

BRB No. 98-1146 BLA

JUDY M. RICHARD)	
(On behalf of BARBARA A. RAY,)	
Survivor of RALPH E. RAY))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
KEYSTONE COAL MINING)	
CORPORATION)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (Law Care), Greensburg, Pennsylvania, for claimant.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0952) of Administrative Law Judge Richard A. Morgan awarding benefits on a 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 accepted

the parties' stipulation to thirteen years of coal mine employment, determined that employer is the responsible operator, and found that Barbara A. Ray is the deceased miner's surviving disabled child. See 20 C.F.R. §§725.209(a)(2)(ii); 725.221. Upon consideration of the medical evidence, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4), and concluded that pneumoconiosis caused or was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). The administrative law judge awarded benefits and employer brought this appeal.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical evidence pursuant to Section 718.202(a) and Section 718.205(c). Claimant, by counsel, responds urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.¹

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).

A claimant becomes entitled to survivor's benefits by establishing that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a). 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)(1), (2), (4). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that

¹ We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, responsible operator status, dependency, and that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3). See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *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).

The threshold issue in a survivor's claim is whether the miner had pneumoconiosis as defined by the Act and regulations. See 30 U.S.C. §902(b); 20 C.F.R. §718.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993). Although Section 718.202(a) provides four distinct methods of establishing pneumoconiosis, “all types of relevant evidence must be weighed together to determine whether the [miner] suffer[ed] from the disease.” *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). The relevant evidence in this record consisted of x-ray readings, CT scan readings, examination and medical treatment reports, and consultation reports based on reviews of the miner's medical records.

Pursuant to Section 718.202(a)(1), the administrative law judge found the weight of the x-ray readings considered in light of the readers' radiological credentials to be negative for pneumoconiosis. Decision and Order at 4-5, 14-15; see *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 310 n.3, 20 BLR 2-76, 2-280 n.3 (3d Cir. 1995). Additionally, the administrative law judge noted that a January 13, 1993 CT scan was read negative for pneumoconiosis.² Decision and Order at 11; Director's Exhibits 13, 19, 34. There was no biopsy or autopsy evidence. See 20 C.F.R. §718.202(a)(2).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the conflicting opinions of several physicians. The record of the miner's lifetime claim, which was denied by an administrative law judge in 1989, contained the reports of Drs. Eligator, Connelly, Cander, Bush, Scott, Tuteur, and Bajwa. Director's Exhibit 38. Dr. Eligator, whose credentials are not of record, examined the miner and diagnosed soft coal workers' pneumoconiosis and obstruction. Director's Exhibit 38. Dr. Cander, who is Board-certified in Internal Medicine, reviewed items of medical evidence and diagnosed chronic obstructive lung disease caused in part by coal dust inhalation. *Id.* Dr. Connelly, whose credentials are not of record, examined and tested the miner and diagnosed emphysema and coal workers' pneumoconiosis due to coal dust exposure. *Id.* Drs. Scott and Bush, who are Board-certified in Internal Medicine and Pulmonary Disease, examined and tested

² In so doing, the administrative law judge properly considered the CT scan readings separately from the conventional chest x-rays. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991).

the miner and reviewed his medical records. Both concluded that the miner did not have pneumoconiosis but suffered from COPD due to smoking. *Id.* Dr. Tuteur, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed medical records and reached the same conclusion. *Id.* Dr. Bajwa, whose credentials are not of record, examined the miner and diagnosed COPD without addressing its etiology. *Id.*

The administrative law judge evaluated these medical opinions on the basis of the physicians' qualifications and found that the weight of the opinions by physicians with superior credentials indicated that pneumoconiosis was not established as of the time their opinions were rendered. Decision and Order at 15-16. The administrative law judge then turned to the more recent medical reports submitted with the survivor's claim, which included hospitalization reports, office treatment notes, and the reports and testimony of Drs. Wald, Sinnenberg, and Scott.

Dr. Patel, the miner's treating physician during several hospitalizations from 1987 to 1996, reported that the miner was treated for pneumonia, bronchitis, respiratory failure, and exacerbation of his COPD. Director's Exhibit 13. In the final hospitalization report included in this exhibit, Dr. Patel recorded that the miner died of respiratory failure on April 18, 1996. Director's Exhibit 13 at 1. Dr. Patel's office treatment notes contained multiple diagnoses of COPD, emphysema, hypertension, and coronary artery disease. Director's Exhibits 13, 14. Dr. Patel did not address the etiology of these diagnoses.

Dr. Wald, who is Board-certified in Internal Medicine, reviewed the medical evidence of record and concluded that although the miner's chest x-rays and CT scan did not reveal clinical pneumoconiosis and his cigarette smoking habit was a major cause of his COPD, his coal mine dust exposure was nevertheless “a substantial factor in the progression” of his COPD. Claimant's Exhibits 1, 2. Accordingly, Dr. Wald opined that under the broader, legal definition of pneumoconiosis, the miner had “a respiratory problem that [was] related to his coal dust exposure. . . .” Claimant's Exhibit 2 at 33.

Dr. Sinnenberg, who is Board-certified in Anatomical and Clinical Pathology, reviewed the medical evidence and opined that the miner might have had mild coal workers' pneumoconiosis, and that “a portion of Mr. Ray's bronchitis may have been industrial bronchitis caused by coal dust exposure during his years of working in the mine.” Employer's Exhibits 3, 7. However, he insisted that the industrial bronchitis would have resolved after the miner's retirement and removal from coal dust, and that the miner's emphysema was due to smoking. *Id.*

Dr. Scott, who is Board-certified in Internal Medicine and Pulmonary Disease

and is a B-reader, reviewed the medical evidence of record and diagnosed COPD with emphysema due to smoking. Director's Exhibit 34. He opined that the miner did not have coal workers' pneumoconiosis or any occupational lung disease. *Id.*

The administrative law judge considered these opinions in light of the physicians' qualifications, and was persuaded by Dr. Wald's opinion that, while the x-rays and CT scans did not show clinical pneumoconiosis, the miner's COPD was aggravated by his coal dust exposure. Decision and Order at 16; see 20 C.F.R. §718.201; see *Swarrow*, 72 F.3d at 312, 20 BLR at 2-84 (legal definition of pneumoconiosis is much broader than the medical definition). In crediting Dr. Wald's opinion, the administrative law judge permissibly criticized Dr. Scott for failing to account persuasively for the miner's exposure to coal dust. See *Peabody Coal Co. v. Hill*, 123 F.3d 412, 417 (6th Cir. 1997). Additionally, in light of the progressive nature of pneumoconiosis, see *Swarrow*, 72 F.3d at 314, 20 BLR at 2-88-89, the administrative law judge reasonably accorded diminished weight to the medical opinions associated with the miner's claim diagnosing no pneumoconiosis as of the late 1980's. See *Kowalchick v. Director, OWCP*, 893 F.2d 615, 621, 13 BLR 2-226, 2-236-37 (3d Cir. 1990). Consequently, we reject employer's arguments that the administrative law judge erred by considering these factors at Section 718.202(a)(4) and Section 718.205(c).³ Employer's Brief at 10, 13-14.

However, employer correctly contends that the administrative law judge failed to weigh together all of the evidence relevant to the existence of pneumoconiosis. Employer's Brief at 11; see *Williams*, *supra*. In finding the existence of pneumoconiosis established, the administrative law judge stated that “[t]he x-ray findings certainly corroborate this,” but did not explain this comment. Further, he did not indicate how much weight, if any, he accorded to the negative CT scan readings. Therefore, we vacate the administrative law judge’s finding that the medical opinion evidence established the existence of pneumoconiosis based on his findings at Section 718.202(a)(4), and remand the case to the administrative law judge for further consideration of the relevant evidence under Section 718.202(a) consistent with *Williams*.

³ We reject as meritless employer's argument that Dr. Wald's opinion should have been rejected as a legal opinion beyond his expertise simply because Dr. Wald addressed both clinical pneumoconiosis and pneumoconiosis as it is legally defined. Employer's Brief at 6.

Because the administrative law judge' finding at Section 718.202(a)(4) was determinative of his finding at Section 718.205(c) that pneumoconiosis caused the miner's death,⁴ Decision and Order at 18, we must vacate the administrative law judge's finding at Section 718.205(c) and instruct him to reconsider this issue if he finds the existence of pneumoconiosis established on remand. For purposes of weighing the medical opinions on remand, the administrative law judge is advised that Dr. Wald is Board-certified in Internal Medicine, but does not hold similar, official credentials in pulmonary medicine as stated and apparently relied upon by the administrative law judge. Decision and Order at 16; Claimant's Exhibit 2 at 26, and Deposition Exhibit A.

Accordingly, the administrative law judge's Decision and Order awarding 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 opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

⁴ The miner's death certificate, completed by Dr. Patel, indicated that he died due to end stage chronic obstructive lung disease. Director's Exhibit 12. Drs. Wald, Sinnenberg, and Scott agreed that the miner died due to COPD. Director's Exhibit 34; Claimant's Exhibits 1, 2; Employer's Exhibits 3, 7.