

BRB No. 04-0670 BLA

EVA SMOLOCK)
(Widow of NICHOLAS SMOLOCK))
)
Claimant-Petitioner)
) DATE ISSUED: 05/13/2005
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Eva Smolock, Frackville, Pennsylvania, *pro se*.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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 representing herself, appeals the Decision and Order (03-BLA-0077 and 03-BLA-5235) of Administrative Law Judge Janice K. Bullard denying benefits on claims 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). The instant case involves claimant's request for modification of a 1989 miner's claim and a survivor's claim filed on August 24, 2001.

¹Claimant is the surviving spouse of the deceased miner who died on June 15, 2001. Director's Exhibit 205.

The miner filed a claim for benefits on January 27, 1989. Director's Exhibit 1. In a Decision and Order dated October 15, 1990, Administrative Law Judge Ainsworth H. Brown found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). Director's Exhibit 30. Judge Brown also found that the miner was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id.* Judge Brown, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, Judge Brown denied benefits. *Id.* By Decision and Order dated March 24, 1992, the Board affirmed Judge Brown's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). *Smolock v. Director, OWCP*, BRB No. 91-0264 BLA (Mar. 24, 1992) (unpublished). The Board, therefore, affirmed Judge Brown's denial of benefits. *Id.* The Board subsequently summarily denied the miner's motion for reconsideration. *Smolock v. Director, OWCP*, BRB No. 91-0264 BLA (June 24, 1992) (Order) (unpublished).

The miner filed a request for modification on February 11, 1993. Director's Exhibit 44. In a Decision and Order dated March 16, 1995, Administrative Law Judge Ralph A. Romano found that the evidence was insufficient to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 80. Judge Romano, therefore, denied the miner's request for modification. *Id.* By Order dated February 12, 1996, the Board dismissed the miner's appeal as abandoned. *Smolock v. Director, OWCP*, BRB No. 95-1300 BLA (Feb. 12, 1996) (Order) (unpublished).

The miner filed a second request for modification on April 5, 1996. Director's Exhibit 92. In a Decision and Order dated December 30, 1996, Judge Romano found that the evidence was insufficient to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 108. Accordingly, Judge Romano denied the miner's request for modification. *Id.* The miner filed an appeal with the Board. Director's Exhibit 109. However, once again, the Board dismissed the miner's appeal as abandoned. *Smolock v. Director, OWCP*, BRB No. 97-0552 BLA (Sept. 9, 1997) (unpublished).

The miner filed a third request for modification on April 28, 1998. Director's Exhibit 118. In a Decision and Order dated April 19, 1999, Judge Romano found that the evidence was insufficient to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 144. Accordingly, Judge Romano denied the miner's request for modification. *Id.* The miner filed an appeal with the Board. Director's Exhibit 145. While his appeal was pending, the miner requested that the Board remand his claim to the district director so that he

could pursue modification. Director's Exhibit 149. By Order dated August 17, 1999, the Board dismissed the miner's appeal and remanded the case to the district director for modification proceedings. *Smolock v. Director, OWCP*, BRB No. 99-0807 BLA (Aug. 17, 1999) (Order) (unpublished).

The miner filed his fourth request for modification on September 30, 1999. Director's Exhibit 154. In a Decision and Order dated May 18, 2001, Administrative Law Judge Paul H. Teitler found that the evidence was insufficient to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 190. Accordingly, Judge Teitler denied the miner's request for modification. *Id.* The miner filed an appeal with the Board on June 15, 2001. Director's Exhibit 191. The miner died on the same day that his appeal was filed with the Board. *See* Director's Exhibit 205.

Claimant filed a survivor's claim on August 24, 2001. Director's Exhibit 203. On October 12, 2001, the miner's counsel notified the Board that the miner had died. Director's Exhibit 196. The miner's counsel requested that the Board remand the miner's claim to the district director so that the miner's widow could pursue modification of the miner's claim and so that the miner's claim and the survivor's claim could be consolidated. *Id.* By Order dated October 26, 2001, the Board dismissed the miner's appeal and remanded the case to the district director for modification proceedings. *Smolock v. Director, OWCP*, BRB No. 01-0737 BLA (Oct. 26, 2001) (Order) (unpublished).

In a Proposed Decision and Order dated August 21, 2002, the district director denied benefits in the survivor's claim. Director's Exhibit 215. In a Proposed Decision and Order dated November 6, 2002, the district director denied claimant's request for modification of the miner's claim. Director's Exhibit 200. At claimant's request, both the miner's claim and the survivor's claim were forwarded to the Office of Administrative Law Judges for a formal hearing.

In regard to the request for modification in the miner's claim, Administrative Law Judge Janice K. Bullard (the administrative law judge) initially noted that it had been established that the miner suffered from pneumoconiosis arising out of his coal mine employment. The administrative law judge further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that the evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, however, found that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits in the miner's claim. The administrative law judge further found that the evidence was insufficient to establish that the miner's death

was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge also denied benefits in the survivor's claim. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, arguing that the administrative law judge erred in finding the evidence insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Director also contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).²

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In regard to the miner's claim, the administrative law judge found that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that a claimant need only prove that his pneumoconiosis is a substantial contributor to his total disability. *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). Revised Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

²Because no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b) and 725.310 (2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20 C.F.R. §718.204(c)(1).

In her consideration of whether the evidence was sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that the opinions of the miner's treating physicians (Drs. Raymond Kraynak, Matthew Kraynak and Kruk) were insufficient to establish that the miner's pneumoconiosis substantially contributed to his disabling pulmonary impairment. The administrative law judge accorded less weight to the opinions of these physicians because they did not address the effect of the miner's cardiac disease upon his respiratory condition. Decision and Order at 18-19.

The Director contends that the administrative law judge erred in discrediting Dr. Raymond Kraynak's (R. Kraynak's) opinion because he did not address the effect of the miner's cardiac disease and hypertension on his respiratory condition.³ We agree. During a November 13, 1998 deposition, Dr. R. Kraynak opined that the miner's hypertension and coronary artery disease did not cause any disability or have any impact upon his pulmonary condition. *See* Director's Exhibit 131 at 5-6. During a March 24, 2000 deposition, Dr. R. Kraynak similarly opined that the miner's coronary artery disease and hypertension did not cause any disability. Director's Exhibit 173 at 7. During an April 4, 2003 deposition, Dr. R. Kraynak noted that the miner previously had a history of successful bypass surgery. Claimant's Exhibit 1 at 7. Dr. Kraynak noted that the miner did not have any complaints of chest pain or cardiac decompensation. *Id.* Upon examination of the miner's heart, Dr. R. Kraynak found no abnormal findings. *Id.* at 8. Thus, contrary to the administrative law judge's characterization, Dr. R. Kraynak addressed the effect of the miner's cardiac disease and hypertension upon his respiratory condition. Inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), we vacate the administrative law judge's finding that the evidence is insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and remand the case for further consideration.

We now turn our attention to the administrative law judge's consideration of the survivor's claim. 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).⁴ *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v.*

³Dr. Raymond Kraynak (R. Kraynak) opined that the miner was totally and permanently disabled due to coal workers' pneumoconiosis. Claimant's Exhibit 1 at 10.

⁴Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

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

In her consideration of whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge permissibly found that the miner's death certificate was insufficient to establish that the miner's death was due to pneumoconiosis because it was unexplained and conclusory. Decision and Order at 19; *See generally Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997) (The mere statement of a conclusion by a physician, without any explanation of the basis for that statement, does not take the place of the required reasoning).

In her consideration of whether the remaining evidence was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge found that Dr. Sherman's opinion that the miner's death was not hastened by pneumoconiosis

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- (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).

was the “best documented and reasoned opinion of record.”⁵ Decision and Order at 19. The administrative law judge accurately noted that Dr. Sherman reviewed the records from the miner’s last hospitalization and the miner’s death certificate, but in crediting Dr. Sherman’s opinion, the administrative law judge failed to acknowledge that Dr. R. Kraynak also reviewed these documents. *See* Claimant’s Exhibit 1 at 8. Dr. R. Kraynak also reviewed Dr. Sherman’s April 30, 2002 medical report.⁶ *Id.* at 9. Thus, the administrative law judge’s failed to provide a basis for his finding that Dr. Sherman’s

⁵In a report dated April 30, 2002, Dr. Sherman opined that:

Death would have occurred from the stroke irrespective of any degree of respiratory impairment which may have been present from his coal workers’ pneumoconiosis. The stroke was not a complication of pneumoconiosis, nor is there any evidence that pneumoconiosis contributed to or hastened [the miner’s] death in any way.

Director’s Exhibit 210.

⁶During an April 4, 2003 deposition, Dr. R. Kraynak noted that he disagreed with Dr. Sherman regarding whether pneumoconiosis contributed to the miner’s death. Dr. R. Kraynak testified that:

It is clear that [the miner] did have multiple disease entities that were causing him a great deal of problems, but when you look at the overall record and you look at the complaints of shortness of breath, the fact that this gentleman required oxygen therapy, he would have been in a better position to fight off the stroke and his other disease problems if he had a normal and functional pulmonary system. The coal workers’ pneumoconiosis made it harder for him to breathe and oxygenate his blood, thereby weakening his system and making his system less able to fight off the multiple disease entities that he did have. He would have survived longer absent coal workers’ pneumoconiosis.

There is no doubt that coal workers’ pneumoconiosis was a substantial contributing factor in [the miner’s] demise. He would have lived longer absent coal workers’ pneumoconiosis. His diseased pulmonary system put a strain on his other bodily systems, helping to cause the cascade and degradation of those systems leading to his death.

Claimant’s Exhibit 1 at 9-10, 11.

opinion is the best documented opinion of record.

The administrative law judge also failed to provide a basis for his finding that Dr. Sherman's opinion was the best reasoned opinion of record. The administrative law judge found that Dr. Sherman's opinion, that the miner's death was due to a medical condition that would have occurred in the absence of pneumoconiosis, was "more persuasive" than Dr. Kraynak's opinion that the miner's pneumoconiosis compromised his pulmonary system, and thus hastened his death. Decision and Order at 19. Although the administrative law judge accepted Dr. Kraynak's opinion that the miner's pneumoconiosis weakened his health as a general principle, he found that Dr. Sherman's opinion regarding the cause of the miner's death was "better reasoned, particularly in consideration of his cardiac impairment." *Id.*

We agree with the Director that, instead of rejecting Dr. R. Kraynak's opinion because it did not address the cardiac factors that lead to the miner's death, the administrative law judge should have focused on the probative value of the doctor's opinion that pneumoconiosis hastened the miner's death by making it harder for the miner to breathe and oxygenate his blood, thereby weakening his system." Director's Brief at 6. While Drs. Sherman and R. Kraynak agreed that the miner's death was due to a stroke, they disagreed as to the effect of the miner's pneumoconiosis on his death. Although the administrative law judge found that Dr. Sherman's opinion was the best reasoned opinion of record, the administrative law judge failed to explain why Dr. Sherman's opinion was better reasoned than that of Dr. R. Kraynak. Consequently, the administrative law judge's analysis of whether the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Although the administrative law judge recognized Dr. R. Kraynak's status as the miner's treating physician, the administrative law judge noted that Dr. R. Kraynak had not treated the miner during his final hospitalization and, therefore, did not possess any superior knowledge regarding the miner's condition at that time. Decision and Order at 19. In *Soubik v. Director, OWCP*, 366 F.3d 226, 235, 23 BLR 2-82, 2-101 (3d Cir. 2004), the Third Circuit held that "treating physicians' opinions are assumed to be more valuable than those of non-treating physicians." Although Dr. R. Kraynak was not the treating physician of record during the miner's final hospitalization, Dr. R. Kraynak testified that he saw the miner on June 6, 2001, just nine days prior to his death. Claimant's Exhibit 1 at 12-13. Dr. R. Kraynak explained that the miner had "marked

shortness of breath,” noting that the miner became short of breath after walking a short distance from the waiting room to the examination area. *Id.* at 11. Dr. R. Kraynak noted that the miner had an increase in wheezing and appeared “progressively more debilitated.” *Id.* The administrative law judge erred in discounting Dr. R. Kraynak’s status as the miner’s treating physician solely because he was not the miner’s treating physician during his last hospitalization. *See Soubik, supra* (holding that, on the facts of the case, the administrative law judge’s minimizing of a treating physician’s opinion in favor of a physician who had never laid eyes on the miner was “indefensible”). On remand, the administrative law judge is instructed to reconsider whether Dr. R. Kraynak’s opinion is entitled to additional weight based upon his status as the miner’s treating physician in light of the factors set out at 20 C.F.R. §718.104(d).

In light of the above referenced errors,⁷ we vacate the administrative law judge’s finding pursuant to 20 C.F.R. §718.205(c)(2)⁸ and remand the case for further consideration thereunder.⁹

⁷The Director, Office of Workers’ Compensation Programs, contends that the administrative law judge erred in not considering whether Dr. Sherman was aware that claimant suffered from a totally disabling pulmonary impairment. *See* Director’s Brief at 7-8. We disagree. Dr. Sherman opined that the miner’s death would have occurred from the stroke “irrespective of any degree of respiratory impairment which may have been present from his coal workers’ pneumoconiosis.” Director’s Exhibit 210. Consequently, Dr. Sherman’s opinion regarding the cause of the miner’s death was not dependent upon the extent of the miner’s respiratory impairment.

⁸Because no evidence of record supports a finding that pneumoconiosis was the cause of the miner’s death, claimant is precluded from establishing that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1). Moreover, because there is no evidence of complicated pneumoconiosis in the record, claimant is also precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3).

⁹On remand, the administrative law judge is also instructed to consider and address the weight accorded to Dr. M. Kraynak’s opinion that the miner’s coal workers’ pneumoconiosis was “a major contributing factor in his death.” *See* Director’s Exhibit 208.

Accordingly, the administrative law judge's decision denying modification in the miner's claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion. The administrative law judge's decision denying benefits in the survivor's claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge