

BRB No. 04-0473 BLA

LINDA J. MORGAN	)	
(Widow of NOBLE MORGAN)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELKAY MINING COMPANY	)	
	)	DATE ISSUED: 03/30/2005
Employer-Respondent	)	
	)	
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 Upon Remand by the Benefits Review Board of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant, the miner's widow, appeals the Decision and Order - Denying Benefits Upon Remand by the Benefits Review Board (00-BLA-0544) of Administrative Law Judge Robert J. Lesnick (the administrative law judge) on a survivor's claim<sup>1</sup> filed pursuant to the provisions of Title IV of the Federal Coal

---

<sup>1</sup> Claimant filed this claim for survivor's benefits on July 29, 1999. Director's

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. The administrative law judge denied benefits by Decision and Order dated August 27, 2002. The administrative law judge determined that the evidence established the existence of pneumoconiosis arising out of the miner's coal mine employment at 20 C.F.R. §§718.202 and 718.203, but found the evidence insufficient to meet claimant's burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant appealed. The Board, in *Morgan v. Elkay Mining Co.*, BRB No. 02-0845 BLA (Sept. 12, 2003)(unpub.), vacated the administrative law judge's finding at 20 C.F.R. §718.205(c) and remanded the case.

On remand, the administrative law judge found that the evidence was insufficient to meet claimant's burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c), relying on the reports of Drs. Spagnolo, Caffrey, Bush, and Oesterling, who each opined that that the miner had no impairment, symptom, or lung tissue destruction due to pneumoconiosis, coal mine employment, or the deposits of coal dust seen in the miner's lung tissue. The administrative law judge found that notwithstanding the holding of the United States Court of Appeals for the Fourth Circuit in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002)(medical opinion that disability was not caused in part by pneumoconiosis may not establish that disability was not caused at least in part by pneumoconiosis, where the physician diagnosed neither legal or medical pneumoconiosis nor any symptoms due to exposure to coal mine dust, and thus, the opinion directly contradicted the administrative law judge's finding that the miner had pneumoconiosis arising out of coal mine employment), the opinions of Drs. Spagnolo, Caffrey, Bush and Oesterling could be credited pursuant to the Fourth Circuit's holding in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), as these physicians attributed the miner's impairment, condition, and symptoms to causes other than exposure to coal mine dust.

On appeal, claimant contends that the administrative law judge erred in failing to apply the Fourth Circuit's holding in *Scott* and in relying, pursuant to the Fourth Circuit's holding in *Ballard*, on the opinions of Drs. Spagnolo, Caffrey, Bush and Oesterling to deny benefits. Claimant also asserts that the administrative law judge's decision to again accord little weight to Dr. Green's opinion, that the miner's coal workers' pneumoconiosis hastened his death, was error. Employer responds, and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed

---

Exhibit 1. The miner's death certificate indicates that he died on July 7, 1999 due to lobar pneumonia. Director's Exhibit 6.

a brief in the 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 rational, supported by substantial evidence, and in accordance with 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>2</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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 *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980, 16 BLR 2-90, 2-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). The

---

<sup>2</sup> The regulation at 20 C.F.R. §718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) 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).

Fourth Circuit held in *Shuff*, 967 F.2d at 980, 16 BLR at 2-93, that any condition that hastens the miner's death is a substantially contributing cause of death. See 20 C.F.R. § 718.205(c)(2).

Claimant contends that the administrative law judge erred in failing to follow the Board's directive to apply *Scott* to determine the issue of death due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant argues that the administrative law judge's reliance on the opinions of Drs. Spagnolo, Caffrey, Bush and Oesterling to deny benefits, on the ground that it was permissible under *Ballard*, was error. Employer responds, and argues that the administrative law judge on remand properly relied on the opinions of Drs. Spagnolo, Caffrey, Bush, and Oesterling, pursuant to *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995) and *Ballard*, and properly accorded less weight to the opinion of Dr. Green. Employer thus urges the Board to affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §718.205(c).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we hold that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Upon further reflection, we note that the Fourth Circuit in *Ballard* determined, *inter alia*, that the opinion of Dr. Caffrey, that the miner did not have coal workers' pneumoconiosis, did not contradict the administrative law judge's finding of pneumoconiosis where Dr. Caffrey "discerned 'black pigment which is morphologically consistent with coal dust,' 'a mild amount of anthracotic pigment,' and a '[m]oderate amount of anthracotic pigment identified within lung tissue and hilar lymph node tissue.'" *Ballard*, 65 F.3d at 1195, 19 BLR at 2-319. In the instant case, the administrative law judge permissibly relied, under *Ballard*, on the opinions of Drs. Spagnolo, Caffrey, Bush, and Oesterling, who each diagnosed or acknowledged the presence of black pigmentation in the miner's lung tissue, see Employer's Exhibits 1, 3, 4, 7, 12, 13, to defeat a finding of entitlement in this survivor's claim.<sup>3</sup> *Id.* Based on the specific medical findings rendered by Drs. Spagnolo, Caffrey, Bush and Oesterling, and the facts of this case as discussed by the administrative law judge on remand from the Board, we hold that the administrative law judge did not err in finding that claimant failed to meet her burden to establish death due to pneumoconiosis at Section 718.205. 20 C.F.R. §718.205(c); see *Shuff*, 967 F.2d at 980, 16 BLR at 2-93.

---

<sup>3</sup> We note that no party alleges any error in the administrative law judge's discrediting of the opinions of Drs. Crouch, Fino, and Castle. See Decision and Order on Remand at 9.

Claimant next challenges the administrative law judge's decision to accord less weight to Dr. Green's opinion regarding the cause of the miner's death in 1999, based on the administrative law judge's findings that the opinion is inconsistent with objective medical evidence of record dating from 1997, and that employer's experts analyzed more medical data than did Dr. Green. Dr. Green opined that the miner had "pneumoconiosis in combination with chronic bronchitis [which] would have contributed to the respiratory failure and specifically to the hypoxia associated with the pneumonia." Claimant's Exhibit 1. The administrative law judge found, within his discretion, that the miner's medical records and employer's experts' opinions contradict a finding that pneumoconiosis contributed to the miner's respiratory failure. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995). We thus affirm the administrative law judge's finding that the relevant evidence failed to meet claimant's burden to establish that pneumoconiosis caused, contributed to, or hastened the miner's death at 20 C.F.R. §718.205(c), as it is supported by substantial evidence and is in accordance with law. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Accordingly, the Decision and Order - Denying Benefits Upon Remand by the Benefits Review Board of the administrative law judge is affirmed.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

I concur.

---

ROY P. SMITH  
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of the majority to affirm the administrative law judge's Decision and Order - Denying Benefits Upon Remand from the Benefits Review Board. I disagree with the holding of the majority that

the opinions of Drs. Spagnolo, Caffrey, Bush and Oesterling are sufficient to constitute substantial evidence to defeat a finding of entitlement in this survivor's claim. In my opinion, the administrative law judge did not follow the Board's directive to apply *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), which the Board held constitutes applicable controlling authority. *Morgan v. Elkay Mining Co.*, BRB No. 02-0845 BLA (Sept. 12, 2003)(unpub.), slip op. at 8, 10. The administrative law judge also did not take into account the Board's rejection of employer's assertion that the evidence relied upon by him on original consideration, to find that claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c), namely the opinions of Drs. Caffrey, Bush, Crouch, Oesterling, Spagnolo, Fino and Castle, can constitute substantial evidence in support of a denial of benefits under *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995) and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). *Morgan*, slip op. at 8-9. I would hold that the administrative law judge's error constitutes reversible error. See *Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

In the instant case, the administrative law judge found that because Drs. Spagnolo, Oesterling, Caffrey, and Bush attributed the miner's impairment or condition to causes other than exposure to coal mine dust, their opinions had probative weight and could be relied upon, pursuant to *Ballard*, to find that claimant did not meet her burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). Decision and Order on Remand at 8-9. The administrative law judge did not analyze specifically whether or not *Ballard* applies, based on the pertinent inquiry of whether the physicians who rendered opinions on the cause of the miner's death, while not diagnosing coal workers' pneumoconiosis, nevertheless diagnosed symptoms consistent with the disease. The record shows, and the administrative law judge recognized on remand, that Drs. Spagnolo, Oesterling, Caffrey, and Bush, did not diagnose coal workers' pneumoconiosis or any symptom consistent with the disease. Employer's Exhibits 1, 3, 4, 7, 12, 13; Decision and Order on Remand at 8-9.

Further, I would hold that claimant correctly contends that the administrative law judge erred in deciding to accord less weight to Dr. Green's opinion regarding the cause of the miner's death in 1999, based on the administrative law judge's findings that the opinion is inconsistent with objective medical evidence of record dating from 1997 and that employer's experts analyzed more medical data than Dr. Green. The administrative law judge referred to a pulmonary function study and a blood gas study, both from 1997, which noted no hypoxia. Decision and Order at 7; see Director's Exhibit 24-11. The Board held, however, that objective tests that do not establish total disability, but show only mild impairment *two years* before the miner's death, do not establish that pneumoconiosis did not play a role in the miner's death in 1999. *Morgan*, slip op.

at 10. On remand, the administrative law judge noted this holding by the Board, and merely stated, “Upon review of the record, however, I maintain that Dr. Green’s opinion is inconsistent with the objective medical data of record.” Decision and Order at 7. This summary finding by the administrative law judge is inadequate to constitute compliance with the Board’s remand order that the administrative law judge reconsider Dr. Green’s opinion, the only opinion of record sufficient to meet claimant’s burden at 20 C.F.R. §718.205(c).

I would, therefore, vacate the administrative law judge’s Decision and Order – Denying Benefits Upon Remand from the Benefits Review Board, and would remand the case for reassignment to an administrative law judge who would follow the Board’s remand instructions and make further findings not inconsistent with the Board’s holdings in this case.

---

BETTY JEAN HALL  
Administrative Appeals Judge