

BRB No. 04-0786 BLA

OLA MAE PRICE )  
(Widow of WILLIAM C. PRICE) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
CONSOLIDATION COAL COMPANY ) DATE ISSUED: 06/28/2005  
 )  
Employer-Petitioner )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 ) DECISION and ORDER  
Party-in-Interest

Appeal of the Decision and Order on Remand Awarding Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Ashley M. Harman (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Survivor's Benefits (97-BLA-1676) of Administrative Law Judge Thomas M. Burke with respect to 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).<sup>1</sup> This is the third time that this case has been before the Board.<sup>2</sup> In the Board's most recent prior Decision and Order, an award of benefits by Administrative Law Judge John C. Holmes was vacated and the case was remanded for reconsideration under 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.205(c). The case was reassigned to Administrative Law Judge Burke (the administrative law judge) on remand. The administrative law judge determined that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis under Section 718.202(a)(4) and that legal pneumoconiosis was at least a contributing cause of the miner's death pursuant to Section 718.205(c). Accordingly, benefits were awarded.

Employer contends on appeal that the ALJ did not properly weigh the evidence relevant to Sections 718.202(a)(4) and 718.205(c). Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Worker's Compensation Programs, has filed a limited response in which he opposes employer's allegations of error regarding the administrative law judge's weighing of Dr. Fino's opinion.<sup>3</sup>

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<sup>1</sup>Claimant is the surviving spouse of miner William C. Price who died on January 8, 1997. Director's Exhibit 4. Claimant filed her application for benefits on January 31, 1997. Director's Exhibit 1.

<sup>2</sup>The procedural history of this case is set forth in detail in the Decision and Order issued by the Board on January 24, 2001. *Price v. Consolidation Coal Co.*, BRB No. 00-0453 BLA (Jan. 24, 2001)(unpub.), slip. op. at 2 nn. 1, 2.

<sup>3</sup>We affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis as this finding has not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits 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. Death due to pneumoconiosis may be established by showing that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis. See 20 C.F.R. 718.205(c), 718.202(a), 718.203; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *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). The United States Court of Appeals for the Fourth Circuit has held that any condition which hastens the miner's death is a substantially contributing cause of death pursuant to Section 718.205(c)(2). *Shuff*, 967 F.2d . 977, 16 BLR 2-90.

Pursuant to Section 718.202(a)(4), the administrative law judge reviewed the opinions in which Drs. Abernathy, Kress, Fino, Endres-Bercher, Castle, and Dr. Zaldivar stated that the miner's obstructive lung disease was attributable solely to his long history of cigarette smoking. The ALJ determined that Dr. Abernathy's opinion was entitled to little weight, as he did not fully address the issue of legal pneumoconiosis and did not explain why forty-two years of coal mine employment did not also contribute to the miner's chronic obstructive pulmonary disease and emphysema. Decision and Order at 5; Director's Exhibit 21.

The administrative law judge discredited Dr. Kress's opinion regarding the cause of the miner's lung disease, as the articles cited by Dr. Kress in support of his opinion run counter to the law of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, and the Department of Labor's view that coal dust exposure can cause obstructive lung disease. The administrative law judge also found that Dr. Kress did not explain his opinion in light of the miner's specific symptoms and his smoking and work histories. Decision and Order at 6-7; Director's Exhibit 21. The administrative law judge found that Dr. Fino's opinion was flawed because the doctor stated that coal workers' pneumoconiosis cannot develop in the absence of continued coal dust exposure, did not explain why hypercarbia is unrelated to clinical or legal pneumoconiosis, and ruled out coal dust exposure as a cause of centrilobular emphysema in contravention of the amended regulations. Decision and Order at 8-10; Director's Exhibit 21; Employer's Exhibits 3, 7.

Regarding Dr. Endres-Bercher's opinion, the administrative law judge found that it was not well-reasoned or well-documented because the doctor appeared to rule out the presence of pneumoconiosis because the miner's impairment was obstructive in nature. Decision and Order at 11; Director's Exhibit 21; Employer's Exhibit 3.

The administrative law judge determined that Dr. Crisalli's opinion was unreasoned, as he merely set forth a conclusory statement regarding the cause of the miner's chronic bronchitis and emphysema. Decision and Order at 11; Employer's Exhibit 1. The administrative law judge found that Dr. Castle's opinion is "unpersuasive" because Dr. Castle failed to explain why the miner's symptoms are solely attributable to smoking in light of the miner's long coal mine employment history. Decision and Order at 13-14; Employer's Exhibits 3, 6. The administrative law judge also determined that Dr. Castle did not resolve conflicting statements that he made concerning the reversibility and progressivity of the miner's impairment, did not explain his conclusion that hypercarbia is not related to coal dust exposure, and mischaracterized Dr. Zaldivar's findings regarding the miner's carboxyhemoglobin level. *Id.* The administrative law judge found that Dr. Zaldivar's opinion was not persuasive as his statement regarding the miner's status as a smoker was not consistent with the evidence of record, he relied upon the absence of a restrictive impairment, and he did not explain why only smoking contributed to the miner's obstructive lung disease. Decision and Order at 15; Employer's Exhibits 1, 11.

With respect to the physicians who determined that coal dust exposure was a contributing cause of the miner's pulmonary condition, the administrative law judge determined that the opinion in which Drs. Buono and Ducatman diagnosed legal pneumoconiosis is supported by the objective evidence of record. Decision and Order at 16-17; Claimant's Exhibit 4. The administrative law judge credited Dr. Buddington's diagnosis of legal pneumoconiosis for the same reason. Decision and Order at 17; Director's Exhibit 21. The administrative law judge found that the hospital and treatment records, although insufficient to establish pneumoconiosis standing alone, lent support to a finding of legal pneumoconiosis. Decision and Order at 18-19; Director's Exhibit 21. The administrative law judge concluded that the opinion of Dr. Rasmussen was well-reasoned and well-documented and, as corroborated by the opinions of Drs. Ducatman, Buono, Buddington and the other medical records, was sufficient to establish the existence of legal pneumoconiosis. Decision and Order at 21; Director's Exhibit 21; Claimant's Exhibit 2.

Employer contends that the administrative law judge did not properly weigh its experts' opinions, as he shifted the burden to them to establish that coal dust exposure did not contribute to the miner's obstructive lung disease. Employer also argues that contrary to the administrative law judge's findings, Drs. Abernathy, Kress, Castle, Fino, Endres-Bercher, and Zaldivar explained their conclusions. Employer further maintains that the administrative

law judge mischaracterized Dr. Castle's and Dr. Zaldivar's statements regarding whether the miner was still smoking in 1991. In addition, employer asserts that the administrative law judge selectively analyzed the evidence, failed to consider the physicians' respective qualifications, and erred in crediting the opinions of claimant's experts.

We find no merit in employer's allegations of error with respect to the administrative law judge's weighing of the opinions of Drs. Abernathy, Endres-Bercher, Kress, and Fino. The administrative law judge acted rationally in determining that Dr. Abernathy's opinion regarding the presence of legal pneumoconiosis was entitled to little weight, as Dr. Abernathy did not adequately consider the presence of legal, as opposed to clinical, pneumoconiosis, as he focused on whether the miner's x-rays were consistent with coal workers' pneumoconiosis. Director's Exhibit 21; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Dr. Abernathy stated that coal workers' pneumoconiosis was not a contributing cause of the miner's lung disease because the miner's x-rays did not show progressive massive fibrosis.

Regarding Dr. Endres-Bercher, the administrative law judge acted within his discretion as fact-finder in determining that this opinion was not persuasive, as the doctor stated, without elaboration, that obstructive lung disease is not characteristic of coal workers' pneumoconiosis. Director's Exhibit 21. The administrative law judge permissibly found that Dr. Endres-Bercher's view conflicted with the amended definition of pneumoconiosis in which provides that legal pneumoconiosis includes any chronic obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2); *see Director, OWCP v. Richardson*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996). The administrative law judge rationally determined that Dr. Kress's opinion was entitled to little weight on the same ground as Dr. Kress stated in his report, dated February 17, 1988, that the literature "quite clearly supports the conclusion that pulmonary emphysema does not result from environmental dust exposure." *Id.*; Director's Exhibit 21.

The administrative law judge also acted within his discretion as fact-finder in determining that Dr. Fino's opinion ruling out any causal link between coal dust exposure and the miner's obstructive pulmonary conditions was entitled to little weight because Dr. Fino stated that pneumoconiosis "is not going to progress in the absence of further coal dust exposure;" a statement that conflicts with the amended definition of pneumoconiosis set forth in 20 C.F.R. §718.201(b). 20 C.F.R. §718.201(b); Employer's Exhibit 3; *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We affirm, therefore, the administrative law judge's findings with respect to the opinions of Drs. Abernathy, Kress, Endres-Bercher, and Fino.

Employer's allegations of error regarding the administrative law judge's findings concerning the medical opinions of Drs. Castle and Zaldivar have merit, however. Employer is correct in arguing that the administrative law judge did not accurately characterize Dr. Castle's opinion and engaged in a selective analysis of the evidence. Contrary to the administrative law judge's finding, Dr. Castle did not diagnose asthma. Rather, he found that there was an asthmatic component to the miner's pulmonary disease because the reversibility of his obstructive impairment was limited. Employer's Exhibits 3, 6 at 18.

Employer is also correct in maintaining that the administrative law judge did not accurately describe Dr. Castle's statements regarding whether the miner continued to smoke after 1985. The administrative law judge found that Dr. Castle erred in stating that Dr. Zaldivar concluded that the miner was still smoking in April of 1991 based on a high carboxyhemoglobin level obtained on April 23, 1991 when Dr. Zaldivar characterized the level as "borderline" between a smoker and a non-smoker. In actuality, Dr. Zaldivar described as "borderline" the results of a carboxyhemoglobin test performed by Dr. Crisalli on April 12, 1991 while the test that he performed on April 23, 1991 produced the "high carboxyhemoglobin of a smoker." Employer's Exhibit 1

In addition, the administrative law judge required Dr. Castle to go beyond his statement that hypercarbia is a classic symptom of smoking induced lung disease and explain why this condition cannot be related to coal dust exposure without addressing the fact that claimant's experts did not acknowledge the presence of this condition and no other medical opinion of record contradicts Dr. Castle's conclusion.

Finally, as employer asserts, the administrative law judge substituted his opinion for that of a medical expert in finding that Dr. Castle's determination that the miner's obstructive impairment responded to the application of bronchodilators conflicted with his statement that the miner's obstructive impairment progressed rapidly after 1987. There is no inherent conflict between these observations and without a medical expert's opinion to the contrary, the administrative law judge's finding on this issue is not supported by substantial evidence.

Regarding Dr. Zaldivar's opinion, employer correctly notes that the administrative law judge erred in stating that Dr. Zaldivar relied upon the borderline carboxyhemoglobin test to find that the miner was still a smoker in 1991. As indicated above, Dr. Zaldivar described Dr. Crisalli's test as producing borderline results but indicated that his own test produced a high value consistent with the current use of tobacco. Employer's Exhibit 1. In addition, a review of Dr. Zaldivar's opinion indicates that in addition to noting that the x-ray evidence was mostly negative for pneumoconiosis and that the miner did not have a restrictive impairment, he referred to numerous medical reports and objective test results and

commented upon whether they supported a diagnosis of a coal dust related lung condition. Employer's Exhibits 1, 3.

Because the administrative law judge's characterization of the opinions of Drs. Castle and Zaldivar does not conform to the evidence of record and reflects a selective analysis of the evidence, his findings regarding these opinions must be vacated. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). We also vacate, therefore, the administrative law judge's findings under Sections 718.202(a)(4) and 718.205(c).

Concerning the administrative law judge's crediting of the opinions of Drs. Rasmussen, Buddington, Buono, Ducatman as supported by the objective evidence, treatment notes, and hospital records, we vacate the administrative law judge's findings. As employer alleges, when weighing the evidence of record, the administrative law judge seemed to presume that because the miner had approximately forty-two years of coal mine employment, his pulmonary conditions were related to coal dust exposure unless proven otherwise. Decision and Order at 5, 6-7, 10, 13, 15. Consequently, he did not apply the same level of scrutiny to the opinions of the doctors who submitted opinions on claimant's behalf. On remand, the administrative law judge must first reconsider whether claimant has established the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a). *Director, OWCP v. Greenwich Collieries* [Ondecko], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

In so doing, the administrative law judge must weigh the medical opinions of Drs. Castle, Zaldivar, Rasmussen, Buddington, Buono, and Ducatman and determine whether they are reasoned and documented and whether they contain adequate explanations of their conclusions as to whether this specific miner's pulmonary impairment was related to dust exposure in coal mine employment. Under the law of the United States Court of Appeals for the Fourth Circuit, the administrative law judge must address the qualifications of the physicians, the sophistication of their opinions, and the extent to which their conclusions are supported by the underlying objective evidence. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). If the administrative law judge finds that claimant has established the existence of pneumoconiosis after weighing all of the evidence relevant to Section 718.202(a) together, he must then address the issue of death due to pneumoconiosis pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Survivor's Benefits is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings 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