

BRB No. 04-0833 BLA

SANDRA K. RAY)	
(Widow of CECIL R. RAY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
MIDLAND COAL COMPANY)	
)	DATE ISSUED: 05/09/2005
Employer-Petitioner)	
)	
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 of Daniel A. Sarno, Jr.,
Administrative Law Judge, United States Department of Labor.

James M. Phemister (Legal Clinic, Washington & Lee University School of
Law), Lexington, Virginia, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals
Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (99-BLA-0874) of
Administrative Law Judge Daniel A. Sarno, Jr. 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). This case is before the Board
for the second time. Initially, Administrative Law Judge Fletcher E. Campbell, Jr. found
that the miner suffered from chronic obstructive pulmonary disease (COPD) which arose
out of his coal mine employment and thus constituted legal pneumoconiosis. *See* 20
C.F.R. §§718.202(a)(4); 718.201. Judge Campbell further found that the miner's

pneumoconiosis caused or hastened his death pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Campbell awarded survivor's benefits to claimant, the miner's widow.

Upon review of employer's appeal, the Board affirmed Judge Campbell's finding that the miner suffered from COPD, but vacated the finding that the COPD was pneumoconiosis because Judge Campbell erroneously presumed that the COPD was related to dust exposure in the miner's coal mine employment, rather than requiring claimant to prove that fact. *Ray v. Midland Coal Co.*, BRB No. 02-0681 BLA, slip op. at 4-5 (Jun. 27, 2003)(unpub.). Because the Board vacated Judge Campbell's finding that the miner had pneumoconiosis, it also vacated his finding that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2), and remanded the case for further consideration. In so doing, however, the Board rejected employer's argument that it was impossible for the miner to have developed legal pneumoconiosis after leaving coal mine employment. *Ray*, slip op. at 5. The Board summarily denied employer's motion for reconsideration alleging that there was no scientific proof that legal pneumoconiosis is progressive and that claimant must prove that the miner's pneumoconiosis was a progressive form of the disease. *Ray v. Midland Coal Co.*, BRB No. 02-0681 (Mar. 26, 2004)(*en banc*)(unpub.).

On remand, Judge Campbell was unavailable and the case was reassigned, without objection, to Administrative Law Judge Daniel A. Sarno, Jr. (the administrative law judge).

The administrative law judge applied the definition of pneumoconiosis set forth at 20 C.F.R. §718.201 and found that claimant established by a preponderance of the evidence that the miner's COPD "was caused at least in part by his exposure to coal dust." Decision and Order on Remand at 3. In so finding, the administrative law judge gave controlling weight to the opinion of the miner's treating physician, Dr. Amin, diagnosing the miner with COPD due in part to coal dust exposure. He also found Dr. Koenig's opinion attributing the miner's COPD partly to coal dust exposure to be well-reasoned and "persuasive as to the effect of coal-dust exposure on [the] Miner's lung disease." Decision and Order on Remand at 2. By contrast, the administrative law judge found Dr. Renn's opinion attributing the miner's lung condition solely to smoking to be inadequately explained. Additionally, the administrative law judge gave several reasons for declining to credit Dr. Fino's opinion that coal mine dust exposure did not cause or contribute to the miner's lung disease. Among these were that Dr. Fino did not diagnose COPD, rendering his disease etiology conclusions questionable, and also that Dr. Koenig's opinion "thoroughly rebut[ted]" Dr. Fino's conclusions, which were found "not well reasoned." Decision and Order on Remand at 3 and n.3.

Having determined that the miner's COPD constituted pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.201, 718.202(a)(4), and 718.203(b), the administrative law judge "adopt[ed] Judge Campbell's findings and conclusions regarding death causation." Decision and Order on Remand at 3, citing Judge Campbell's Decision and Order at 7-8. The administrative law judge therefore found that "there is a significant preponderance of evidence that [the] Miner's death was caused, contributed to, or hastened by his exposure to coal dust while working in the coal mines." Decision and Order on Remand at 3; *see* 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting the opinions of Drs. Amin and Koenig and in discrediting those of Drs. Renn and Fino when he found that the miner's COPD was pneumoconiosis. Because the administrative law judge's findings at 20 C.F.R. §§718.203(b) and 718.205(c) rest on his finding as to the existence of pneumoconiosis, employer urges that they also be vacated. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not file a substantive response to employer's appeal. In the letter, the Director nevertheless urges the Board to reject employer's renewed assertion that legal pneumoconiosis is not progressive absent further dust exposure. Employer has filed a reply brief reiterating its contentions.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or 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 hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992). Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Initially, employer argues that there is no scientific proof that legal pneumoconiosis progresses absent further dust exposure, and no proof in this record that the miner's legal pneumoconiosis progressed. Employer's Brief at 11 n.11. Because the Board previously rejected these contentions and employer has not demonstrated any exception to the law of the case doctrine, the Board will not reconsider its decision on these issues. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *see also Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004)(rejecting identical arguments)¹; *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (*en banc*)(same). Employer also "renews its request" to "respond . . . with evidence" against the principle that pneumoconiosis may be progressive. Employer's Brief at 11 n.11. Because the Board's review is limited to the hearing record, the Board must deny this request. 20 C.F.R. §802.301(b).

Employer alleges that in determining whether the miner's COPD was pneumoconiosis, the administrative law judge "failed to evaluate the evidence explicitly and failed to set forth his reasoning in a way that permits appellate review." Employer's Brief at 11. Review of the administrative law judge's Decision and Order reflects that in considering the existence of pneumoconiosis, he reviewed the evidence, cited to the record, and set forth his findings and the reasons therefor. Decision and Order on Remand at 2-3. Thus, contrary to employer's contention, the administrative law judge complied with the Administrative Procedure Act, 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), such that the Board can review his findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge violated *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), because he "credited Dr. Amin's report solely because Dr. Amin treated [the miner] many years before he died." Employer's Brief at 12. Upon review of the administrative law judge's Decision and Order in light of the record as a whole, we conclude that the administrative law judge did not violate the circuit court's holding in *McCandless*.

In *McCandless*, the Seventh Circuit court held that an administrative law judge must have a medical reason for crediting a treating physician's opinion. *McCandless*, 255 F.3d at 469, 22 BLR at 2-318. Accordingly, "the treating physician's views may not

¹ Because the miner's coal mine employment occurred in Illinois, Director's Exhibits 3, 4, 36-2, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

be accepted unless there is a good reason to believe that they are accurate.” *McCandless*, 255 F.3d at 469-70, 22 BLR at 2-318.

In the case at bar, the administrative law judge provided a reason why Dr. Amin’s opinion merited the weight he gave it: not only was Dr. Amin’s opinion found well-reasoned and supported by Dr. Amin’s credentials, it was consistent with Dr. Koenig’s “thorough, well-documented and well-reasoned opinion,” that was “persuasive as to the effect of coal dust exposure on [the] Miner’s lung disease.” Decision and Order on Remand at 2; *see McCandless*, 255 F.3d at 469-70, 22 BLR at 2-318; 20 C.F.R. §718.104(d)(5)(requiring that a treating doctor’s opinion be considered based on its “reasoning and documentation, other relevant evidence and the record as a whole”). Ultimately, the administrative law judge relied on both doctors’ opinions and found them together to be “a preponderance of [the] evidence,” outweighing employer’s contrary opinions. Decision and Order on Remand at 2. As we will discuss below, the administrative law judge identified valid reasons for discounting the contrary opinions by Drs. Renn and Fino. Thus, the administrative law judge’s Decision and Order is consistent with both *McCandless* and 20 C.F.R. §718.104(d).²

Employer next argues that the administrative law judge erred in finding Dr. Koenig’s opinion well-reasoned when Dr. Koenig never stated that coal mine dust exposure contributed to the miner’s COPD in this particular case. Employer’s Brief at 14-15. Contrary to employer’s contention, Dr. Koenig made clear that his opinion was that this particular miner’s COPD was related to coal mine dust exposure. Claimant’s Exhibit 2 at 2, 4-5. Whether a report is reasoned is a decision that is made by the administrative law judge. *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 895, 22 BLR 2-409, 2-426 (7th Cir. 2002). Substantial evidence supports the administrative law judge’s discretionary determination that Dr. Koenig’s report was well-reasoned, documented, and persuasive. Claimant’s Exhibit 2. We therefore reject employer’s allegation of error.

Employer asserts that the administrative law judge did not provide a valid reason for discounting Dr. Renn’s opinion that the miner’s lung disease was unrelated to coal dust. This argument lacks merit. Dr. Renn concluded that the miner’s respiratory impairment was “a result of his idiopathic pulmonary interstitial fibrosis and his tobacco smoke-induced bullous emphysema. Coal workers’ pneumoconiosis was neither a cause of, nor a contributing factor to, the ventilatory impairment which existed prior to his

² Employer does not challenge the administrative law judge’s findings regarding the nature and extent of Dr. Amin’s treatment relationship with the miner, that Dr. Amin was well-qualified to render an opinion, or that Dr. Amin’s opinion was well-reasoned. *See* 20 C.F.R. §718.104(d).

demise.” Employer’s Exhibit 4 at 7. A review of Dr. Renn’s report confirms the administrative law judge’s finding that Dr. Renn offered no explanation for these conclusions. Employer’s Exhibit 4 at 7. Because “an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process,” *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 336, 22 BLR 2-581, 2-589 (7th Cir. 2002), the administrative law judge permissibly discounted Dr. Renn’s opinion as inadequately explained. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Employer argues that, even if Dr. Renn did not explain his etiology opinion, “the ALJ’s approach is impermissible as the Sixth Circuit recently found in *Williams*.” Employer’s Brief at 15. Employer discusses the Sixth Circuit court’s disapproval in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), of an administrative law judge’s decision to discount an expert’s opinion as to the etiology of a miner’s COPD for failing to adequately explain why the miner’s coal mine employment had nothing to do with the COPD. Employer concludes that here, as in *Williams*, “it makes no sense . . . to assume that because [Dr. Renn] does not explain why Decedent’s work as a miner has not caused his lung impairment, then his work as a miner must have caused his lung impairment.” Employer’s Brief at 16, quoting *Williams*. 338 F.3d at 515-16, 22 BLR at 2-651.

Employer’s reliance on *Williams* is misplaced. First, the Seventh Circuit court makes clear that discounting an expert’s unexplained opinion is permissible. *Villain*, 312 F.3d at 336, 22 BLR at 2-589. Second, in the case at bar the administrative law judge did not assume that because Dr. Renn did not explain why coal mine employment did not cause the miner’s COPD, then coal mine employment must have caused the COPD. The administrative law judge had before him medical evidence to support that finding in the opinions of Drs. Amin and Koenig, which he found well-reasoned and explained. Thus, he was entitled to look for some explanation to support Dr. Renn’s contrary opinion. *Villain*, 312 F.3d at 336, 22 BLR at 2-589; *Clark*, 12 BLR at 1-155. Accordingly, we reject employer’s contention that the administrative law judge erred in his approach to Dr. Renn’s opinion.

Employer contends that the administrative law judge erred in declining to credit Dr. Fino’s opinion that the miner’s lung condition was unrelated to coal mine employment. Employer takes issue with the administrative law judge’s findings that Dr. Fino relied on assumptions in conflict with the Department of Labor’s findings underlying 20 C.F.R. §718.201, and that Dr. Fino failed to diagnose COPD in the first place, thus rendering his etiology opinion under the mistaken view that the miner did not have COPD. Employer’s Brief at 16-18. Review of the administrative law judge’s Decision and Order reflects that he gave two valid reasons for discounting Dr. Fino’s opinion.

First, the administrative law judge validly questioned Dr. Fino's disease etiology opinion because Dr. Fino did not believe that the miner had COPD, "rais[ing] questions about the accuracy of his conclusion as to the causation of the miner's COPD." Decision and Order on Remand at 3. Since the administrative law judge had to determine whether the miner's COPD was related to coal dust, it was reasonable for him to question Dr. Fino's opinion, since Dr. Fino did not believe that the miner had COPD. See *Trujillo v. Kaiser Steel Corp.* 8 BLR 1-472, 1-473 (1986). The record reflects that Dr. Fino's belief that COPD was absent was integral to his etiology opinion: "I don't believe there's any chronic obstructive disease. . . . So, I'm eliminating not only coal mine dust, but even his cigarette smoking history as being the cause of [COPD]. Obviously, because I don't think that he has [COPD]." Employer's Exhibit 7 at 19. Thus, contrary to employer's allegation, the administrative law judge did not err in this regard.³

Second, the administrative law judge found Dr. Fino's opinion "not well reasoned" because "Dr. Koenig's opinion thoroughly rebut[ted] Dr. Fino's conclusions with reference to the medical literature, objective medical findings, and [the] Miner's social history." Decision and Order on Remand at 3 n.3. This was a credibility determination reserved for the administrative law judge, *Stein*, 294 F.3d at 895, 22 BLR at 2-426; *Clark*, 12 BLR at 1-155, and employer does not challenge it. Thus, we hold that the administrative law judge provided two valid reasons for discounting Dr. Fino's opinion. Consequently, we need not address employer's other arguments concerning the administrative law judge's analysis of Dr. Fino's opinion. See *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Employer argues that the administrative law judge "should have considered the opinions of Drs. Wiot, Wheeler, and Templeton, all of whom found that Ray's respiratory problems were not dust induced." Employer's Brief at 18. There was no need for the administrative law judge to discuss these radiologists' x-ray and CT scan readings, because they did not address the etiology of the miner's COPD. Director's Exhibits 28, 36; Employer's Exhibits 1, 6; cf. *Amax Coal Co. v. Director [Chavis]*, 772 F.2d 304, 306 (7th Cir. 1985)(explaining that there is no need for a remand where "undiscussed evidence is not probative on the issue in dispute"). The record reflects that in fact, Dr. Wheeler testified that he was unable to determine the etiology of the miner's COPD by examining his x-rays and CT scans. Employer's Exhibit 6 at 45. We therefore reject employer's allegation that the administrative law judge overlooked relevant evidence.

³ Employer argues that Dr. Fino assumed that the miner had COPD in rendering his opinions regarding disease etiology and death causation. Employer's Brief at 18. The Board again reviewed Dr. Fino's report and testimony and could find no point at which he assumed that the miner had COPD. Employer's Exhibits 2, 7; *Ray*, slip op. at 6 (addressing the same argument).

Based on the foregoing discussion, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.201, 718.202(a)(4). Because we affirm the administrative law judge's finding of the existence of pneumoconiosis, and employer does not otherwise challenge the administrative law judge's finding that employer did not rebut the presumption that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), we affirm the administrative law judge's finding at 20 C.F.R. §718.203(b).

Pursuant to 20 C.F.R. §718.205(c), employer's sole challenge to the administrative law judge's finding that pneumoconiosis caused or hastened the miner's death is that the finding that the miner had pneumoconiosis was flawed. We have just affirmed the administrative law judge's finding that the existence of pneumoconiosis was established. In the administrative law judge's Decision and Order on Remand, he identified the specific portion of Judge Campbell's decision that he was adopting to find that pneumoconiosis caused or hastened the miner's death. Judge Campbell reviewed all of the relevant evidence and credited the opinions of Drs. Amin and Koenig that coal dust-related COPD hastened the miner's death due to respiratory failure, because Judge Campbell found those opinions to be better-reasoned and documented and bolstered by Dr. Amin's treatment relationship with the miner. Decision and Order on Remand at 3, adopting [2002] Decision and Order at 7-8. Employer has made no specific challenge to those findings in this appeal. In sum, the Board is able to discern what evidence the administrative law judge relied upon and why, *see* 5 U.S.C. §557(c)(3)(A), and the findings that he adopted are supported by substantial evidence and are in accordance with law. *See Stein*, 294 F.3d at 895, 22 BLR at 2-426; *Villain*, 312 F.3d at 335, 22 BLR at 2-588; Claimant's Exhibit 1 at 2; Claimant's Exhibit 2 at 5. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order on Remand awarding survivor's benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge