BRB No. 08-0629 BLA

A.H. (Widow of T.H.) Claimant-Respondent v. U.S. STEEL MINING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/07/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Debra L. Henry, Greensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns, White & Hickton, LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (04-BLA-6532) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) rendered on a survivor's claim[1] filed pursuant to the provisions of Title IV of the

[1] Claimant is the widow of the miner, T.H., who died on November 2, 2002. Director's Exhibits 1, 11. Claimant filed the instant survivor's claim on November 12, 2002. Director's Exhibit 3.

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This is the second time this case is before the Board. In his initial Decision and Order Granting Benefits, the administrative law judge noted that the miner was awarded benefits on his lifetime claim. However, based on the Board's decision in *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), the administrative law judge determined that collateral estoppel was not applicable in the survivor's claim to preclude employer from relitigating the existence of pneumoconiosis arising out of coal mine employment, which was established in the miner's claim, and that therefore, claimant had to establish this element of entitlement.[2] Weighing the evidence admitted into the record in the survivor's claim, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis, vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.205(c), and remanded the case for further consideration. [*A.H.*] *v. U.S. Steel Mining Co.*, BRB No. 06-0780 BLA (May 31, 2007)(unpub.). The Board directed the administrative law judge, on remand, to determine whether the credibility of Dr. McMonagle's diagnosis of legal pneumoconiosis[3] was affected by the discrepancy between the administrative law judge's finding that the miner had twenty-five years of

[2] The Board, in *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), held that collateral estoppel did not bar an employer from relitigating the existence of pneumoconiosis in a survivor's claim, where the miner had established this element of entitlement prior to the United States Court of Appeals for the Fourth Circuit's decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) (requiring the administrative law judge to weigh the evidence under all of the subsections at 20 C.F.R. §718.202(a) together before determining whether the existence of pneumoconiosis is established). While noting that this case is governed by the law of the United States Court of Appeals for the Third Circuit, the administrative law judge found *Collins* applicable, because after the award of benefits in the miner's claim, the Third Circuit adopted a standard similar to the Fourth Circuit's *Compton* standard for determining the existence of pneumoconiosis. Decision and Order Granting Benefits at 10, citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

coal mine employment,[4] and Dr. McMonagle's belief that the miner worked for forty years in coal mine employment. *Id.* slip op. at 5. The Board additionally directed the administrative law judge to reconsider whether Dr. Kaplan's opinion, that the miner did not have pneumoconiosis, was hostile to the Act, and to adequately explain his conclusions on remand. Further, the Board instructed the administrative law judge to reconsider the applicability of the doctrine of collateral estoppel, as the Board's 2003 holding in *Collins* was subsequently reversed by the United States Court of Appeals for the Fourth Circuit. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006)(holding that the doctrine of collateral estoppel barred employer from relitigating the existence of pneumoconiosis in a survivor's claim, where the miner established this element of entitlement prior to the Fourth Circuit's holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000);[5] [*A.H.*], BRB No. 06-0780 BLA, slip op. at 6.

On remand, the administrative law judge again found that claimant established the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.205(c). Further, pursuant to the Board's instructions, the administrative law judge reconsidered the applicability of the doctrine of collateral estoppel. Although the administrative law judge determined that claimant established the existence of pneumoconiosis, he alternatively found that employer was collaterally estopped from relitigating the issue. In so finding, the administrative law judge determined that the facts of this case are consistent with those in *Collins*, and that the Fourth Circuit's holding in *Collins* is in accord with Third Circuit law. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Thus, because the miner established the existence of pneumoconiosis arising out of coal mine

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's most recent coal mine employment was in Pennsylvania. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] The Fourth Circuit explained in *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006) that, although *Compton* invalidated the practice of allowing administrative law judges to find the existence of pneumoconiosis established by looking exclusively at evidence within one of the four subsections at 20 C.F.R. §718.202(a), it left unaltered the legal definition of pneumoconiosis, the methods by which a claimant may establish the existence of pneumoconiosis, and the burden of proving the existence of pneumoconiosis by a preponderance of the evidence. The court thus concluded that the issue sought to be precluded in the survivor's claim was identical to that previously adjudicated in the successful miner's claim decided prior to *Compton*, and that therefore, collateral estoppel was applicable to preclude relitigation of the existence of pneumoconiosis. *Collins*, 468 F.3d at 219, 23 BLR at 2-403-04.

employment in his successful claim for lifetime benefits, the administrative law judge determined that employer was collaterally estopped from relitigating the issue. Decision and Order on Remand at 5-6. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in weighing the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a), 718.205(c), and in finding that collateral estoppel is applicable. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response in this appeal.

The Board 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.3, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' 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)(1)-(c)(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); *Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989). 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).

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. McMonagle and Kaplan.[6] Dr. McMonagle opined that the miner's chronic lung disease was caused by both his coal mine employment and smoking histories, both of which Dr. McMonagle characterized as "substantial." Director's Exhibit 15. By contrast, Dr. Kaplan opined that there was no evidence of coal workers'

[6] Although the record additionally contains the opinion of Dr. Perper, the Board previously affirmed, as unchallenged, the administrative law judge's discounting of his opinion. [*A.H.*] *v. U.S. Steel Mining Co.*, BRB No. 06-0780 BLA, slip op. at 4 n.6, (May 31, 2007)(unpub.).

pneumoconiosis and that it was impossible to say whether the miner had a significant respiratory impairment that could be related to coal mine employment, because recent lung function studies were not available to review. Employer's Exhibits 1 at 3; 2 at 19.

Employer asserts that the administrative law judge improperly substituted his opinion for that of a medical expert in crediting Dr. McMonagle's opinion despite his reliance on an inaccurate coal mine employment history. Employer's Brief at 6. We disagree.

Pursuant to the Board's remand instruction, the administrative law judge determined that Dr. McMonagle's belief that the miner worked for forty years in coal mine employment did not undermine his conclusions as to the existence of pneumoconiosis, because his opinion was not based solely on the miner's coal mine employment history. Decision and Order on Remand at 2. The administrative law judge explained:

> [Dr. McMonagle] was also aware of all of the Miner's medical problems and other exposure histories, including the Miner's heart problems and his smoking history. His opinion was further based on the Miner's clinical symptoms and the fact that the Miner had stopped smoking four years prior to beginning treatment with Dr. McMonagle.

Id. at 3. Substantial evidence supports this permissible finding. *See Mancia v. Director, OWC*P, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997). Further, the administrative law judge explained that Dr. McMonagle's opinion was not undermined by an exaggerated coal mine employment history, because twenty-five years of coal mine employment was also a "significant" history of coal mine employment. *Id.* Contrary to employer's contention that, in so finding, the administrative law judge substituted his opinion for that of a medical expert, the record reflects that both Drs. Perper and Kaplan stated that twenty-five years of coal mine employment is sufficient to cause pneumoconiosis. Employer's Exhibit 2 at 23; Claimant's Exhibit 1 at 24. Thus, the uncontradicted medical opinion evidence of record supports the administrative law judge's finding that twenty-five years of coal mine employment is a significant history of coal mine employment. Because the administrative law judge reasonably resolved the issue of whether the credibility of Dr. McMonagle's opinion was affected by an inaccurate employment history, we reject employer's allegation of error. *See Anderson*, 12 BLR at 1-113; *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

We additionally reject employer's assertion that the administrative law judge erred in assigning increased weight to Dr. McMonagle's opinion based on his status as the miner's treating physician. Employer's Brief at 7. Employer has mischaracterized the

record; the administrative law judge made no such finding. Decision and Order on Remand at 2-3.

Although employer also asserts that Dr. McMonagle did not adequately address the miner's cigarette smoking history, whether an opinion is reasoned and documented is for the trier-of-fact to determine. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Because substantial evidence supports the administrative law judge's finding, that Dr. McMonagle based his opinion on the miner's clinical symptoms and exposure histories, we affirm the administrative law judge's finding that Dr. McMonagle's opinion is reasoned and documented. *See Lango*, 104 F.3d at 578, 21 BLR at 2-20.

We additionally reject employer's assertion that the administrative law judge erred in discounting Dr. Kaplan's opinion as hostile to the Act. Employer's Brief at 11-13. Contrary to employer's assertion, the administrative law judge did not find that Dr. Kaplan's opinion was hostile to the Act. In fact, the administrative law judge explicitly stated that Dr. Kaplan's opinion as to the existence of legal pneumoconiosis did not "amount[] to the level of contrary to the [A]ct," but rather, was "unpersuasive" because the doctor's reasoning tended to emphasize clinical coal workers' pneumoconiosis. Decision and Order on Remand at 3. Further, although, as employer contends, Dr. Kaplan conceded that it is possible to have pneumoconiosis despite a negative x-ray, substantial evidence supports the administrative law judge's finding that Dr. Kaplan did not adequately consider whether coal mine dust exposure affected the miner's pulmonary condition, apart from his consideration of whether the miner had clinical manifestations of coal workers' pneumoconiosis.[7] Decision and Order on Remand at 4; Employer's Exhibit 2. Consequently, we affirm the administrative law judge's determination to discount Dr. Kaplan's opinion as "unpersuasive." *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

[7] As summarized by the administrative law judge, Dr. Kaplan stated that "It's conceivable to have . . . coal workers' pneumoconiosis in the absence of an abnormal x-ray, though clinically we can't make that diagnosis." Employer's Exhibit 2 at 21. Dr. Kaplan further stated that "simple coal workers' pneumoconiosis generally does not result in significant impairment, [or] significant air flow obstruction especially in the very low grades of coal workers' pneumoconiosis. So when we talk about COPD, the problem with COPD is cigarette smoking. It's not occupationally induced." *Id.* at 25. Dr. Kaplan explained that "[g]enerally the only time we see" COPD is "in advanced forms of coal workers' pneumoconiosis, perhaps complicated coal workers' pneumoconiosis. . . . One just doesn't relate simple coal workers' pneumoconiosis to the genesis of COPD." Employer's Exhibit 2 at 25-26.

In light of the foregoing, we affirm the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Moreover, because employer raises no further challenge to the administrative law judge's overall weighing of the evidence at 20 C.F.R. §718.202(a), we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis. *See Williams*, 114 F.3d at 25, 21 BLR at 2-112.

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge determined that Dr. McMonagle's opinion as to death causation[8] was well-reasoned and documented and that it established that the miner's pneumoconiosis substantially contributed to his death. Decision and Order at 3. Although employer asserts that Dr. McMonagle's opinion is not supported by the miner's treatment records, Employer's Brief at 17, substantial evidence supports the administrative law judge's finding that Dr. McMonagle explained that pneumoconiosis hastened the miner's death because it weakened the miner and left him less capable of recovering from a myocardial infarction and lung cancer. *See Hill v. Director, OWCP*, 562 F.3d 264, - - - BLR - - - (3d Cir. 2009); *Mancia*, 130 F.3d at 584, 21 BLR at 2-234; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155. Further, because Dr. Kaplan did not diagnose pneumoconiosis, the administrative law judge rationally discounted his opinion, and determined that Dr. McMonagle's opinion established that pneumoconiosis substantially contributed to the miner's death. *See Soubik v. Director, OWCP*, 366 F.3d 266, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); Decision and Order on Remand at 4. Consequently, we affirm the administrative law judge's finding at 20 C.F.R. §718.205(c). Further, as claimant has established each element of entitlement, we affirm the administrative law judge's award of benefits.

Because we have affirmed the administrative law judge's finding that the medical evidence established the existence of pneumoconiosis in the survivor's claim, we need

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[8] Dr. McMonagle stated:

> I believe the dust exposure [that the miner] experienced in the coal mining environment over his prolonged period of employment was substantial and a direct cause of his respiratory symptoms. . . . I believe it left him debilitated with less capability of fighting any other insults. In this case specifically[,] the myocardial infarction and the carcinoma of the lung. That is, although the immediate cause of death was carcinoma of the lung and the patient had suffered a myocardial infarction, the debilitation of the coal workers' pneumoconiosis was a contributing factor to the patient's ultimate morbidity and mortality.

Claimant's Exhibit 3 at 1.

not address the administrative law judge's alternative finding that employer is collaterally estopped from relitigating the existence of pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is affirmed.

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