4 and 5 are admitted." Hearing Transcript at 11. In claimant's post-hearing brief, she requested reconsideration of this ruling. In his Decision and Order, the administrative law judge properly declined to apply the amended version of 20 C.F.R. §725.414, limiting the number of consultative opinions, because this case was pending on January 19, 2001.[5] In addition, the administrative law judge stated that the "holding in *Woodward* dictates that when embarking on an inquiry involving cumulative evidence, an administrative fact finder must make a qualitative evaluation of the evidence instead of relying on a mere 'head counting' approach." Decision and Order at 4-5. The administrative law judge therefore denied claimant's request and found that the evidence in question was admissible.

We hold that the administrative law judge did not abuse his discretion in admitting these exhibits submitted by employer, thus his admission of these exhibits was reasonable. The evidence in dispute includes four consultative opinions which do not constitute "voluminous, duplicative evidence" which administrative law judges are given the discretion to limit. *Woodward v. Director, OWCP*, 991 F.2d 314, 321,17 BLR 2-77, 2-87 (6th Cir. 1993). In addition, the administrative law judge properly indicated that he would consider claimant's objection when he weighed the evidence. *See* Hearing Transcript at 4-5. Consequently, we find no error in the administrative law judge's decision to admit Employer's Exhibits 2-5 into the record. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984).

We next consider the administrative law judge's findings on the miner's claim. Section 725.309(d) (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim.[6] 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change has been established, an administrative law judge must consider

all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). If claimant establishes the existence of that element, she has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all the evidence, including the evidence submitted with the prior claim, supports a finding of entitlement to benefits. *Id.*

The miner's initial claim was denied because Judge McElroy found the evidence insufficient to establish total disability pursuant to Section 718.204(c) (2000). The administrative law judge stated that in order to establish a material change in conditions, claimant must establish that the miner was totally disabled due to pneumoconiosis. Decision and Order at 23, 26. The administrative law judge considered the newly submitted evidence and found that claimant did not establish that the miner was totally disabled due to pneumoconiosis. Decision and Order at 26.

Claimant maintains that the administrative law judge erred by considering disability causation in his material change in conditions analysis. In addition, claimant contends that the newly submitted medical opinion evidence contains evidence that establishes that the miner suffered a pulmonary impairment, and that claimant has, therefore, established a material change in conditions.

Because the relevant inquiry in the instant case is whether the newly submitted evidence establishes total disability, without regard to the cause of any disability, *see Ross, supra*, and since the administrative law judge's material change in conditions analysis does not include an evaluation of Dr. Norsworthy's opinion diagnosing a severe pulmonary impairment, Claimant's Exhibit 1, we vacate the administrative law judge's finding pursuant to Section 725.309 (2000), and remand the case for further consideration of the material change in conditions issue.[7] On remand, the administrative law judge must determine whether claimant has established a material change in conditions, *i.e.,* whether the newly submitted evidence is sufficient to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). If, on remand, the administrative law judge finds that claimant has established a material change in conditions, *see* 20 C.F.R. §725.309(d) (2000); *Ross, supra*, the administrative law judge must then evaluate all of the evidence of record and determine whether it is sufficient to establish entitlement.

We now turn to claimant's assertions regarding the administrative law judge's findings on the survivor's claim. 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.[8] 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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)(5); *Brown v. Rock Creek Mining Co.,* 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).

Claimant asserts that the administrative law judge erred in relying on the opinions of Drs. Fino and Branscomb, contending that these opinions regarding death due to pneumoconiosis are conclusory and do not constitute substantial evidence to support a finding that the miner's death was not due to pneumoconiosis pursuant to Section 718.205(c). Claimant asserts that Dr. Caffrey's opinion is equivocal and that Dr. Caffrey failed to provide any rationale for his conclusory opinion. Claimant maintains that Dr. Hansbarger's opinion does not address the relevant inquiry at Section 718.205(c). Finally, claimant asserts that the record contains competent medical evidence to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), specifically, the opinion of Dr. Norsworthy, the miner's treating physician.[9]

The administrative law judge found the medical opinions of Drs. Hansbarger, Fino, Branscomb and Caffrey[10] better reasoned, documented and supported by the evidence, and the administrative law judge relied upon their superior qualifications. Decision and Order at 33. We affirm the administrative law judge's finding that the opinions of these physicians, regarding the cause of the miner's death, are better reasoned, documented and supported by the medical evidence of record. As the administrative law judge noted, the medical records from the miner's hospitalization prior to his death do not mention pneumoconiosis. Decision and Order at 33. Moreover, the administrative law judge permissibly found that these physicians detailed the bases for their opinions, and that their opinions are supported by the evidence they considered. *See Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987). In addition, we affirm the administrative law judge's reliance on the superior qualifications of Drs. Fino, Branscomb, Caffrey and Hansbarger, as supported by the record.[11] *See Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). Consequently, we affirm the administrative law judge's finding that the miner's death was not due to pneumoconiosis pursuant to Section 718.205(c).

Although we affirm the administrative law judge's finding that claimant has not established that the miner's death was due to pneumoconiosis, pursuant to Section 718.205(c), we consider the administrative law judge's findings regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a), as the administrative law judge may reach this issue on remand in addressing the miner's claim.

Claimant asserts that the administrative law judge erred in his consideration and characterization of the x-ray evidence at Section 718.202(a)(1). Specifically, she contends that the administrative law judge failed to consider all of the x-ray evidence and she asserts that Dr. Sargent's interpretation of 1/0 is a positive interpretation. In addition, claimant maintains that it was error for the administrative law judge to consider x-rays that were not specifically read for the existence of pneumoconiosis as evidence establishing the absence of pneumoconiosis.

We reject claimant's assertion that the administrative law judge erred by considering the x-ray readings which were read for purposes other than determining the existence of pneumoconiosis. The Board has held that where the interpretation of a chest x-ray does not mention the existence of pneumoconiosis, an administrative law judge may reasonably infer that pneumoconiosis is not present. *Marra v. Consolidation Coal Co.,* 7 BLR 1-216 (1984).

Claimant's argument with respect to Dr. Sargent's interpretation of the August 6, 1998 film has merit. The administrative law judge stated that Dr. Sargent read this x-ray as negative for pneumoconiosis. Decision and Order at 27. In fact, on the standard Department of Labor x-ray interpretation form, Dr. Sargent identified small opacities of 1/0 s, p, with an asterisk indicating that there was a note lower on the form. This note states "* Smoking history? Not CWP." Director's Exhibit 27-59. In *Cranor v. Peabody Coal Co.,* 22 BLR 1-1 (1999), the Board held that a physician's x-ray interpretation of 1/1 which included the notation "not CWP etiology unknown" was properly considered as an x-ray reading that was positive for the existence of pneumoconiosis. The Board held that the physician's "comment that the pneumoconiosis was not coal workers' pneumoconiosis does not undermine the diagnosis of pneumoconiosis, the relevant issue at Section 718.202(a)(1)." *Cranor*, 22 BLR at 1-5. Similarly, we hold that the administrative law judge erred in considering Dr. Sargent's interpretation to be an interpretation that is negative for the existence of pneumoconiosis. *See* Director's Exhibit 27-59; *Cranor, supra*. Accordingly, the administrative law judge must reevaluate the x-ray evidence, if reached, on remand.

Further, in weighing the x-ray evidence of record, the administrative law judge stated:

> I give greater weight to the interpretations by Drs. Sargent and Wiot, due to their superior diagnostic skills as B readers and Board-certified Radiologists. While Dr. Cole is a dually qualified physician, and Dr. Stokes is a Board-certified Radiologist, I find that their two positive readings are outweighed by the numerous

> negative readings by Drs. Sargent and Wiot, both dually qualified physicians. Therefore, I find that the x-ray evidence does not establish the existence of pneumoconiosis.

Decision and Order at 28. The administrative law judge did not address Dr. Gallo's positive x-ray interpretation of "Category 1p," Director's Exhibit 27(at Employer's Exhibit 6 at 7); Dr. Anderson's interpretation of "category 2 pneumoconiosis," Director's Exhibit 26(at Employer's Exhibit 20 at 22); or Dr. O'Bryan's interpretation of "category 1 pneumoconiosis," Director's Exhibit 9. Because the administrative law judge has not considered all of the relevant evidence of record, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), we vacate the administrative law judge's finding pursuant to Section 718.202(a)(1).

Claimant also alleges errors in the administrative law judge's analysis of the medical opinion evidence pursuant to Section 718.202(a)(4). Claimant asserts that the administrative law judge mischaracterized Dr. Anderson's report as opining that the miner did not have pneumoconiosis, and maintains that the administrative law judge improperly injected the x-ray analysis into his evaluation of the medical opinion evidence. In addition, claimant contends that the administrative law judge improperly relied on the opinions of the consulting physicians to discredit the opinions of the examining physicians.

The administrative law judge noted that Dr. Anderson initially diagnosed pneumoconiosis, but after reviewing medical evidence, changed his opinion "and opined that the [m]iner did not have pneumoconiosis or any pulmonary impairment." Decision and Order at 29; Director's Exhibit 26. The administrative law judge indicated that Drs. Lane and O'Neill stated that there was no evidence of pneumoconiosis. Employer's Exhibit 15. He noted that Drs. Fino, Branscomb, Hansbarger and Burki, who each authored recent consultative reports, determined that the miner did not suffer from coal workers' pneumoconiosis, Director's Exhibit 27; Employer's Exhibits 1-3, and that Dr. Caffrey stated that he could not state whether the miner had coal workers' pneumoconiosis, Employer's Exhibit 1. The administrative law judge also noted the diagnoses of pneumoconiosis provided by Drs. O'Bryan, Simpao, Eric Norsworthy, Robert Norsworthy and Gallo.[12] Decision and Order at 29-30; Director's Exhibits 4, 7, 9, 11, 21, 27; Claimant's Exhibit 1; Employer's Exhibit 6. He accorded less weight to the opinions of Drs. O'Bryan, Simpao, Eric Norsworthy, Robert Norsworthy and Gallo. The administrative law judge gave less weight to the opinion of Dr. O'Bryan, noting that his diagnosis was based on a pulmonary function study, blood gas study and an x-ray, and the administrative law judge stated that he had found the x-ray evidence negative for pneumoconiosis. In addition, the administrative law judge noted that the pulmonary function study relied upon by Dr. O'Bryan was not contained in the record and had been found invalid by other physicians. He gave less weight to Dr. Simpao's opinion, noting that the physician relied upon a positive x-ray reading, a pulmonary function study which

was determined to be invalid by other physicians and an arterial blood gas study which yielded results within normal limits. The administrative law judge accorded less weight to the opinion of Dr. Eric Norsworthy because he relied in part on an x-ray interpretation, and the administrative law judge had found the x-ray evidence to be negative for pneumoconiosis. He accorded less weight to the opinion of Dr. Robert Norsworthy noting that his pulmonary function study results were unreadable, the record contained no tracings, and the pulmonary function study was found invalid. In addition, the administrative law judge noted that the blood gas study relied upon by Dr. Robert Norsworthy was not contained in the record. The administrative law judge accorded less weight to the opinion of Dr. Gallo, because Dr. Gallo relied upon a positive x-ray interpretation and the administrative law judge had found the x-ray evidence to be negative for pneumoconiosis, and because the length of coal mine employment is an insufficient basis for a diagnosis of pneumoconiosis.

We hold that the administrative law judge erred by not weighing the opinions of Drs. Anderson, Lane and O'Neill in his analysis at Section 718.202(a)(4). Director's Exhibits 26; Employer's Exhibit 15; Decision and Order at 31. Inasmuch as the administrative law judge did not consider all of the relevant medical opinion evidence of record in determining whether the miner suffered from pneumoconiosis, we vacate the administrative law judge's finding at Section 718.202(a)(4). *See Tackett, supra*.

Moreover, we hold that the administrative law judge erred in according less weight to the opinions of Drs. O'Bryan, Simpao, Eric Norsworthy, and Gallo on the basis that these physicians relied on x-ray interpretations which are contrary to the administrative law judge's finding at Section 718.202(a)(1). An administrative law judge may not discredit a medical opinion on the grounds that it is based, in part, on an x-ray reading at odds with the administrative law judge's conclusion at Section 718.202(a)(1). *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996).

We also vacate the administrative law judge's characterization of Dr. Anderson's opinion, that he first diagnosed pneumoconiosis and later changed his opinion. Decision and Order at 29; Director's Exhibit 26. In view of the inconsistencies in Dr. Anderson's opinions[13] and the administrative law judge's limited analysis of these opinions, *see* Decision and Order at 29, the administrative law judge is instructed to fully explain his characterization of Dr. Anderson's opinion, if reached, on remand. In addition, the administrative law judge must consider the holdings of the United States Court of Appeals for the Sixth Circuit, that the opinions of treating physicians must be accorded additional weight where the administrative law judge finds them to be well reasoned and credible on the merits.[14] *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits 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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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Administrative Appeals Judge