

BRB No. 06-0677 BLA

RAMONA McCRARY, o/b/o and as Survivor)	
of JOHN E. McCRARY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY, LLC)	DATE ISSUED: 05/11/2007
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

James M. Nolan (Walston Wells & Birchall, LLP), Birmingham, Alabama, for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for 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:

Employer appeals the Decision and Order (05-BLA-6099 and 05-BLA-6100) of Administrative Law Judge Paul H. Teitler awarding benefits on a living 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). The miner filed a claim for benefits on March 6, 2003, and claimant, the miner's widow, filed a claim for survivor's benefits on January 7, 2004.¹ The administrative law judge adjudicated the claims pursuant to 20 C.F.R. Part 718. In a Decision and Order issued on May 9, 2006, the administrative law judge noted that the parties had agreed that claimant established forty-four years of coal mine employment, found that claimant established the existence of coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that the evidence established a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge further found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded on both claims.

On appeal, employer challenges the administrative law judge's weighing of the evidence relevant to the existence of pneumoconiosis at Section 718.202(a) and death due to pneumoconiosis at Section 718.205(c).² Claimant responds that substantial evidence supports the award of benefits on both claims. The Director, Office of Workers' Compensation Programs (the Director), also responds, asserting that the administrative law judge's award of benefits should be affirmed.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

¹ The miner died on December 10, 2003. Director's Exhibit 38.

² The administrative law judge's finding that total disability due to pneumoconiosis was established at 20 C.F.R. §718.204(b), (c), is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. Death is due to pneumoconiosis where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where death was caused by complications of pneumoconiosis, or where the presumption set forth at 20 C.F.R. §718.304, relating to complicated pneumoconiosis, is applicable. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).³

Employer first contends that the administrative law judge erred in finding the existence of pneumoconiosis based exclusively on medical opinion evidence, without weighing it with the more reliable biopsy evidence, which showed that claimant did not have pneumoconiosis. The administrative law judge found that the existence of pneumoconiosis was not established at Section 718.202(a)(1), as the x-ray evidence did not establish the existence of pneumoconiosis. Turning to Section 718.202(a)(2), the administrative law judge found that the existence of pneumoconiosis was not established by the biopsy evidence. The administrative law judge also found that the existence of pneumoconiosis could not be established at Section 718.202(a)(3), as the presumptions contained therein were not applicable. Considering the medical opinion evidence at Section 718.202(a)(4), however, the administrative law judge concluded that it established the existence of pneumoconiosis.

Contrary to employer's contention, the administrative law judge did not err by failing to weigh together the biopsy and medical opinion evidence in determining that the existence of pneumoconiosis was established. Although employer cites to the holding of the United States Court of Appeals for the Third Circuit, in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), which requires that all evidence relevant under Section 718.202(a)(1)-(a)(4) be weighed together in determining whether pneumoconiosis is established, that case is not binding on the instant case which arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *United States Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004). Moreover, the Board has held that Section 718.202(a)(1)-(4) provides four distinct, alternative methods of establishing the existence of pneumoconiosis. *Dixon*

³ Because the miner last worked in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

v. North Camp Coal Co., 8 BLR 1-1-344 (1985); *see* 20 C.F.R. §718.202(a)(1)-(a)(4). Employer's argument, that the administrative law judge should have weighed the medical opinion and biopsy evidence together before determining whether the existence of pneumoconiosis was established is, therefore, rejected, and we need not further address employer's argument regarding the biopsy evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer contends that the administrative law judge's assessment of the medical opinion evidence at Section 718.202(a)(4) was faulty. Specifically, employer contends that the administrative law judge erred in relying on the opinion of Dr. Hawkins as Dr. Hawkins failed to consider the miner's entire medical history in assessing the etiology of his respiratory impairment. Employer also argues that the administrative law judge erred in relying on the opinion of Dr. Crain, as Dr. Crain's reports and findings lacked adequate explanation. Employer also contends that Dr. Crain's finding of pneumoconiosis was inconsistent with the statement he made on the miner's original death certificate where he only referenced respiratory and cardiac arrest secondary to lung cancer.⁴ Director's Exhibits 11, 38.

In finding that the medical opinion evidence established the existence of pneumoconiosis, the administrative law judge credited the opinion of Dr. Hawkins, as his finding of pneumoconiosis was based on an examination, social and work histories, diagnostic tests, including x-ray, pulmonary function and blood gas studies, and on the miner's smoking history.⁵ The administrative law judge credited the opinion of Dr. Crain because it was based on the miner's smoking and coal mine employment history, and upon an examination, x-ray, and spirometry. Decision and Order at 5. The administrative law judge further noted, in crediting these opinions, that both doctors accounted for the miner's lengthy smoking and coal mine employment histories and both had tested the miner for, and diagnosed him with pneumoconiosis, prior to treating him for lung cancer. The administrative law judge found the opinions particularly credible, as both doctors found evidence of pneumoconiosis prior to the miner's treatment for lung cancer and continued to diagnose it, after the miner was diagnosed with lung cancer. The administrative law judge's finding is reasonable and supported by substantial evidence.

⁴ Employer contends that upon notification from claimant that she was applying for black lung benefits, Dr. Crain amended the original death certificate to include a diagnosis of coal workers' pneumoconiosis. Director's Exhibit 48.

⁵ As the result of numerous tests, examination, symptoms and history, Dr. Hawkins diagnosed pneumoconiosis due to coal mine employment. Dr. Hawkins also noted that the miner was exposed to asbestos in his work environment. Director's Exhibit 11.

See Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4).

Finally, employer contends that the administrative law judge erred in finding that pneumoconiosis hastened the miner's death, based on the reports of Drs. Crain and Dossman, who stated that the miner's pneumoconiosis complicated his treatment for lung cancer because pneumoconiosis prevented the miner from undergoing surgery for his lung cancer. Employer contends however, that the administrative law judge did not consider the fact that Dr. Crain also said that the miner's lung cancer was "non-operable secondary to his underlying diseases, hypoxemia, and probable mediastinal involvement." Employer's Exhibit 3. Employer observed that Dr. Dossman also stated that the miner was not a surgical candidate due to his pulmonary condition and evidence of mediastinal lymph node extension. Employer's Exhibit 3.

In finding that the miner's pneumoconiosis hastened his death, the administrative law judge noted that both Drs. Crain and Dossman found that the miner's pneumoconiosis complicated his treatment for lung cancer. *See* 20 C.F.R. §718.205(c)(5). The administrative law judge specifically noted that Dr. Crain stated that the miner was not a candidate for surgical treatment of lung cancer due to his pulmonary condition, which included pneumoconiosis. Employer's Exhibit 3.⁶ Regarding the opinion of Dr. Dossman, an oncologist, the administrative law judge noted that Dr. Dossman stated that he had reviewed Dr. Crain's assessment and agreed. Employer's Exhibit 3. The administrative law judge found therefore that "[e]ven if [the miner] died primarily due to lung cancer, as [e]mployer contends, the fact that he was inoperable due to his pneumoconiosis makes the disease a significantly contributing factor of his death." Decision and Order at 10.

In reaching this finding, however, the administrative law judge did not consider and discuss other findings made by Drs. Crain and Dossman. Although, on the one hand, they indicated that the miner's pneumoconiosis precluded surgery for lung cancer, they also opined that the miner was not a surgical candidate because his cancer had spread outside the lung. Employer's Exhibit 3. The administrative law judge's failure to consider all the findings made by the doctors in assessing their opinions as to the cause of death is error. *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge's finding that claimant established that the miner's death was due to

⁶ Dr. Crain opined that "due to the extent of [the miner's] pneumoconiosis, he was felt to be a nonsurgical candidate from the standpoint of his lung cancer. Therefore, he was treated with chemotherapy and radiation therapy and unfortunately subsequently passed away." Claimant's Exhibit 1.

pneumoconiosis is, therefore, vacated and the case is remanded for the administrative law judge to reconsider the medical opinion evidence relevant to cause of death. *See* 20 C.F.R. §718.205(c); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order awarding benefits on the miner's claim is affirmed. His award of benefits on the survivor's claim is vacated and the case is remanded for reconsideration of that claim 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