BRB No. 99-0523 BLA

MARIE CASH (Widow of FRED CASH)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
AMAX COAL COMPANY	)	
Employer-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Robert M. Hodge, Chicago, Illinois, for claimant.

Gregory S. Feder (Arter & Hadden LLP), Washington, D.C., for employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-BLA-1702) of Administrative Law Judge Donald W. Mosser on a miner's claim and 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).[1] Regarding the miner's claim, the administrative law judge initially considered whether the evidence submitted subsequent to the denial of the miner's first claim supported a finding of a material change in conditions under 20 C.F.R. §725.309 in accordance with the standard set forth by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, in *Sahara Coal Co. v. Director, OWCP[McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991).[2] The administrative law judge found that because the newly

[1]Claimant is the surviving spouse of miner Fred Cash, who died on August 8, 1995. Director's Exhibit 47A.

[2]The miner filed a claim for benefits on May 8, 1986. In a Decision and Order issued on August 9, 1990, Administrative Law Judge Rudolph L. Jansen accepted employer's concession that the miner was totally disabled and determined that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Judge Jansen further found, however, that the miner did not establish that pneumoconiosis was a contributing cause of his total disability under 20 C.F.R. §718.204(b). Accordingly, benefits were denied. The Board affirmed the denial of benefits in a Decision and Order issued on November 25, 1992. *Cash v. Amax Coal Co.*, BRB Nos. 90-2161 BLA and 90-2161 BLA-A (Nov. 25, 1992)(unpub.). The miner took no further action until filing a second claim on August 8, 1994.

submitted evidence was insufficient to establish total disability due to pneumoconiosis, no material change in conditions was established. The administrative law judge also determined that even if a material change in conditions was demonstrated, the evidence of record, as a whole, was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

In the survivor's claim, the administrative law judge determined that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a), 718.204(b), and 718.205(c). Employer responds and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has responded solely with respect to claimant's contention that the administrative law judge erred in failing to reject Dr. Tuteur's opinion under Section 718.204(b).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

Turning first to the miner's claim, the administrative law judge determined correctly that under the standard set forth in *McNew*, the newly submitted evidence must demonstrate that the miner's pneumoconiosis became totally disabling subsequent to the denial of his first claim. Decision and Order at 4-5. Claimant argues under Section 718.204(b) that in giving more weight to the opinions in which Drs. Tuteur and Kleinerman stated that pneumoconiosis did not play a role in the miner's disability, the administrative law judge failed to address adequately the fact that Dr. Cohen based his conclusion that the miner's totally disabling chronic obstructive pulmonary disease was caused, in part, by coal dust exposure on a number of published epidemiological studies, including a report from the National Institute of Occupational Safety and Health. This contention is without merit. In summarizing the medical evidence of record, the administrative law judge noted both Dr. Cohen's citation of several epidemiological studies in support of his opinion and Dr. Tuteur's critique of a number of these studies. Decision and Order at 10-11. In assessing the probative value of the medical reports of record in his role as fact-finder, and in determining that the reports of

Drs. Tuteur, Kleinerman, and Cohen were reasoned and documented, the administrative law judge was not required to do more. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Claimant also argues that under the decision of the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), the administrative law judge erred in crediting Dr. Tuteur's opinion without first determining that the conclusions expressed by Dr. Tuteur concerning the absence of a clear link between coal dust exposure and chronic obstructive pulmonary disease are accepted by a significant number of his peers. As noted by employer and the Director, *Daubert* does not apply to proceedings under the Act, as the Supreme Court's holding concerned the interpretation of Federal Rule of Evidence 702, which pertains to the use of expert testimony in federal district courts. In addition, the holding in *Daubert* concerns the *admissibility*, rather than the probative value, of such testimony. In the present case, claimant did not object to the admission of Dr. Tuteur's opinion into the record at the hearing. *See* Hearing Transcript at 7-8.

Moreover, contrary to claimant's (and the Director's) suggestion that Dr. Tuteur's opinion is suspect because he assumed that pneumoconiosis cannot cause an obstructive impairment, the United States Court of Appeals for the Seventh Circuit has specifically held in *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995), that an opinion in which Dr. Tuteur expressed conclusions nearly identical to those he expressed in this case was acceptable under the Act. Also, Dr. Tuteur acknowledged that pneumoconiosis can produce an obstructive impairment when it is advanced. Employer's Exhibit 34 at 10, 29.

Claimant further maintains that the administrative law judge erred in determining that the qualifications possessed by Drs. Tuteur and Kleinerman are superior to Dr. Cohen's. We disagree. The administrative law judge found and the record reflects the following with respect to physician qualifications: Dr. Kleinerman is a Board-certified pathologist, a professor of pathology, head of pathology research and clinical pathology at St. Luke's Hospital, and has published 162 articles in medical journals concerning lung and pulmonary pathology. Director's Exhibit 68A. Dr. Tuteur is Board-certified in internal medicine and pulmonary disease, is the director of the pulmonary function lab at Washington School of Medicine and has published forty-one articles and authored chapters in several textbooks relating to pulmonary disease. Employer's Exhibit 29. Dr. Cohen is Board-certified in internal medicine and

pulmonary disease, the director of the Cook County Hospital's Black Lung Clinic and the cardiopulmonary exercise lab, and coauthor of sixteen articles and abstracts; most of them regarding tuberculosis. Claimant's Exhibit 13. Based upon this evidence, the administrative law judge rationally found that Drs. Tuteur and Kleinerman possess expertise superior to Dr. Cohen's. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Inasmuch as there is no merit in claimant's allegations of error regarding the administrative law judge's finding that the newly submitted evidence of record is insufficient to prove that the miner was totally disabled due to pneumoconiosis under Section 718.204(b), we affirm the administrative law judge's determination that claimant did not demonstrate a material change in conditions pursuant to Section 725.309. *See McNew*, *supra*. Accordingly, we affirm the denial of benefits in the miner's claim. *Id*.

Turning to the survivor's claim, in order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantial contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *see 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 Seventh Circuit has held that evidence that establishes that pneumoconiosis hastened the miner's death satisfies the portion of Section 718.205(c)(2) which requires proof that pneumoconiosis was a substantially contributing cause or factor in the miner's death. Decision and Order at 7; *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Claimant asserts that the administrative law judge erred in neglecting to consider under Section 718.205(c), the report in which Dr. Vennekotter, the miner's treating physician, explained his conclusion that pneumoconiosis contributed to the miner's death from a thromboembolism. Claimant's counsel indicated in the Memorandum in Support of Claimant's Petition for Review that Dr. Vennekotter's report appears in the record at Director's Exhibit 39A, but rather than quoting directly from the report, counsel set forth Dr. Cohen's transcription of Dr. Vennekotter's opinion. *See* Claimant's Exhibit 12. We reject

claimant's contention, as the report to which claimant refers is not in the record and Dr. Cohen's summary of its contents does not substitute for the appropriate submission and admission of the report. *See* 20 C.F.R. §§725.414, 725.546. Furthermore, the situation in the present case is distinguishable from that presented in *Peabody Coal Co. v. Director, OWCP, [Durbin]*, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999), in which the Seventh Circuit held that the administrative law judge erred in discrediting Dr. Fino's opinion because Dr. Naeye's review of the autopsy report, upon which Dr. Fino relied, in part, in reaching his conclusions, was not part of the record. In this instance, claimant is arguing that the administrative law judge should have weighed Dr. Vennekotter's report as a separate entity along with the other medical reports of record. Absent compliance with the regulations concerning the admission of documentary medical evidence, the administrative law judge was not permitted to consider Dr. Vennekotter's report. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984)*; Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant also maintains that the administrative law judge ignored the fact that Drs. Tuteur, Kleinerman, and Long did not address the relationship between the miner's severe chronic respiratory disease and his death. Although claimant is correct in stating that these physicians did not discuss this precise issue, they were not required to do so, in light of their conclusion that neither pneumoconiosis nor any other coal dust related impairment caused, contributed to or hastened the miner's death. *See Railey*, *supra*; *Neeley*, *supra*.

Finally, claimant argues that the administrative law judge erred in relying upon the opinions of physicians who ruled out pneumoconiosis as a contributing cause of death solely on the basis of their assumption that the miner did not have pneumoconiosis. This contention is without merit, as the administrative law judge relied upon the opinions of Drs. Tuteur and Kleinerman; both of whom explained why the objective evidence of record did not support a finding that pneumoconiosis or coal dust inhalation caused, contributed to, or hastened the miner's death. Director's Exhibit 68A; Employer's Exhibits 31, 33-35. The administrative law judge rationally determined that their opinions were entitled to greater weight than Dr. Cohen's opinion based upon the fact that Dr. Kleinerman reviewed the autopsy slides in addition to the documentary medical evidence and that Dr. Tuteur's opinion is well-reasoned and consistent with the medical evidence of record. Decision and Order at 17; *see Clark*, *supra*; *Peskie*, *supra*; *Lucostic*, *supra*.

Inasmuch as claimant has not set forth any meritorious allegations of error regarding the administrative law judge's finding under Section 718.205(c) that

pneumoconiosis did not cause, contribute to, or hasten the miner's death, we affirm that finding and the denial of benefits in the survivor's claim.[3] *See Railey*, *supra*; *Neeley*, *supra*. We decline to address, therefore, claimant's contentions regarding the administrative law judge's findings under Section 718.202(a), as error, if any therein, is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3]The irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304 is not applicable in the present case, as there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.205(c)(3), 718.304.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge