BRB No. 07-0750 BLA

S. G. (On Behalf of and Widow of B. F. G.) Claimant-Respondent v. ANTELOPE COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/29/2008 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell), Draper, Utah, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-6682 and 04-BLA-6683) of Administrative Law Judge Richard K. Malamphy (the administrative law judge) rendered 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 administrative law judge

credited the miner with at least ten years of coal mine employment[1] and adjudicated both claims pursuant to the regulations contained in 20 C.F.R. Part 718. Noting that the evidence of record was the same in both claims, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), the existence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c), and, that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both the miner's and survivor's claims.

On appeal, employer challenges the administrative law judge's weighing of the evidence pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.204(c), and 718.205(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal. [2]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must prove the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes 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).

In order to establish entitlement to benefits in a survivor's claim, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202, 718.203,

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

[2] We affirm as unchallenged on appeal the administrative law judge's finding that the miner established at least ten years of coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39, 1-41 (1988). Under Section 718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Claimant may establish that pneumoconiosis was a substantially contributing cause of a miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5).

Pursuant to Section 718.202(a)(1) and (a)(4), the administrative law judge found that claimant established that the miner had clinical and legal pneumoconiosis. Decision and Order at 16-17. Pursuant to Section 718.202(a)(2), the administrative law judge found that the biopsy evidence did not establish that the miner had pneumoconiosis.

On appeal, employer argues that the administrative law judge erred in failing to weigh together all the evidence presented at 20 C.F.R. §718.202(a)(1)-(a)(4) before reaching a conclusion that the evidence established the existence of clinical and legal pneumoconiosis. Citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), employer specifically argues that where, as here, the record contains both x-ray interpretations and biopsy reports relevant to the issue of clinical pneumoconiosis, the Act prohibits the conclusion that the miner had pneumoconiosis based on the x-ray evidence alone. Employer's Brief at 12-13. Employer, however, fails to cite any binding authority from the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, in support of its position that all forms of evidence must be weighed together. The Board has long held that Section 718.202 provides four alternative methods for establishing the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), and has declined to extend the holding in *Williams* and *Compton* outside of the Third and Fourth Circuits, respectively. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002)(*en banc*). We hold, therefore, that the administrative law judge rationally found that the existence of clinical pneumoconiosis was established based upon his accurate determination, pursuant to Section 718.202(a)(1), that the preponderance of the x-ray evidence established that the miner had simple pneumoconiosis. 20 C.F.R. §718.202(a); *Dixon*, 8 BLR at 1-345; Decision and Order at 6; Director's Exhibits 13, 15, 24; Claimant's Exhibits 1, 2.

Ordinarily, affirmance of the administrative law judge's finding that the existence of pneumoconiosis was established by the chest x-rays at Section 718.202(a)(1) would obviate the need to review his finding that the medical opinions established the existence of pneumoconiosis at Section 718.202(a)(4). *See Dixon*, 8 BLR at 1-345. However, in this case, the administrative law judge's findings that the miner's total disability and death were due to pneumoconiosis rest on his finding pursuant to Section 718.202(a)(4) that the miner's idiopathic pulmonary fibrosis constituted legal pneumoconiosis, a

finding that is challenged by employer. Moreover, as employer correctly notes, the conflicting evidence that was submitted pursuant to the other subsections of 20 C.F.R. §718.202(a) is also relevant to whether the miner's clinical pneumoconiosis found by x-ray arose out of coal mine employment, and, as will be discussed, the administrative law judge did not properly consider that issue. Consequently, we will discuss employer's challenges to the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (4).

Pursuant to 20 C.F.R. §718.202(a)(2), employer asserts that the administrative law judge erred in failing to weigh all relevant biopsy evidence together. Specifically, employer argues that the administrative law judge erred in failing to consider the biopsy reports of Drs. Cool and Perper[3] in conjunction with the reports of Drs. Stinson and Oesterling. Employer's Brief at 15-16. A review of the administrative law judge's decision reflects that he did not consider these reports. However, because the administrative law judge found that the biopsy reports of Drs. Stinson and Oesterling did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), any error that the administrative law judge may have made by not including the reports of Drs. Cool and Perper in his weighing of the evidence was harmless, as employer was not prejudiced. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer next challenges the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Specifically, employer asserts that the administrative law judge failed to consider the treatment records of Drs. Brown and Portnoy. Employer's Brief at 23. Employer further asserts that the administrative law judge erred in crediting the opinions of Drs. Bennett, Smith, and Perper over Dr. Rosenberg's contrary opinion without first assessing the validity of each medical opinion, and failed to state a valid reason for discounting Dr. Repsher's opinion. *Id*. at 16-22. Employer's assertions of error have merit.

Relevant to 20 C.F.R. §718.202(a)(4), the record contains the medical opinions of Drs. Bennett, Smith, Perper, Rosenberg, Repsher, Brown and Portnoy. In finding that the medical opinion evidence established the existence of legal pneumoconiosis in the form

[3] Dr. Cool stated that the biopsy slides showed interstitial fibrosis and honeycombing and diagnosed usual interstitium pneumonia. Director's Exhibit 17. Although Dr. Perper reviewed the biopsy slides, along with other medical evidence, claimant designated his report as a medical report, not a biopsy report. Dr. Perper diagnosed "severe coal workers' pneumoconiosis, of the interstitial fibrosis type" based upon the biopsy slides evidencing "severe compact and interstitial fibro-anthracosis with presence of birefringent silica and silicate crystals and severe centrilobular and pan-acinar emphysema." Claimant's Exhibit 3 at 27.

of idiopathic pulmonary fibrosis that was due to, or aggravated by, coal mine dust exposure pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge omitted the treatment records of Drs. Brown and Portnoy, which stated that it was unlikely that coal dust exposure caused the miner's idiopathic pulmonary fibrosis. The administrative law judge assessed the validity of only a portion of Dr. Repsher's opinion.[4] The administrative law judge further noted that Drs. Bennett, Smith, and Perper believed that the miner's idiopathic pulmonary fibrosis was caused or aggravated by coal dust exposure, while Drs. Repsher and Rosenberg opined that the miner did not have legal pneumoconiosis. Decision and Order at 17; Director's Exhibits 16, 18, 19; Claimant's Exhibit 3; Employer's Exhibits 3, 4, 5, 6. The administrative law judge then summarily concluded that the weight of the medical reports established that the miner suffered from legal pneumoconiosis. Decision and Order at 17.

We agree with employer that the administrative law judge made conclusory findings with regard to the issue of legal pneumoconiosis, and that his Decision and Order does not reflect that he gave proper consideration to whether the opinions that he credited were sufficiently reasoned to satisfy claimant's burden of proof. *See Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993); *Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149, 1-155 (1989) (*en banc*). The administrative law judge failed to discuss whether the opinions of Drs. Bennett, Smith, and Perper were reasoned, and failed to explain why he found them more persuasive than the opinions of Drs. Repsher and Rosenberg. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1293 (1984); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Moreover, the administrative law judge failed to state a valid reason for discounting Dr. Repsher's entire opinion. Although Dr. Repsher stated that the miner's centrilobular emphysema was not associated with coal mine dust, he opined that the sole source of the miner's respiratory impairment was his idiopathic pulmonary fibrosis. Employer's Exhibit 10 at 30-34, 52-58. Because the administrative law judge did not find that the miner's emphysema was caused by exposure to coal dust, the fact that Dr. Repsher believed that the miner's centrilobular emphysema could not have been caused by coal dust exposure was irrelevant to the doctor's opinion regarding the etiology of the miner's idiopathic pulmonary fibrosis. *See Fuller*, 6 BLR at 1-1293. Further, because Drs. Portnoy and Brown stated an opinion as to the cause of the miner's pulmonary fibrosis, the administrative law judge was obligated to consider their opinions pursuant to 20 C.F.R.

[4] The administrative law judge discounted the probative value of Dr. Repsher's report, finding that Dr. Repsher foreclosed the possibility that coal dust exposure could cause, or contribute to, the miner's centrilobular emphysema. Decision and Order at 14. The administrative law judge did not assess the validity of Dr. Repsher's opinion that the miner's idiopathic pulmonary fibrosis was unrelated to coal dust exposure. Director's Exhibit 19; Employer's Exhibits 5, 10 at 30-34.

§718.202(a)(4). *See* 30 U.S.C. §923(b); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fuller*, 6 BLR at 1-1293.

For the above-stated reasons, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must assess the probative value of all relevant medical opinions, including the totality of Dr. Repsher's opinion. Specifically, the administrative law judge must consider the physicians' qualifications and determine whether their conclusions are reasoned in light of their underlying reasoning and the record as a whole. When considering the reasoning and validity of Dr. Perper's report, to the extent that Dr. Perper relied on biopsy evidence that the administrative law judge found did not establish pneumoconiosis at 20 C.F.R. §718.202(a)(2), the administrative law judge must bear in mind the other pathologists' conflicting biopsy observations. *See Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873, 20 BLR 2-334, 2-338-339 (10th Cir. 1996); *Hansen*, 984 F.2d at 370, 17 BLR at 2-59. Further, the administrative law judge must resolve the conflicts in the opinions, and explain the basis for his findings of fact and conclusions of law, as required by the Administrative Procedure Act (the APA). 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); *see Hansen*, 984 F.2d at 370, 17 BLR at 2-59; *Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793, 1-795 (1985).

Employer next challenges the administrative law judge's finding, pursuant to 20 C.F.R. §718.203(b), that the miner's pneumoconiosis arose out of coal mine employment. Specifically, employer argues that substantial evidence does not support the administrative law judge's finding that employer did not rebut the presumption that the miner's clinical pneumoconiosis arose out of coal mine employment. We agree.

As discussed *infra*, the administrative law judge did not err in finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). However, in finding that employer did not rebut the presumption that the miner's pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge considered only the fact that employer did not submit evidence showing that the miner's pneumoconiosis arose from his uranium mine employment. Decision and Order at 19. The administrative law judge failed to consider the conflicting evidence concerning the source of the miner's pneumoconiosis.[5]

[5] Employer asserts that there is ample evidence in this case to establish that the changes seen in the miner's lungs were the result of idiopathic pulmonary fibrosis, not coal workers' pneumoconiosis. Employer specifically points to a May 16, 2001 x-ray read as indicating diffuse interstitial lung disease, Director's Exhibit 18; Dr. Wiot's December 16, 2002 x-ray comments diagnosing interstitial pulmonary fibrosis and explaining that the changes in the miner's lungs were not caused by coal dust exposure,

Consequently, we vacate the administrative law judge's finding at Section 718.203(b). On remand, in considering whether employer has met its burden to rebut the presumption that the miner's pneumoconiosis arose from his coal mine employment, the administrative law judge must consider all evidence relevant to the etiology of the miner's clinical pneumoconiosis, and explain his findings.

Employer additionally challenges the administrative law judge's findings at 20 C.F.R. §§718.204(c), 718.205(c), arguing that the administrative law judge's findings were premised on an erroneous finding of pneumoconiosis. Employer's Brief at 25-26. Employer additionally asserts that the administrative law judge erred in failing to explain why the opinions that he credited were persuasive. We agree.

In considering whether pneumoconiosis was a substantially contributing cause of the miner's totally disabling pulmonary impairment and death pursuant to 20 C.F.R. §§718.204(c), 718.205(c), the administrative law judge found that Drs. Bennett, Smith, and Perper opined that coal dust contributed to the miner's pulmonary impairment and death, while Drs. Repsher, Rosenberg, and Oesterling had contrary opinions. Because they failed to diagnose clinical and legal pneumoconiosis, the administrative law judge determined that the opinions of Drs. Repsher and Rosenberg were entitled to diminished weight. The administrative law judge, therefore, concluded that the weight of the evidence established that the miner's pneumoconiosis was a substantially contributing cause of his totally disabling pulmonary impairment and death. Decision and Order at 22, 25. Because the administrative law judge failed to explain his credibility determinations and based his determinations upon his findings at 20 C.F.R. §718.202(a)(4), which have been vacated, we must vacate his findings at 20 C.F.R. §§718.204(c), 718.205(c). On remand, the administrative law judge must reconsider the medical opinion evidence, and resolve the conflicts as to whether coal dust exposure caused the miner's disabling respiratory impairment and whether it caused or hastened the miner's death. *See* 20 C.F.R. §§718.204(c), 718.205(c). In consideration of these

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Director's Exhibit 15; the biopsy reports of Drs. Stinson, Cool, and Oesterling diagnosing interstitial pneumonia/idiopathic pulmonary fibrosis, with Dr. Oesterling explaining why the changes could not have been caused by coal dust exposure, Director's Exhibit 17, Employer's Exhibits 1, 9; CT scans reviewed by physicians at National Jewish Medical Center as indicating idiopathic pulmonary fibrosis, Director's Exhibit 16; the medical opinions of Drs. Rosenberg and Repsher stating that coal dust exposure did not contribute to the miner's idiopathic pulmonary fibrosis, Director's Exhibit 19, Employer's Exhibits 5-6; and the treatment records of Drs. Brown and Portnoy stating that coal dust exposure was unlikely to be the cause of the miner's idiopathic pulmonary fibrosis. Director's Exhibit 16.

issues, the administrative law judge must set forth a rationale explaining his credibility determinations. *See Trumbo*, 17 BLR at 1-88, 1-89; *Fuller*, 6 BLR at 1-1293.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge