

BRB No. 04-0127 BLA

FRONA WOJCIK)	
(Widow of HENRY WOJCIK))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 06/29/2004
FLORENCE MINING COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

George H. Thompson (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2002-BLA-422) of Administrative Law Judge Michael P. Lesniak awarding benefits 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). The administrative law judge found, and the parties stipulated to, twenty-eight and one-half years of coal mine employment, that employer was the proper responsible operator and that the existence of pneumoconiosis was established. Decision and Order at 3-4. Based on the date of filing, the administrative law judge considered entitlement in this survivor's claim pursuant to 20 C.F.R. Part 718.¹ Decision and

¹ Claimant is Frona Wojcik, the miner's widow. The miner, Henry Wojcik, filed claims

Order at 7. The administrative law judge initially found that there was no evidence of complicated pneumoconiosis in the record. Decision and Order at 8. After considering all of the relevant evidence of record pursuant to the proper standard, the administrative law judge concluded that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205. Decision and Order at 8-9. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in his evaluation of the medical opinion evidence in concluding that the miner's death was due to pneumoconiosis. Claimant has not filed a brief in the instant appeal. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not participate in this appeal.²

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

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. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing

for benefits on April 27, 1973, June 26, 1984, January 31, 1990 and August 29, 1995. Director's Exhibits 1-4. On October 7, 1996, employer withdrew its controversion and conceded liability for the miner's benefits. Director's Exhibit 4. The miner died on August 25, 2000. Director's Exhibit 12. Claimant filed her claim for benefits on September 21, 2000, which was denied by the district director on March 2, 2001. Director's Exhibits 6, 15. Claimant subsequently requested a hearing on her survivor's claim and the case was transferred to the Office of Administrative Law Judges on August 16, 2002. Director's Exhibit 53.

² The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.304 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

cause” of a miner’s death if it hastens the miner=s death. *See* 20 C.F.R. §718.205(c)(5); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After consideration of the administrative law judge’s Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge’s Decision and Order must be vacated and the case remanded to the administrative law judge for further consideration.

Employer contends that the administrative law judge erred in finding that claimant established that the miner’s death was due to pneumoconiosis as he failed to properly weigh the evidence of record. Employer’s Brief at 3-9. Specifically, employer contends that the administrative law judge impermissibly accorded greater weight to the medical reports of Dr. Comas and ignored his subsequent deposition testimony which supports the opinion of Dr. Fino that the miner’s death was in no way related to coal workers’ pneumoconiosis or coal dust exposure.

The administrative law judge, however, found that the opinion of Dr. Comas was persuasive because he had treated the miner during the last week of his life, his opinion was well reasoned and documented and it was based on history, his examination and review of previous hospital records and the oncology report by Dr. Awan. Decision and Order at 9. The administrative law judge further concluded that the opinion of Dr. Fino was not as convincing as the physician never had the opportunity to examine the miner. Decision and Order at 9.

Initially, we reject employer=s contention that the administrative law judge did not consider the subsequent deposition testimony of Dr. Comas. Employer’s Brief at 3-4. The administrative law judge specifically set forth the physician=s testimony and considered it in weighing the evidence of record in determining if pneumoconiosis hastened the miner’s death. *See* Decision and Order at 6, 9.

Employer further contends that Dr. Comas should not be given determinative weight based solely upon his status as a treating physician because this status does not automatically make his opinion reasoned and documented. Employer’s Brief at 4-8. We agree. The administrative law judge, in the instant case, found the opinion of Dr. Comas to be persuasive as he had the opportunity to examine and treat the miner during the last week of his life and the opinion of Dr. Fino was not as convincing as he never had the opportunity to examine the miner. Decision and Order at 9. The administrative law judge’s analysis does not comport with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne*

Light Co., 12 BLR 1-162 (1989). The question of whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge. 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); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). The United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, has indicated, however, that automatic preferences are disfavored. See *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Thus, the opinions of treating and examining physicians should not automatically be presumed to be correct, entitled to the greatest weight or considered to have the most probative value. Additionally, an administrative law judge cannot discredit the report of a physician solely because the physician did not examine the miner. See *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). The administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to the examining physicians' opinions, when warranted. See 20 C.F.R. §718.104(d); *Mancia*, 130 F.3d 579, 21 BLR 2-114; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Clark*, 12 BLR 1-149; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

In the instant case, the administrative law judge accorded determinative weight to the medical opinions based solely upon whether the physician had the ability to examine the miner. Decision and Order at 9. This finding does not contain the requisite inquiry into the credibility and reasonableness of the opinions consistent with circuit law.³ See *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia*, 130 F.3d 579; *Lango*, 104 F.3d 573; *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986). Thus, in light of the facts of this particular case, we vacate the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 and remand the case to the administrative law judge for reconsideration of the relevant medical opinions. On remand, the administrative law judge must set forth his credibility determinations regarding the medical opinions of record in detail. Finally, the status of Dr. Comas as a treating physician does not automatically entitle his opinion to additional weight. Consideration must be given to how his status has enabled him to form a credible opinion regarding claimant's condition and whether his opinion is adequately reasoned. See 20 C.F.R. §718.104(d); *Lango*, 104 F.3d 573.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 7.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge