BRB No. 02-0210 BLA

MOLLIE E. HARVEY (Widow of VIRGIL D. HARVEY)	)	
Claimant-Respondent	)	
v.	)	
BELVA COAL COMPANY/CAYMAN COAL, INCORPORATED	)	DATE ISSUED:
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-BLA-0047) of Administrative Law Judge Richard A. Morgan awarding benefits on 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).[1] The administrative law judge credited the miner with forty

[1]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,

years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203 and that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded. On appeal, employer challenges the administrative law judge's findings under Sections 718.202(a)(2) and (4) and 718.205(c). In response, claimant asserts that the administrative law judge's Decision and Order awarding benefits is supported by substantial evidence. 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. 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis and death due to pneumoconiosis under 20 C.F.R. §718.202(a)(1), (3) and 718.205(c)(1) and (3).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *see 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); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).[3]

Employer argues that the administrative law judge has failed to provide valid and proper reasons for crediting the opinions in which Drs. DeLara and Green diagnosed pneumoconiosis pursuant to Section 718.202(a)(2). Specifically, employer argues that in his analysis of the pathological evidence, the administrative law judge failed to compare and weigh the conflicting medical opinions and "simply stated that the opinions of Drs. DeLara and Green are detailed and well-reasoned and should be accepted as accurate." Employer's Brief at 14.

Employer's contentions have merit. The administrative law judge found that the prosector, Dr. DeLara, and Dr. Green "clearly and unequivocally diagnosed simple coal worker's pneumoconiosis." Decision and Order at 19. The administrative law judge summarized the contrary findings of Drs. Naeye, Bush, Caffrey, Crouch and Oesterling and concluded that:

> Notwithstanding the numerical superiority of the pathologists who found insufficient evidence to establish pneumoconiosis, I find that the autopsy report of Dr. DeLara, as buttressed by the detailed well-reasoned opinion of Dr. Green, should be accepted as accurate and not fraudulently represented. In making this determination, I conclude that the findings of coal worker's

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as the miner's last year of qualifying coal mine employment occurred in the State of West Virginia. Director's Exhibits 2, 22-2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

> pneumoconiosis by Dr. DeLara and Green are most consistent with the pathology findings of coal dust pigmentation, fibrosis, and coal dust macules, emphysema, as well as the miner's 40-year history of coal mine employment which ended in 1977, and his minimal cigarette smoking history which ended in the 1940's.

Id. The administrative law judge did not explain, however, why he found Dr. DeLara's and Dr. Green's conclusions regarding the significance of the "pathology findings" more persuasive than the alternative analyses provided by Drs. Naeye, Bush, Caffrey, Crouch, and Oesterling.[4] Thus, the administrative law judge's Decision and Order does not accord with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by U.S.C. §554(c)(2), 33 U.S.C.§919(d) and 30 U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

We vacate, therefore, the administrative law judge's finding that the existence of pneumoconiosis was established under Section 718.202(a)(2) and remand the case to the administrative law judge for reconsideration of this issue. In addressing the relative probative weight of the evidence relevant to Section 718.202(a)(2), the administrative law judge must address the qualifications of the respective physicians, the explanation of their

[4]Dr. Naeye, in his three medical reports and deposition, stated that pneumoconiosis was absent. Director's Exhibit 20; Employer's Exhibits 4, 6. Dr. Naeye asserted that there was no fibrosis associated with the anthracotic pigmentation seen in the histologic slides and that contrary to Dr. Green's opinion, the fibrosis was associated with pneumonia, that Dr. Green's diagnosis of interstitial fibrosis is a consequence of centrilobular emphysema not related to coal dust exposure and that the chronic bronchitis was more likely related to the miner's cigarette smoking. Director's Exhibit 20; Employer's Exhibits 4, 6, 10. Drs. Crouch, Bush, Caffrey, Castle, and Morgan similarly agreed with Dr. Naeye's conclusions. Employer's Exhibits 2, 5, 7.

conclusions, the documentation underlying their medical judgments and the sophistication and bases of their diagnoses. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

With respect to the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), employer argues that the administrative law judge erred in crediting the 1980 and 1991 reports of Drs. Lesaca and Carrillo. This contention also has merit. The administrative law judge found that:

> Since the miner had a long history of shortness of breath, abnormalities on, at least some, of the physical examinations of the chest and lungs, a forty year coal mine employment history, and evidence of slightly reduced results on clinical testing, I credit the opinion of Dr. Carrillo, as buttressed by Dr. Lesaca's earlier report, and I therefore find that the Claimant has established the presence of *legal* pneumoconiosis by a preponderance of the (non-pathology) medical opinion evidence under §718.202(a)(4).

Decision and Order at 20 (emphasis supplied). However, the administrative law judge did not address whether the reports of Drs. Lesaca and Carrillo were documented and reasoned based upon an examination of the clinical data that they cited in their respective reports.[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985). Consequently, we vacate the administrative law judge's finding that the existence of pneumoconiosis is established under Section 718.202(a)(4) and remand for further analysis of the evidence. *See Hicks*, *supra*; *Akers*, *supra*; *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). If the administrative law judge again determines that these opinions are sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), he must determine their probative value in comparison to the opinions in which the miner's respiratory condition was attributed to causes other than dust exposure in coal mine employment. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 1-162 (4th Cir. 2000).

Under Section 718.205(c), employer argues that in accepting Dr. Green's report and rejecting the contrary opinions of Drs. Naeye, Bush, Caffrey, Crouch, Oesterling, Fino, Castle, and Morgan, the administrative law judge erred by "simply" relying on Dr. Green's

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[5]Because the administrative law judge credited Dr. Lesaca's diagnosis of legal pneumoconiosis, the physician's reference to a negative x-ray reading is not a factor which the administrative law judge was required to consider. 20 C.F.R. §§718.201, 718.202(a)(4).

pathological diagnosis of pneumoconiosis. Employer's Exhibit 16. The administrative law judge accorded greatest weight to Dr. Green's opinion, as partially buttressed by the autopsy report of Dr. DeLara, because it was most consistent with the pathology findings of coal dust pigmentation, fibrosis, silicotic nodules, and emphysema, as well as the miner's forty years of coal mine employment. Director's Exhibit 7; Claimant's Exhibit 1; Decision and Order at 23. Further, the administrative law judge accorded less weight to the opinions of Drs. Naeye, Bush, Caffrey, Fino, Castle, Crouch, Morgan and Oesterling, because they did not diagnose either legal or clinical pneumoconiosis and "many of the foregoing physicians found no respiratory or pulmonary impairment whatsoever, and/or related the miner's pulmonary problems to cigarette smoking history, while discounting Mr. Harvey's 40 years of exposure to coal dust in the mines." *Id*.

Because the administrative law judge relied upon his determination that the autopsy and medical opinion evidence established the existence of pneumoconiosis and we have vacated his findings in that regard, we must also vacate the administrative law judge's findings under Section 718.205(c)(2), (c)(4), and (c)(5). On remand, the administrative law judge must reconsider his determination that claimant established that pneumoconiosis caused the miner's death in light of his reconsideration of the medical opinions relevant to Section 718.202(a)(2) and (a)(4). In addition, the administrative law judge must address the significance of the fact that Drs. Naeye, Bush, Fino, Castle and Morgan opined that, even assuming that the miner had pneumoconiosis, the disease was too mild and insignificant to have contributed to the miner's death. Director's Exhibit 20; Employer's Exhibits 1, 3-6, 8, 10, 11; *see generally Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g* 14 BLR 1-37 (1990)(*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge