BRB No. 07-0708 BLA

B.B. (On Behalf of and Widow of E.B.) Claimant-Petitioner v. PEABODY COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/28/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

B.B., Holmes Mill, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (06-BLA-05505) of Administrative Law Judge Robert D. Kaplan issued on a request for modification of the deceased miner's duplicate claim,[1] and a

[1] The miner filed his initial claim for benefits on March 7, 1988. Director's Exhibit 1. The claim was denied by the district director on March 20, 1990, because the evidence failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. *Id*. The miner did not pursue the claim further. On April 8,

survivor's claim[2] 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).[3] The administrative law judge credited the miner with twenty-seven years of coal mine employment[4] and adjudicated both claims pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the request for modification of the denial of the miner's duplicate claim, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and therefore failed to establish a basis for modification of the prior determination that the miner did not establish a material change in conditions pursuant to 20 C.F.R. §§725.309 (2000), 725.310 (2000). Accordingly, the administrative law judge denied benefits in the miner's claim. Turning to the survivor's claim, the administrative law judge found that because the evidence failed to establish that the miner suffered from pneumoconiosis, claimant could not establish that the miner's death was due to pneumoconiosis. The administrative law judge further found that, even if the miner had pneumoconiosis, the relevant medical opinion evidence did not establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits in the survivor's claim.

1997, the miner filed the instant claim for benefits. Director's Exhibit 36. On May 19, 2000, Administrative Law Judge Robert L. Hillyard denied benefits, finding that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R.§718.202(a), and therefore failed to establish a material change in conditions pursuant to 20 C.F.R.§725.309 (2000). *Id*. The miner died on April 11, 2001, and on May 3, 2001, his representative requested modification. Director's Exhibit 37.

[2] Claimant filed her survivor's claim on October 10, 2002. Director's Exhibit 3. The survivor's claim was subsequently consolidated with the miner's claim, forwarded to the Office of Administrative Law Judges, and assigned to Administrative Law Judge Robert D. Kaplan on October 11, 2006.

[3] 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.

[4] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc).*

On appeal, claimant generally challenges the administrative law judge's denial of benefits in the miner's claim and the survivor's claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the duplicate claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Sixth Circuit has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18 (6th Cir. 1994). Claimant "must also demonstrate that this change rests upon a qualitatively different evidentiary record" than was considered in the previous claim. *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 479, 23 BLR 2-44, 2-63 (6th Cir. 2003)(Moore, J., concurring in the result). If claimant is successful, he has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence supports a finding of entitlement. *Flynn*, 353 F.3d at 480, 23 BLR at 2-66. The miner's prior claim was denied because the evidence did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements to obtain review of the merits of the miner's claim. 20 C.F.R. §725.309(d) (2000).

In considering a request for modification of the denial of a duplicate claim, which was denied based upon a failure to establish a material change in conditions, the administrative law judge must determine whether the evidence developed in the duplicate claim, including any evidence submitted with the request for modification, establishes a material change in conditions. *See* 20 C.F.R. §§725.309(d) (2000), 725.310 (2000); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). Thus, the issue properly before the

administrative law judge was whether all of the new evidence in the duplicate claim established the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §725.309 (2000), since the final denial of the previous claim in 1990. Consequently, the administrative law judge erred in failing to address whether the evidence developed in the duplicate claim established the existence of a totally disabling respiratory impairment. As the record contains conflicting evidence relevant to the issue of total disability, and for the additional reasons that follow, we remand this case for further consideration.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered two interpretations of the July, 20, 2000 x-ray submitted in support of modification, and fifty-six x-ray interpretations initially submitted with the duplicate claim. The administrative law judge accurately noted that Dr. Buck interpreted the July 20, 2000 x-ray as indicating "very mild underlying chronic interstitial disease," while Dr. Wheeler, a Board-certified radiologist and B reader, interpreted the film as negative for pneumoconiosis. Decision and Order at 4; Director's Exhibits 1, 13. As there were no contrary interpretations, substantial evidence supports the administrative law judge's finding that this x-ray evidence did not establish pneumoconiosis. Considering the fifty-six x-ray interpretations previously submitted, the administrative law judge found that the prior x-ray evidence was "overwhelmingly negative for pneumoconiosis."[5] The administrative law judge acted within his discretion in relying on the preponderance of negative interpretations by Board-certified radiologists and B readers. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-85 (6th Cir. 1993). Because it is supported by substantial evidence, we affirm the administrative law judge's finding at 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge correctly found that the record contains no biopsy evidence. Decision and Order at 11. The administrative law judge also properly found that claimant is precluded from establishing

[5] In so finding, the administrative law judge agreed with Judge Hillyard's prior determination that fifty-five of the interpretations were negative for pneumoconiosis and that, although one x-ray was interpreted as positive for pneumoconiosis by Dr. Pathak, a dually qualified B reader and Board-certified radiologist, the same x-ray was interpreted as negative for pneumoconiosis by Drs. Wiot and Wheeler, both of whom were dually qualified, and that therefore, this x-ray was negative for pneumoconiosis.

the existence of pneumoconiosis via any of the presumptions listed at 20 C.F.R. §718.202(a)(3).[6] *Id*.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered only the medical opinion evidence submitted with the request for modification. The administrative law judge acted within his discretion in finding Dr. Irvin's June 23, 2000 letter and treatment records entitled to no weight because they failed to explain any basis for the diagnosis of black lung disease. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). Additionally, the administrative law judge permissibly found that Dr. Cooperstein's August 11, 2003 letter diagnosing pneumoconiosis was entitled to no weight because the physician made no independent diagnosis, and failed to adequately explain why she relied on Dr. Smiddy's diagnosis of pneumoconiosis. *Id*.

With respect to the opinions of Drs. Smiddy and Cohen, however, the administrative law judge failed to adequately discuss the physicians' diagnoses attributing the miner's respiratory problems to coal dust exposure. *See* 20 C.F.R. §718.201(a)(2); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Director's Exhibits 1, 36; Claimant's Exhibit 2; Employer's Exhibit 3. Specifically, the administrative law judge determined that Dr. Smiddy's opinion was entitled to no weight, because Dr. Smiddy based his diagnosis of pneumoconiosis upon Dr. Bucks' July 20, 2000 x-ray interpretation, which did not support a finding of pneumoconiosis, and because "Dr. Smiddy conceded that the results of the miner's [pulmonary function test] of July 20, 2000 could be due solely to his smoking history." Decision and Order at 13. Contrary to the administrative law judge's findings, however, Dr. Smiddy's diagnosis of a "severe obstructive impairment" caused at least in part by coal dust exposure was not based on Dr. Buck's x-ray interpretation. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 124 (6th Cir. 2000). Dr. Smiddy explained that coal dust exposure contributed to the miner's severe obstructive impairment, based on the miner's symptoms and July 20, 2000 pulmonary function test. Director's Exhibit 1, Smiddy Deposition at 16, 19-20. Further, Dr. Smiddy identified coal dust exposure as a cause of the miner's obstructive impairment by comparing the miner's heavy coal dust exposure with his history of smoking a pipe "some." *Id.* at 24-26. Because the administrative law judge

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[6] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because the miner filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is a miner's claim filed after June 30, 1982, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

failed to state a valid reason for discounting Dr. Smiddy's opinion diagnosing legal pneumoconiosis, we vacate his finding pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for him to reconsider Dr. Smiddy's opinion. *See* 20 C.F.R. §718.201(a)(2); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

The administrative law judge determined that Dr. Cohen's opinion was entitled to no weight, because Dr. Cohen testified that he could not differentiate between the miner's coal dust exposure and prior smoking history as a cause of his chronic bronchitis, and because his diagnosis of pneumoconiosis was based solely on the miner's employment history and symptoms. Decision and Order at 13-14. Contrary to the administrative law judge's findings, Dr. Cohen testified that the fact that the miner was on chronic home oxygen indicated that his abnormal gas exchange was caused in part by his underlying chronic lung disease. Employer's Brief at 13, 23, 29. Dr. Cohen stated that he was "very certain" that the miner had chronic bronchitis[7] caused at least in significant part by his coal mine dust exposure, because people do not usually develop chronic bronchitis with no exposure. *Id*. at 12, 26. Dr. Cohen explained that the miner's two exposures were his twenty-seven years of coal mine employment and his pipe smoking; and, although there is no specific test that definitively proves which of the two exposures caused the impairment or symptoms, the medical literature on these exposures makes clear that the effects of tobacco smoke and coal mine dust are additive.[8] *Id*. at 26-28. Because the administrative law judge did not address the totality of Dr. Cohen's diagnosis of chronic bronchitis caused in part by coal dust exposure, he must reconsider the opinion on remand. *See* 20 C.F.R. §718.201(a)(2); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

With respect to the physicians who opined that the miner does not have pneumoconiosis, the administrative law judge considered the reports of Drs. Branscomb and Fino together, finding them reasoned and documented because they were consistent with the x-ray evidence of record. Decision and Order at 14. However, the physicians additionally opined that the miner did not suffer from a respiratory impairment that could be attributed to coal dust exposure. On remand, therefore, the administrative law judge

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[7] Dr. Cohen explained that he was able to diagnose chronic bronchitis based on the miner's treatment records noting a chronic productive cough that produced a cup of colored sputum daily. Employer's Exhibit 3 at 26. He further explained that these symptoms could not be attributed to the miner's cardiac disease. *Id.* at 13.

[8] Dr. Cohen explained that the miner worked in the mines from 1960-1986 and that every year prior to 1970 was equivalent to smoking 1.5 – 2 packs of cigarettes per day, while every year he worked after 1970 was equivalent to smoking about ½ pack per day. Employer's Exhibit 3 at 27.

must consider these opinions in conjunction with the opinions of Drs. Smiddy and Cohen pursuant to 20 C.F.R. §718.202(a)(4), in determining whether the existence of legal pneumoconiosis is established.

The duplicate claim record contains additional evidence that the administrative law judge did not consider, including medical treatment records diagnosing coal workers' pneumoconiosis, and opinions from Drs. Dahhan, Branscomb, and Fino, respectively, dated October 16, 1998; August 2, 1999; and, August 18, 1999, stating that the miner did not have a pulmonary impairment related to coal dust exposure. Director's Exhibit 1. Therefore, on remand, the administrative law judge must consider this evidence pursuant to 20 C.F.R. §718.202(a)(4). *See Hess*, 21 BLR at 1-143; *Lafferty v. Cannelton Indus.*, 12 BLR 1-190, 1-192 (1989); *Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793, 1-795 (1985).

The administrative law judge did not make any findings as to total disability. However, as the miner's previous claim was denied for failure to establish the existence of pneumoconiosis or a totally disabling respiratory impairment, the administrative law judge should have assessed whether the new evidence established total disability and therefore a material change in conditions. *See* 20 C.F.R. §§725.309(d) (2000), 725.310 (2000); *Ross*, 42 F.3d at 997-98, 19 BLR at 2-18; *Hess*, 21 BLR at 1-143. Consequently, on remand, the administrative law judge must consider whether the evidence submitted in the instant duplicate claim, including the evidence submitted in the request for modification, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2).

If, on remand, the administrative law judge determines that, based on a "qualitatively different evidentiary record," claimant established either the existence of pneumoconiosis, or a totally disabling respiratory impairment, and therefore, a material change in conditions pursuant to 20 C.F.R. §§725.309 (2000), 725.310 (2000), the administrative law judge must review the miner's claim on its merits.

Next, we address the administrative law judge's denial of the survivor's claim. To establish entitlement to survivor's benefits, 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.[9] *See* 20 C.F.R.

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[9] Section 718.205(c) provides, in pertinent part, 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

§§718.3, 718.202, 718.203, 718.205(a); *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). For survivors' 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement to benefits. *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).

Weighing the same evidence contained in the miner's claim, the administrative law judge determined that claimant failed to establish that the miner had pneumoconiosis. However, because the widow's claim was filed on October 10, 2002, the evidentiary limitations of 20 C.F.R. §725.414 apply to her claim. *See* 20 C.F.R. §725.2(c). Therefore, the administrative law judge should have based his findings on the evidence designated in the survivor's claim.[10] As the only conflicting evidence regarding the existence of pneumoconiosis are the opinions of Drs. Fino, Branscomb, Cooperstein, and Cohen, the administrative law judge is directed to limit his consideration to these opinions on remand, and to explain his credibility findings pursuant to 20 C.F.R. §718.202(a).

> (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.
> ...
> (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).

[10] The evidence designated in the survivor's claim consists of the miner's treatment records; Dr. Wheeler's negative interpretation of the July 20, 2000 x-ray; the miner's death certificate; the July 16, 2003 opinion of Dr. Branscomb; the September 10, 2003 opinion of Dr. Fino; and, the opinions and depositions of Drs. Cooperstein and Cohen. Director's Exhibit 1, 9, 11-14, 36; Claimant's Exhibits 1-2; Employer's Exhibits 1-3.

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge determined, assuming that the miner had pneumoconiosis, that claimant failed to establish that the miner's death was due to pneumoconiosis. Specifically, the administrative law judge found that Dr. Cohen's opinion was unpersuasive because it was based upon generalities, and that Dr. Cooperstein's deposition testimony established that the miner's death was not caused or hastened by pneumoconiosis.[11] Substantial evidence does not support these findings.

The record reflects that Dr. Cohen's diagnosis was specific to the miner. Dr. Cohen explained that it was the miner's "significant chronic lung disease with gas exchange problems," caused in part by coal dust exposure, that decreased his already weakened heart's ability to function, thereby hastening his death. Employer's Exhibit 3 at 24, 35-36, 38-43. Because the administrative law judge failed to state a valid reason for discrediting Dr. Cohen's opinion, we vacate his finding pursuant to 20 C.F.R. §718.205(c). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Thus, if reached on remand, the administrative law judge must reconsider Dr. Cohen's opinion at 20 C.F.R. §718.205(c).

With respect to Dr. Cooperstein's opinion, the record reflects that the administrative law judge did not consider the entirety of Dr. Cooperstein's opinion nor determine whether her opinion was reasoned and documented. Although Dr. Cooperstein stated that the miner would not have lived longer if he did not have any pulmonary impairment, she additionally testified that the miner's black lung "probably did contribute [to his death], probably made a stress on his heart. It was not the ultimate cause of his death but, you know --" Employer's Exhibit 2 at 28. Further, when asked how black lung would have played a role in the miner's death, she responded that the hypoxia could have triggered his fatal arrhythmia. *Id*. at 31. Therefore, the administrative law judge must consider the entirety of Dr. Cooperstein's opinion on remand, when weighing it with Dr. Cohen's opinion that gas exchange problems from legal pneumoconiosis hastened the

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[11] In finding Dr. Cooperstein's opinion to be persuasive, the administrative law judge stated:

> [I]n her deposition Dr. Cooperstein stated that the miner would not have lived longer if he had no lung problems because his heart disease was taking its toll at the time he died. . . . Dr. Cooperstein's statement is adequate reason to conclude that even if the miner had pneumoconiosis it was not a substantial contributor to his death.

Decision and Order at 16.

miner's sudden cardiac death. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1293 (1984); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Further, as Drs. Fino and Branscomb opined that the miner's death was unrelated to pneumoconiosis, the administrative law judge must consider their opinions on remand, in conjunction with the opinions of Drs. Cohen and Cooperstein, pursuant to 20 C.F.R. §718.205(c). *See Lafferty*, 12 BLR at 1-192; *Robertson*, 7 BLR at 1-795.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this decision.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge