BRB No. 04-0899 BLA

NORA L. COLLINS (Widow of JOHNNIE J. COLLINS) Claimant-Petitioner v. POND CREEK MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/14/2005 DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (98-BLA-1295) of Administrative Law Judge Richard A. Morgan rendered 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 the second time. Initially, the administrative law judge accepted the parties'

stipulation that the miner had at least eleven years of coal mine employment,[1] 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 found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and thus could not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, 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). Specifically, the Board held that the intervening change in the law effected by *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), requiring that all types of evidence submitted pursuant to 20 C.F.R. §718.202(a) be weighed together to determine the existence of pneumoconiosis, rendered the pneumoconiosis issue in the survivor's claim non-identical to the issue litigated in the miner's claim prior to *Compton*. *Collins*, 22 BLR at 1-232-33.

On the merits, the Board agreed with claimant that the administrative law judge did not consider all of the x-ray evidence when he found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Collins*, 22 BLR at 1-233-34. The Board therefore vacated the administrative law judge's finding and remanded the case for him to consider all of the x-ray evidence. In so doing, however, the Board rejected claimant's argument that multiple, conflicting readings of three x-rays taken in September of 1997 merited no weight. 22 BLR at 1-233 n.3. Because the administrative law judge's incomplete analysis of the x-ray evidence affected his weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), the Board also vacated his finding at subsection (a)(4) and instructed him to reassess the medical opinion evidence. *Collins*, 22 BLR at 1-234. The Board further instructed the administrative law judge that if he found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a) and *Compton*, he must determine whether claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id*.

Subsequently, the Board granted a motion filed by the Director, Office of Workers' Compensation Programs (the Director), to reconsider its holding that the

[1] The record indicates that the miner's last coal mine employment occurred in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

doctrine of collateral estoppel did not apply to preclude employer from relitigating the existence of pneumoconiosis in the survivor's claim. Upon reconsideration, the Board denied the relief requested and reaffirmed its Decision and Order. *Collins v. Pond Creek Mining Co*., BRB No. 02-0329 BLA, slip op. at 1-2 (Nov. 12, 2003)(unpub.).

On remand, the administrative law judge found that the x-ray evidence was inconclusive and that the better reasoned medical opinions did not establish the existence of pneumoconiosis. Weighing the inconclusive x-ray evidence together with the medical opinion evidence pursuant to *Compton*, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge additionally found that, even had claimant established the existence of pneumoconiosis arising out of coal mine employment, she did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that employer was collaterally estopped from relitigating the existence of pneumoconiosis. Claimant further asserts that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that the existence of pneumoconiosis was not established. Additionally, claimant argues that the administrative law judge erred in giving any weight to the opinions of employer's medical experts stating that the miner's death was unrelated to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a letter indicating that he will not file a substantive response to claimant's 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967

F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *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).

Claimant contends that the administrative law judge erred in not finding employer collaterally estopped from relitigating the issue of the existence of pneumoconiosis in this survivor's claim, based on the finding of pneumoconiosis in the miner's lifetime claim for benefits. The Board held previously that the administrative law judge properly declined to apply the doctrine of collateral estoppel in this case. *Collins*, 22 BLR at 1-232-33. Claimant presents no reason why the Board should revisit its holding. Consequently, the Board's holding remains the law of the case on this issue. *See Braenovich v. Cannelton Indus*., 22 BLR 1-237, 1-246 (2003); *Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990).

Pursuant to Section 718.202(a)(1), claimant argues that the administrative law judge did not properly weigh the x-ray readings when he found the x-ray evidence inconclusive for the existence of pneumoconiosis. We disagree. The administrative law judge had before him eighty-six readings of fourteen x-rays. There were thirty positive readings, forty-three negative readings, and thirteen reports stating that certain x-rays were unreadable. The administrative law judge noted accurately that virtually all of the x-ray readings were rendered by physicians qualified as Board-certified radiologists, B-readers, or both. Discussing these readings in light of the readers' radiological qualifications, the administrative law judge found that the x-rays, including the more recent x-rays taken near the time of the miner's death, had received "numerous conflicting interpretations by various dual qualified B-readers and Board-certified radiologists." Decision and Order on Remand at 7. In view of the highly conflicting nature of the x-ray evidence, the administrative law judge found that the x-ray evidence "taken as a whole, neither precludes nor establishes the presence of pneumoconiosis." *Id*. This was a proper analysis of both the quantity and quality of the overall x-ray readings, *see Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992), and substantial evidence supports the administrative law judge's finding that the x-ray evidence was inconclusive.

Claimant nevertheless contends that a remand is required because "the administrative law judge did not undergo an x-ray by x-ray analysis of the x-ray evidence." Claimant's Brief at 18. Claimant, however, fails to explain how this method of weighing the x-rays would have altered the administrative law judge's conclusion that overall, the x-rays in this record were conflicting and inconclusive. Claimant instead argues that, had the administrative law judge focused solely on the x-ray taken on August 7, 1997, the seven positive readings of that x-ray rendered by Board-certified radiologists and B-readers would have preponderated over the negative readings rendered by four readers with these same credentials, resulting in a finding that the existence of

pneumoconiosis was established. Claimant's Brief at 18-20. But claimant reaches this result only by omitting from consideration forty-four conflicting readings of three later x-rays taken on September 6, September 7, and September 10, 1997,[2] as well as the readings of all of the earlier x-rays of record. Decision and Order at 5-7. The administrative law judge was not free to ignore these readings by qualified physicians. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66; *Collins*, 22 BLR at 1-233 n.3. Moreover, the record reflects that the administrative law judge did not merely count the overall number of x-ray readings or the physicians reading them but reviewed the readings of individual x-ray films as summarized by claimant in her brief on remand to the administrative law judge. Decision and Order on Remand at 6-7. On the facts of this case, we detect no reversible error in the administrative law judge's finding that the extensive x-ray readings viewed in light of the readers' qualifications were conflicting and neither precluded nor established the existence of pneumoconiosis. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the opinions of the miner's treating physicians diagnosing pneumoconiosis should have been given "controlling weight." Claimant's Brief at 23. Claimant's contention lacks merit. While a treating physician's opinion may be entitled to special consideration, there is no requirement that a treating physician's opinion be given greater weight than the opinions of other expert physicians. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-88, 22 BLR 2-564, 2-571 (4th Cir. 2002).

In the case at bar, the administrative law judge considered Dr. Younes's status as the miner's treating physician, but permissibly found that in diagnosing pneumoconiosis, Dr. Younes did not "adequately address the extent to which [the miner's] significant smoking history contributed to the miner's chronic obstructive pulmonary disease."[3] Decision and Order on Remand at 12; *see Compton*, 211 F.3d at 212, 22 BLR at 2-176; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The

[2] As we noted earlier, these were three x-rays that we held had to be considered on remand, contrary to claimant's argument that they merited no weight. *Collins v. Pond Creek Mining Co.*, 22 BLR 1-228, 1-233 n.3 (2003). The record indicates that each of these three later x-rays was read positive by three Board-certified radiologists and B-readers, but negative by four physicians with both of these credentials. Director's Exhibits 25, 29; Employer's Exhibit 5; Claimant's Exhibits 1, 3, 4, 8, 10, 11, 13, 14, 16.

[3] On remand, the administrative law judge found that the miner had approximately thirty-four years of coal mine employment and a forty to sixty pack-year history of smoking cigarettes. Decision and Order on Remand at 5. Claimant has not challenged either of these findings on appeal.

administrative law judge was also within his discretion to find that Dr. Younes's opinion was countered by the "better reasoned" opinions of several physicians who possessed pulmonary credentials "comparable" to Dr. Younes's. Decision and Order on Remand at 12; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Substantial evidence in the record supports these credibility determinations. Director's Exhibit 13; Employer's Exhibits 1, 2, 6-11, 14. The administrative law judge additionally found that Dr. Mian, a cardiologist who had treated the miner, recorded a history of chronic obstructive pulmonary disease and coal workers pneumoconiosis, but had "provided little analysis regarding this finding." Decision and Order on Remand at 11; *see Compton*, 211 F.3d at 212, 22 BLR at 2-176; *Clark*, 12 BLR at 1-155. Substantial evidence supports this finding. Director's Exhibit 14. Thus, the administrative law judge validly declined to give greater weight to the opinions of the miner's treating physicians. *Held*, 314 F.3d at 187-88, 22 BLR at 2-571.

Claimant argues further that Dr. Gaziano's opinion supported those of the miner's treating physicians and should not have been discounted. This contention is without merit. The administrative law judge rationally gave Dr. Gaziano's diagnosis of coal workers' pneumoconiosis "little weight" because Dr. Gaziano's "analysis [was] negligible" in that "he failed to cite any clinical test results or other medical data to support his opinion." Decision and Order at 11, 12; *see Compton*, 211 F.3d at 212, 22 BLR 2-176; *Clark*, 12 BLR at 1-155. Substantial evidence supports the administrative law judge's finding that Dr. Gaziano provided little reasoning or support for his conclusions. Director's Exhibit 15.

Based on the foregoing discussion, we affirm the administrative law judge's finding that the better reasoned medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Further, we affirm his finding that the inconclusive x-ray evidence and the medical opinion evidence, when weighed together pursuant to *Compton*, did not establish the existence of pneumoconiosis pursuant to Section 718.202(a).

We also affirm the administrative law judge's alternative finding that, even had claimant established the existence of pneumoconiosis arising out of coal mine employment, she did not prove that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant's sole allegation of error in the administrative law judge's finding is that employer's physicians' opinions as to the cause of the miner's death merited little weight because those physicians did not diagnose pneumoconiosis. Claimant's Brief at 26. Contrary to claimant's contention, because the administrative law judge did not find the existence of pneumoconiosis established in this case, he could properly rely on the causation opinions of physicians who did not diagnose pneumoconiosis. *Cf. Scott v. Mason Coal Co.*, 289 F.3d 263, 268, 22 BLR 2-372, 2-384

(4th Cir. 2002)(explaining that where an administrative law judge finds the existence of pneumoconiosis established, disability causation opinions by physicians who did not diagnose pneumoconiosis merit "little weight").

Moreover, the administrative law judge properly discounted the medical evidence in support of a finding that pneumoconiosis caused or hastened the miner's death. Substantial evidence supports the administrative law judge's permissible finding that the miner's death certificate listing coal workers' pneumoconiosis as a significant factor contributing to his death, without further explanation, was not a reasoned opinion that pneumoconiosis caused or hastened the miner's death.[4] *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); Director's Exhibit 12. Similarly, the record supports the administrative law judge's discretionary finding that the opinions of Drs. Younes and Gaziano stating that pneumoconiosis was a major contributing factor to the miner's death were "cursory" and not well-reasoned. Decision and Order on Remand at 14; *see Compton*, 211 F.3d at 212, 22 BLR 2-176; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Directors Exhibits 13, 15. The record contains no other evidence to support a finding that pneumoconiosis caused or hastened the miner's death. Consequently, we affirm the administrative law judge's finding that claimant "failed to meet her burden of establishing death due to pneumoconiosis" pursuant to Section 718.205(c). Decision and Order on Remand at 14; *see Sparks*, 213 F.3d at 190, 22 BLR at 2-259.

[4] As the administrative law judge noted, no autopsy was performed in this case.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

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