BRB No. 01-0433 BLA

SARAH C. VANDYKE (Widow of ELMER C. VANDYKE)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED:
L & R MINING, INCORPORATED	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order on Remand - Denying Miner's and Survivor's Consolidated Claims of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise III, Abingdon, Virginia, for claimant.

Lenore S. Ostrowsky (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Helen H. Cox (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand - Denying Miner's and Survivor's Consolidated Claims (96-BLA-1074) of Administrative Law Judge Clement J. Kichuk 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).[2] The case is before the Board for the second time and involves the

[1] Claimant is the widow of the miner, Elmer C. Van Dyke, who died on August 13, 1993. Director's Exhibit 160. The miner filed his initial application for benefits on October 7, 1986, which was ultimately denied in a Decision and Order issued by Administrative Law Judge G. Marvin Bober on October 7, 1991. Director's Exhibit 61. On January 23, 1992, the miner filed a request for modification with the Department of Labor, an appeal of the denial of which was pending before the Board when claimant filed a motion to remand to the district director for modification of the miner's claim and consolidation with the survivor's claim which had been filed on February 8, 1994. Director's Exhibits 63, 127, 140. The Board granted claimant's motion and remanded the miner's claim on July 17, 1995. *See Van Dyke v. L & R Mining, Inc.*, BRB No. 95-0867 BLA (unpub. Order); Director's Exhibit 141. The claims were subsequently consolidated before the district director. Director's Exhibit 147. Claimant is currently pursuing both the miner's claim and her survivor's claim.

[2] The Department of Labor has 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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board requested supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the

consolidation of a living miner's claim filed on October 7, 1986, and a survivor's claim filed on February 8, 1994. This case has a detailed procedural history which was thoroughly discussed in the Board's previous Decision and Order. *See Van Dyke v. L & R Mining, Inc.*, BRB Nos. 98-1607 BLA and 98-1607 BLA-A, slip op. at 2-4 (Apr. 28, 2000)(unpub.). In that decision, the Board vacated the Decision and Order of Administrative Law Judge Joan Huddy Rosenzweig and remanded the case for reconsideration of the medical opinion evidence of record. Specifically, the Board vacated Judge Rosenzweig's finding that pneumoconiosis was a contributing cause of the miner's total respiratory disability pursuant to 20 C.F.R. §718.204(b) (2000).[3] In addition, the Board vacated her finding that pneumoconiosis contributed to or hastened the miner's death pursuant to 20 C.F.R. §718.205(c) (2000). The Board instructed Judge Rosenzweig, on remand, to reconsider all aspects of the medical opinion evidence. In particular, the Board stated that Judge Rosenzweig must consider the qualifications of the physicians, the explanations of their medical opinions, the documentation underlying their medical judgments and the sophistication and bases of their opinions. *Van Dyke*, slip op. at 10.

On remand, the case was transferred to Administrative Law Judge Clement J. Kichuk (the administrative law judge) due to the unavailability of Judge Rosenzweig. In considering the medical evidence of record, the administrative law judge found that the weight of the medical evidence was insufficient to establish that pneumoconiosis was a

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February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[3] The Board affirmed Judge Rosenzweig's decision to credit the miner with thirty-three years of coal mine employment as well as her findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4), 718.203(b), 718.204(c) (2000), as unchallenged on appeal. *Van Dyke v. L & R Mining, Inc.*, BRB Nos. 98-1607 BLA and 98-1607 BLA-A, slip op. at 4, n.6; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

necessary cause of the miner's totally disabling respiratory impairment pursuant to Section 718.204(b) (2000). Decision and Order on Remand at 11. Consequently, the administrative law judge found that claimant failed to carry her burden of establishing that the evidence of record supports a finding of modification or entitlement to benefits in the miner's claim. With regards to the survivor's claim, the administrative law judge found that the medical opinion evidence was insufficient to establish that the miner's death was due to pneumoconiosis, concluding that the weight of the evidence fails to support a finding that pneumoconiosis contributed to or hastened the miner's death pursuant to Section 718.205(c) (2000). Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding the medical evidence of record insufficient to establish that pneumoconiosis was a contributing cause of the miner's total respiratory disability and also insufficient to establish that pneumoconiosis was a contributing cause of the miner's death. Specifically, claimant contends that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Robinette and Henry, the miner's treating physicians, over the contrary opinions of record. In addition, claimant contends that the administrative law judge erred in the weight he accorded the opinions of Drs. Kleinerman, Rodman and Endres-Bercher, arguing that these opinions are flawed. In response, employer urges affirmance of the administrative law judge's denial of benefits in both the miner's claim and in the survivor's claim as supported by substantial evidence. Additionally, employer contends that claimant is seeking a reweighing of the medical evidence, which the Board is not empowered to do. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this 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 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).

In considering entitlement to benefits in the miner's claim, the administrative law judge found that the medical opinion evidence was insufficient to establish that pneumoconiosis was a necessary cause of the miner's total respiratory disability pursuant to Section 718.204(b) (2000).[4] Specifically, the administrative law judge considered all

[4] The provision pertaining to disability causation, previously set forth at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c), while the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c) (2000), is now

of the relevant medical opinions of record and credited the opinions of Drs. Kleinerman, Rodman, Renn, Castle and Endres-Bercher, that the miner's total respiratory disability was due entirely to his smoking history and that pneumoconiosis played no role in the miner's disability, over the contrary opinions of Drs. Robinette, Henry and Naeye. Decision and Order on Remand at 6-11. In weighing the medical opinions, the administrative law judge found that the opinions of Drs. Kleinerman, Rodman, Renn, Castle and Endres-Bercher were well reasoned and fully consistent with the underlying documentation. *Id*.

Claimant contends that the administrative law judge erred in his weighing of the medical opinion evidence of record. In particular, claimant contends that the administrative law judge erred in failing to accord more weight to the opinions of Drs. Robinette and Henry based on their status as the miner's treating physicians. Claimant also raises numerous challenges to the administrative law judge's weighing of the medical opinions of Drs. Kleinerman, Rodman, Endres-Bercher and Hippensteel, arguing that the flaws contained in these opinions render them entitled to little probative weight. These contentions lack merit.

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found at 20 C.F.R. §718.204(b).

Contrary to claimant's contention, the opinions of Drs. Robinette and Henry are not entitled to more weight based solely on their status as the miner's treating physicians. As the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993), "neither this Circuit nor the Benefits Review Board has ever fashioned either a requirement or a presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians." *Grizzle*, 994 F.2d at 1097, 17 BLR at 2-128-129; *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Rather, in addressing the relative probative weight of the medical evidence, the administrative law judge must address the qualifications of the respective physicians, the explanation of their conclusions, the documentation underlying their medical judgments and the sophistication and bases of their diagnoses.[5] *Akers, supra; see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Herein, the administrative law judge set forth all of the relevant medical opinions of record, including the qualifications of the physicians, the documentation underlying their conclusions as well as the explanations of their conclusions. Decision and Order on Remand at 6-11. The administrative law judge acknowledged that Dr. Robinette's status as one of the miner's treating physicians as well as his qualifications as a Board-certified pulmonologist place him in a "preferred status." Decision and Order on Remand at 7. Nonetheless, the administrative law judge reasonably found that Dr. Robinette's opinion regarding the cause of the miner's total respiratory disability was entitled to little weight

[5] Claimant further requests that the Board apply the subsection in the amended regulations governing the weighing of the opinions of treating physicians, arguing that this subsection accords a preference to treating physicians. Claimant's Brief at 1. Contrary to claimant's contention, the added consideration to be accorded treating physicians contained in the amended regulations, 20 C.F.R. §718.104(d), is not applicable in this case. Rather, the amended regulations state that the subsection regarding the weight to be accorded to treating physicians and the factors to be considered by the administrative law judge in weighing the opinions of these physicians is applicable only to evidence developed after January 19, 2001, the effective date of the amended regulations. 20 C.F.R. §718.101(b). Moreover, contrary to claimant's contention, the weight to be accorded a treating physician's opinion under the amended regulations is not a mechanical preference for the opinions of treating physicians, but rather, the regulation states "that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

because it is not well-reasoned and lacks persuasive reliability inasmuch as the physician did not adequately explain how the clinical evidence supports his conclusion. Decision and Order on Remand at 8; Director's Exhibits 63, 67, 107, 109, 160, 163, 183; *Akers, supra; Hicks, supra*. Likewise, the administrative law judge reasonably accorded little weight to the opinion of Dr. Henry, the miner's other treating physician of record, finding that the physician did not adequately explain his conclusion that pneumoconiosis was a causative factor of the miner's total respiratory disability in light of Dr. Henry's failure to relate any of the conditions diagnosed in his treatment summaries to coal dust exposure as well as Dr. Henry's exclusion of the miner's smoking history in his analysis. Decision and Order on Remand at 10; Director's Exhibits 161, 162, 164; *Akers, supra; Hicks, supra.*

Furthermore, contrary to claimant's contention, it was not irrational for the administrative law judge to credit the opinions of Drs. Endres-Bercher and Hippensteel, that the miner's total respiratory disability was not due to pneumoconiosis, even though they did not diagnose the existence of pneumoconiosis. The administrative law judge reasonably credited these opinions because the physicians acknowledged the presence of a disabling respiratory or pulmonary impairment which they opine can be fully explained by a cause other than pneumoconiosis, *i.e.*, the miner's heavy smoking history. Decision and Order on Remand at 5-6; Director's Exhibits 21, 23, 41, 69; *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). We also reject claimant's contention that the opinions of Drs. Renn, Castle, Kleinerman and Rodman are predicated on the erroneous assumption that an obstructive lung impairment is inconsistent with coal dust exposure and, thus, should not be credited, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). As discussed in the Board's prior Decision and Order, these opinions are not violative of *Warth*, because the determinative factor common to all the opinions is that the miner suffered panacinar emphysema, most commonly caused by cigarette smoking, and not that chronic obstructive pulmonary disease can never result from dust exposure in coal mine employment. *Van Dyke*, slip op. at 9; *see generally Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). The remainder of claimant's arguments merely seeks a reweighing of the medical opinion evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, since the administrative law judge has rationally considered all of the relevant medical opinion evidence, we affirm his finding that the weight of the medical evidence is insufficient to establish that pneumoconiosis was a contributing cause of the miner's total respiratory disability. 20 C.F.R. §718.204(c).

With regard to the survivor's claim, the administrative law judge found that the preponderance of the medical evidence was insufficient to establish that pneumoconiosis

contributed to or hastened the miner's death. In particular, the administrative law judge found that the opinion of Dr. Robinette, that pneumoconiosis hastened the miner's death, was outweighed by the contrary opinions of Drs. Kleinerman, Renn, Rodman and Castle. Decision and Order on Remand at 12-13. The administrative law judge further found that Dr. Stefanini, the autopsy prosector, declined to answer the question of whether pneumoconiosis contributed to or hastened the miner's death. Rather, the administrative law judge credited the opinions of Drs. Kleinerman, Renn, Rodman and Castle, that pneumoconiosis did not contribute to or hasten the miner's death, finding that these opinions were well-reasoned and that their findings are consistent with and supported by their respective opinions regarding the role pneumoconiosis played in the miner's death. *Id*.

Claimant generally contends that the opinions of Drs. Robinette and Henry opined that coal dust and coal workers' pneumoconiosis hastened the miner's death. However, claimant does not set forth any new allegations of error with respect to these findings, other than those allegations of error in the administrative law judge's weighing of the medical opinion evidence of record, previously addressed and rejected by the Board in this decision. *See* discussion, *supra*. Consequently, since claimant does not allege any other errors of law with specificity, we affirm the administrative law judge's finding that the weight of the medical evidence is insufficient to establish entitlement to benefits in the survivor's claim. 20 C.F.R. §718.205(c); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *see generally Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Miner's and Survivor's Consolidated Claims is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge