BRB No. 00-0534 BLA

ROSE MARIE DRUMHELLER (Widow of ARCHIE DRUMHELLER) Claimant-Respondent v. JEDDO-HIGHLAND COAL COMPANY and LACKAWANNA CAUSALITY COMPANY Employer/Carrier- Petitioners 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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Michelle A. Jones (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0894) of Administrative Law Judge Ainsworth H. Brown 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).[1] The administrative law judge credited the miner with "at least" thirty-six years of coal mine employment. Decision and Order at 2. Applying the regulations at 20 C.F.R. Part 718, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) (2000), 718.203(b) (2000). Decision and Order at 3-4. The administrative law judge also found that claimant[2] established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Decision and Order at 4. Accordingly, benefits were awarded, commencing June 1997. Decision and Order at 5.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis and in finding that the miner's death was due to pneumoconiosis. Employer's Brief at 13-16. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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[1]The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant is Rose Marie Drumheller, widow of Archie Drumheller, who filed her claim for benefits on August 12, 1998. Director's Exhibit 1.

[3]We affirm the administrative law judge's length of coal mine employment finding as it is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which both employer and the Director have responded.[4] Claimant has not filed a response.[5] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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).

Regarding the existence of pneumoconiosis, the administrative law judge considered the relevant medical opinion evidence and concluded that claimant established that the miner "suffered from a coal mine related respiratory condition that arose at least in part from his more than 36 year exposure." Decision and Order at 4. In arriving at this conclusion, the administrative law judge relied on the opinion of Dr. Cable, who, the administrative law judge noted, was a "pulmonary specialist"[6] and had been "attending and consulting with respect to the miner's respiratory status as early as 1989." Decision and Order at 3-4. The administrative law judge found the contrary opinion of Dr. Dittman to "demonstrate a hostility to the Act" because Dr. Dittman failed to recognize that claimant is not required to

[4]Both employer and the Director in their briefs, dated March 13, 2001 and February 28, 2001, respectively, assert that the regulations at issue in the lawsuit do not affect the outcome of this case.

[5]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[6]In crediting Dr. Cable's opinion, the administrative law judge referred to this physician as "a pulmonary specialist." Decision and Order at 4. However, the record does not appear to contain Dr. Cable's qualifications.

have a positive x-ray in order to establish the existence of pneumoconiosis. Decision and Order at 3. The administrative law judge stated "that it would not be legally defensible to reject Dr. Cable's diagnosis, especially since Dr. Dittman displays such a pinched view of the diagnostic criteria." Decision and Order at 4. Therefore, "[b]ecause of the infirmity in Dr. Dittman's opinion and the lack of any apparent defect in Dr. Cable's diagnosis," the administrative law judge found the existence of pneumoconiosis. *Id.*

Employer asserts that the administrative law judge erred in relying on the opinion of Dr. Cable to find the existence of pneumoconiosis established because his findings "waffled over the years." Employer's Brief at 15. While Dr. Cable initially found "probable" coal workers' pneumoconiosis, hospital notes prepared by Dr. Cable in 1991 and 1995 indicate a diagnosis of coal workers' pneumoconiosis, not probable coal workers' pneumoconiosis. Director's Exhibit 7. Thus, contrary to employer's assertion, Dr. Cable's diagnosis of coal workers' pneumoconiosis did not "waffle over the years."[7]

The administrative law judge properly discredited Dr. Dittman's opinion because this physician appears to have erroneously required a positive x-ray for a diagnosis of pneumoconiosis.[8] *See* 20 C.F.R. §718.202(a)(4); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986).

[7]The administrative law judge stated that Dr. Cable initially diagnosed the miner with "probable CWP." Decision and Order at 3. The administrative law judge noted that Dr. Cable dropped the "probable" from his diagnosis of coal workers' pneumoconiosis in 1991, but added "probable" back into his diagnosis in 1995. *Id.* However, as discussed above, Dr. Cable did not diagnose probable coal workers' pneumoconiosis in 1995, *see* discussion, *supra*. Director's Exhibit 7.

[8]As noted by the administrative law judge, Dr. Dittman testified that it would be a contradiction for there to be a diagnosis of pneumoconiosis in the hospital records without a positive x-ray to support such a diagnosis. Employer's Exhibit 1 at 23-24.

Additionally, the record indicates that Dr. Cable began treating the miner as early as 1989 and continued to treat him until his death in 1997, Director's Exhibits 5, 7, 10. Therefore, it was not unreasonable, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), for the administrative law judge to find the existence of pneumoconiosis based on the opinion of Dr. Cable and his status as the miner's treating physician. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *see also Berta v. Peabody Coal Co.*, 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Accordingly, we affirm the administrative law judge's treatment of the medical opinion evidence regarding the existence of pneumoconiosis.

Employer also asserts, however, that the administrative law judge erred in finding pneumoconiosis established because the x-ray evidence does not support such a finding. Employer's Brief at 15. The record contains numerous x-ray interpretations which are relevant to the administrative law judge's finding regarding the existence of pneumoconiosis. Director's Exhibits 7-9, 11-15, 17-18, 30; Employer's Exhibits 2-3. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir.1997), that an administrative law must consider all types of relevant evidence together to determine whether the miner suffered from pneumoconiosis. In considering whether claimant established the existence of pneumoconiosis in this case, the administrative law judge failed to weigh the x-ray evidence together with the medical opinion evidence. Therefore, we instruct the administrative law judge on remand to consider all the evidence at Section 718.202(a)(1)-(4) to determine if claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a) in accordance with *Williams.*

Pursuant to 20 C.F.R. §718.205(c) (2000), the administrative law judge found that claimant established that pneumoconiosis substantially contributed to the miner's death. Decision and Order at 4. Specifically, the administrative law judge stated:

> [e]xcept for the certificate of death whose authorship may only be by a lay deputy coroner, there is no positive evidence implicating CWP with the miner's death. However, as noted by Dr. Dittman more specifically in his written report, the miner's cardiovascular [disease] could not be addressed as his cardiologists would have wished. Accepting the fact that his heart condition was severe enough to have caused death it is clear that the pulmonary condition complicated the medical management sufficiently to be implicated in the terminal process either by substantially contributing to the miner's demise, or, hastening it to some extent.

Decision and Order at 4.

Employer asserts that the administrative law judge's conclusion that "the miner's pulmonary condition complicated his medical management to substantially contribute to his death or hasten it to some extent is clearly unsupported in the record." Employer's Brief at 15-16. Given the administrative law judge's limited findings pursuant to Section 718.205(c) (2000), it is difficult for the Board to determine whether the administrative law judge's determination that the miner's death was hastened by pneumoconiosis is reasonable. Accordingly, we vacate the administrative law judge's finding regarding the cause of the miner's death and remand this case for the administrative law judge to reconsider the relevant medical opinion evidence pursuant to Section 718.205(c) and to fully explain his findings and conclusions and the basis therefor. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 1-83 (3d Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

We instruct the administrative law judge on remand, when reconsidering the relevant medical evidence, to cite to specific medical evidence which establishes that the miner's pneumoconiosis caused or substantially contributed[9] to his death.[10] *See Lango, supra*; *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Specifically, the administrative law judge should indicate what evidence establishes that the miner's death was caused by his failure to have heart surgery,[11] what evidence establishes that the miner could not tolerate the cardiac bypass surgery he needed because of his pulmonary status, and what evidence implicates pneumoconiosis or the miner's coal mine employment in the process that complicated the management of the miner's heart condition.

[9]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); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

[10]We instruct the administrative law judge that it is within his discretion to re-open the record for additional evidence on remand. *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989)(*en banc*); *Toler v. Associated Coal Co.*, 12 BLR 1-49 (1988)(*en banc* with McGranery J., concurring); *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986).

[11]The death certificate indicates that no autopsy was performed. Director's Exhibit 5.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge