BRB No. 06-0548 BLA

ETHEL ELAINE TOLLIVER (on behalf of and as Survivor of MICHAEL LEE TOLLIVER)	)	
Claimant-Respondent	)	
v.	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 03/26/2007
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2000-BLA-882) of Administrative Law Judge Alice M. Craft on a duplicate miner's claim filed

on May 16, 1995 and a survivor's claim filed on October 15, 1999 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] This case, as presently postured, is before the Board for a second time.[2] When the case was first before the Board, the Board vacated the administrative law judge's award of benefits. *Tolliver v. Eastern Associated Coal Corp.*, BRB No. 04-0129 BLA (Oct. 22, 2004)(unpub.). The Board held that the administrative law judge's material change in conditions finding pursuant to 20 C.F.R. §725.309(d) (2000) could not be affirmed because the administrative law judge discussed only the general standard of review for determining whether a material change in conditions was established, without rendering a specific finding based upon consideration of the newly submitted evidence. *Tolliver*, *slip op.* at 3. The Board also vacated the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)(2000) and remanded the case for reconsideration of the x-ray evidence because the administrative law judge had failed to provide an adequate rationale for her weighing of the x-ray evidence and because she did not provide an explanation of her reasons or bases for her conclusions in light of the various reader qualifications and conflicting interpretations. Board's Decision and Order at 4. Further, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of the disease under 20 C.F.R. §718.202(a)(4)(2000). In so doing, the Board remanded the case for reconsideration of the medical opinion evidence because the administrative law judge erred in crediting the opinions of Drs. Jenkins, Rasmussen and Albin, which were not well-reasoned and documented, while discounting the contrary opinions of Drs. Tuteur, Renn, Naeye, Repsher, Dahhan and Kleinerman without sufficiently explaining her reasons for doing so pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as

[1] 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The miner filed his first claim for benefits on February 8, 1993. Director's Exhibit 32-1. This claim was denied by the district director on July 20, 1993, Director's Exhibit 32-18, and no further action was taken. The miner filed a second claim on May 16, 1995, the claim before us. Decision and Order at 2; Director's Exhibit 1. A hearing was held before Administrative Law Judge Stuart Levin on July 20, 1999, but the miner died on September 25, 1999, prior to the issuance of a Decision and Order by Judge Levin. Decision and Order at 2; Director's Exhibit 62. Claimant, the miner's widow, filed a survivor's claim on October 15, 1999, Decision and Order at 2; Director's Exhibit 70, and the claims were consolidated for consideration.

incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), and the decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). *Tolliver*, slip op. at 3-6. The Board further instructed the administrative law judge to weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4)(2000) pursuant to *Island Creek Coal Co. v Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) in considering whether the existence of pneumoconiosis was established. *Tolliver*, slip op. at 6. In addition, the Board held that since the administrative law judge's errors regarding the existence of pneumoconiosis directly impacted her findings regarding disability causation and death due to pneumoconiosis, those findings were likewise vacated and the case was remanded for reconsideration of those issues, if necessary. 20 C.F.R. §§718.204, 718.205 (2000). *Id*.

On remand, in considering the newly submitted x-ray, CT scan, and medical opinion evidence together, as required by *Compton*, 211 F.3d at 211, 22 BLR at 2-174, the administrative law judge concluded that while the newly submitted x-ray evidence was inconclusive and was, therefore, insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)(2000), the newly submitted medical opinion evidence was sufficient to establish to establish the existence of pneumoconiosis at Section 718.202(a)(4)(2000). Decision and Order on Remand at 30-37.[3] The administrative law judge concluded, therefore, that a material change in conditions was established pursuant to Section 725.309(d)(2000). Further, based on her review of all of the evidence of record, and the fact that the miner was employed in coal mine employment for over twenty-seven years, the administrative law judge found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). The administrative law judge also found, on review of the record, that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(b), (c) and that his death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, benefits were again awarded on both the miner's and the survivor's claims.

On appeal, employer challenges the administrative law judge's weighing of the evidence under Sections 718.202(a)(4), 718.204(c) and 718.205(c). In response, claimant

[3] The administrative law judge noted that the methods for establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3) were not available in this case. Decision and Order on Remand at 31. As this finding has not been challenged, it is affirmed. *Skrack*, 6 BLR 1-710.

urges that the award of benefits be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[4]

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).

Employer first contends that the administrative law judge failed to fully analyze the credentials of the physicians who provided the medical opinions. Specifically, employer contends that, although acknowledging the importance of physician qualifications, the administrative law judge failed to explain why the opinions of pulmonary disease specialists, who opined that the miner did not suffer from legal pneumoconiosis, were not entitled to greater weight than the opinions of physicians diagnosing the presence of the disease, who had no pulmonary expertise.

Employer also contends the administrative law judge failed to explain why she found the opinion of Dr. Rasmussen to be reasoned and documented while the opinions of Drs. Sullivan and Jenkins were not, when she had found that: Dr. Rasmussen did not have all of the miner's medical records; Dr. Rasmussen noted that the miner had other conditions that could have caused his lung disease; and Dr. Rasmussen did not explain what factors, other than coal dust exposure, led him to conclude that coal dust was a cause of the miner's respiratory condition. Moreover, employer argues that Dr. Rasmussen's opinion diagnosing pneumoconiosis was not an affirmative finding, but was instead merely based on x-ray evidence and the physician's inability to "rule out" coal dust exposure as a source of the miner's condition. Thus, in sum, employer contends that the administrative law judge's analysis of Dr. Rasmussen's opinion does not comply with the Board's remand instructions.

Similarly, employer argues that the administrative law judge's treatment of the opinions of Drs. Renn, Tuteur, Repsher and Dahhan, Director's Exhibits 42, 48, 58; Employer's Exhibits 1, 2, 5-13, all of whom concluded that the miner did not suffer from pneumoconiosis or any disease arising out of coal mine dust exposure, failed to comply with the Board's remand instructions as the administrative law judge failed to provide a

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that the pulmonary function study and medical opinion evidence supports a finding of totally disabling respiratory impairment. Decision and Order on Remand at 37; 20 C.F.R. §718.204(b)(2)(i), (iv); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

rational reason for discrediting these physicians' opinions. Employer contends that the administrative law judge determined that these opinions were not consistent with each other, Decision and Order on Remand at 35, but ignored the fact that they were consistent as to what role coal dust exposure played in the miner's condition, *i.e.*, they all agreed that it was not a factor. Employer also contends that the administrative law judge mischaracterized these opinions when she found that they relied too heavily on negative biopsy results to find that pneumoconiosis was absent, when the administrative law judge, herself, acknowledged that these doctors relied on more than biopsy results. Moreover, employer contends that the administrative law judge erred in finding these opinions to be "hostile to the Act" since these doctors never stated that pneumoconiosis could never be "latent and progressive." Employer's Brief 19-21.

The administrative law judge specifically noted that claimant failed to offer any evidence that substantiated the background and qualifications of the physicians that supported his claim, while the credentials of the pulmonologists consulted by employer were well-documented in the record.[5] As employer contends, the administrative law judge did not further address the credentials of the physicians. On remand, therefore, the administrative law judge must address the physicians' credentials and the effect they have on her assessment of their credibility. *See Hicks*, 138 F.3d 524, 21 BLR 2-323.

As employer contends, in finding that Dr. Rasmussen's opinion supported a finding of legal pneumoconiosis[6] pursuant to Section 718.202(a)(4), the administrative law judge failed to explain why Dr. Rasmussen's opinion constituted a well-reasoned, well-documented opinion,[7] *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993),

[5] The administrative law judge found that Drs. Tuteur and Repsher are Board-certified in internal medicine and pulmonary disease, in addition to having numerous other qualifications in the field of pulmonary medicine. Decision and Order on Remand at 19-29.

[6] "Legal" pneumoconiosis is "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[7] A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *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);. To make that

when, at the same time, the administrative law judge found not credible the opinions of Drs. Sullivan and Jenkins, treating physicians, who considered the same evidence as Dr. Rasmussen and reached the same conclusions. The administrative law judge's failure to fully explain her conclusions as required by the 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a) necessitates remand. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

In addition, as employer avers, review of Dr. Rasmussen's conclusions reveals that the physician rendered his ultimate diagnosis of legal pneumoconiosis based on his finding that coal mine dust exposure was "a **possible** [emphasis added] significant contributing factor" to claimant's condition. Director's Exhibit 40. The failure of the administrative law judge to address the equivocal nature of Dr. Rasmussen's conclusion and to determine whether such equivocation calls into question the credibility of the physician's opinion is error requiring remand. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see generally Piney Mountain Coal Co. v Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-606 (4th Cir. 1999). Further, we agree with employer that the administrative law judge has not provided an affirmable basis for discounting the medical opinions of Drs. Renn, Tuteur, Repsher and Dahhan. The mere fact that the physicians did not all reach the same medical diagnosis does not, for purposes of the instant case, render their opinions incredible. All of these physicians specifically opined that the miner did not suffer from pneumoconiosis and did not have a disease related to the inhalation of coal mine dust. As the burden at Section 718.202(a)(4) rests with claimant to affirmatively establish the existence of pneumoconiosis, *see 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), a physician's report that specifically opines that the miner does not suffer from pneumoconiosis constitutes relevant evidence. We vacate, therefore, the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4), and remand this case to the administrative law judge for another review of the newly submitted medical opinion evidence. On remand, the administrative law judge must specifically set forth her findings in applying the factors identified by the Fourth Circuit in *Hicks* and *Akers* to the medical opinions relevant to Section 718.202(a)(4), and she must also set forth the bases for these findings.

---

determination, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based.

Moreover, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), she must weigh together the relevant evidence at 20 C.F.R. §718.202(a)(1)-(4) to determine whether claimant has established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) in accordance with *Compton*, 211 F.3d 203, 22 BLR 2-162. Consequently, we vacate the administrative law judge's finding of the existence of pneumoconiosis, as well as a material change in conditions, and remand the case to the administrative law judge to reconsider the medical evidence and determine if it establishes the existence of pneumoconiosis by a preponderance of the new evidence. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1364, 20 BLR 2-227, 2-234 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 510 U.S. 1090 (1997).

Additionally, since the administrative law judge's errors have a direct impact on her findings regarding disability causation and death due to pneumoconiosis, we vacate the administrative law judge's finding that the evidence was sufficient to establish total disability due to pneumoconiosis at Section 718.204(c) and death due to pneumoconiosis at Section 718.205(c), and instruct the administrative law judge to reconsider the evidence thereunder, if necessary. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). In the interest of judicial economy, and in order to avoid repetition of error on remand, however, we address employer's allegation of error at Section 718.204(c) and Section 718.205.

Employer argues that in finding that claimant established disability causation at Section 718.204(c), the administrative law judge erred in analyzing the evidence. Employer further argues that the administrative law judge's analysis did not constitute "reasoned decisionmaking" and was not in compliance with law.

Regarding disability causation and whether the opinion of a physician may be credited, in the absence that physician's diagnosis of pneumoconiosis, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has identified two lines of cases. In *Mays*, 176 F.3d 753, 21 BLR 2-587; *Ballard*, 65 F.3d 1189, 19 BLR 2-304 and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86, (4th Cir. 1995), the Fourth Circuit held that an administrative law judge may credit physicians' assessments regarding disability or death causation even when the physicians' opinions are contrary to the administrative law judge's finding concerning the existence of pneumoconiosis. The court instructed that doctors' opinions that claimant does not have clinical pneumoconiosis, but does have legal pneumoconiosis or symptoms consistent with legal pneumoconiosis, do not necessarily contradict an administrative law judge's finding that the miner has legal pneumoconiosis.

In *Scott*, 289 F.3d 263, 22 BLR 2-372 and *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70 (4th Cir. 1995), the Fourth Circuit held that physicians who find, contrary to an administrative law judge's determination, that the miner has neither legal nor clinical pneumoconiosis, can be discredited. In this case, employer contends that the administrative law judge should have applied *Ballard*, 65 F.3d 1189, 19 BLR 2-304; and *Hobbs*, 45 F.3d 819, 19 BLR 2-86, as Drs. Tuteur, Renn, Repsher and Dahhan all recognized that the miner suffered from a respiratory impairment, but specifically opined that the impairment was not related to coal mine dust exposure.

In considering the cause of the miner's disabling respiratory impairment, the administrative law judge accorded greatest weight to the opinion of Dr. Rasmussen that claimant suffered from pneumoconiosis and was totally disabled thereby, and gave no weight to the opinions of Drs. Tuteur, Renn, Repsher and Dahhan because "there was no specific or persuasive reason for crediting the opinions on the cause of [the miner's] disability…." Decision and Order at 39. Although the administrative law judge cited the *Hobbs* case, she failed to apply its holding to the facts of this case and to the opinions in question. Accordingly, if reached on remand, the administrative law judge must again consider the relevant opinions and the relevant law pursuant to Section 718.204(c). Consistent with employer's assertion, the administrative law judge must specifically reconsider Dr. Rasmussen's opinion in the context of Section 718.204(c), and determine whether the physician's opinion is supported by underlying documentation. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (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). Accordingly, on remand, if reached, the administrative law judge must again consider the issue of disability causation pursuant to Section 718.204(c).

Employer also argues that, in considering the survivor's claim, the administrative law judge erred in finding that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205.[8] Employer argues that it is undisputed that the miner's death was due to pancreatitis and that the sole issue in this case is whether the evidence supports a finding that pneumoconiosis hastened the miner's death. Employer argues that the administrative law judge impermissibly relied on the opinion of Dr. Sullivan, the miner's treating/attending physician, to support such a finding. Employer contends that Dr. Sullivan's opinion that the miner "would not have died from pancreatitis had it not been

[8] For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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).

for pneumoconiosis and other health problems," Employer's Exhibit 9, does not affirmatively support claimant's burden of establishing death due to pneumoconiosis. Employer also argues that the administrative law judge erred in mechanically according superior weight to the opinion of Dr. Sullivan based on his status as a treating physician and argues that the above statement was inconsistent with the physician's earlier conclusions, on the death certificate, which do not mention the existence of pneumoconiosis. Claimant's Exhibit 71.

In the instant case, in crediting the opinion of Dr. Sullivan as to the cause of the miner's death, the administrative law judge appears to have erroneously credited the physician's conclusion merely because the physician was the miner's attending physician. The administrative law judge did not address the documentation underlying the physician's opinion, nor did she explain how the physician's status entitled his opinion to superior weight, *see Hicks*, 138 F.3d at 536; 21 BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-224; *Tedesco v. Director, OWCP*, 18 BLR 1-104, 1-105 (1994). Further, contrary to the administrative law judge's determination that the opinions of Drs. Renn, Dahhan, Tuteur and Repsher "beg the question as to whether the [miner's] lung impairment *hastened* [the miner's] death" [emphasis in original], Decision and Order on Remand at 40, the opinions of Drs. Renn and Dahhan clearly state the miner's death was due to pancreatitis, and that pneumoconiosis played no role in the miner's death. In addition, Dr. Tuteur noted there was no evidence in the record supporting Dr. Sullivan's finding that the miner's death was hastened by pneumoconiosis. Accordingly, on remand, if reached, the administrative law judge must again address the issue of whether the miner's death was due to pneumoconiosis pursuant to Section 718.205.

Lastly employer argues that the administrative law judge erred in his determination of the date from which benefits commence in the miner's claim. Because we vacate the award of benefits, we vacate the administrative law judge's finding that the miner was entitled to benefits as of July 20, 1994, and direct the administrative law judge to again consider the issue, if reached on remand. Once entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. 725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless credible evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

Accordingly, the Decision and Order Awarding Benefits on Remand of the administrative law judge is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge