

BRB No. 05-0246 BLA

EVELYN R. RIEDEL)
(Widow of ALFRED B. RIEDEL))
)
 Claimant-Petitioner)
)
 v.)
)
 INTERNATIONAL ANTHRACITE)
 CORPORATION)
)
 and) DATE ISSUED: 11/30/2005
)
 STATE WORKERS INSURANCE FUND)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (02-BLA-0420) of Administrative Law Judge Ralph A. Romano denying 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).² This case involves a 1998 survivor's claim.³ In the initial decision, Administrative Law Judge Ainsworth H. Brown found that claimant failed to establish that pneumoconiosis was a substantially contributing cause of the miner's death or that it hastened the miner's death in any way. Director's Exhibit 22. Accordingly, Judge Brown denied benefits. *Id.* Although claimant filed an appeal with the Board, Director's Exhibit 23, employer subsequently filed a request that the Board dismiss claimant's appeal based upon claimant's failure to comply with the Board's briefing schedule. Director's Exhibit 25. On June 22, 2001, the Board granted employer's request and dismissed claimant's appeal as abandoned. *Riedel v. Int'l Anthracite Corp.*, BRB No. 01-0472 BLA (June 22, 2001)(order) (unpub.).

Claimant filed a timely request for modification. Director's Exhibit 29. In a Decision and Order dated May 12, 2003, Administrative Law Judge Ralph A. Romano (the administrative law judge), based upon employer's concession, 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. However, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).⁴ Accordingly, the administrative law judge denied benefits. By Decision and Order dated June 16, 2004, the Board affirmed the administrative law judge's evidentiary rulings. *Riedel*

¹Claimant is the surviving spouse of the deceased miner who died on December 13, 1998. Director's Exhibit 2.

²The 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.

³The miner previously filed a claim for benefits on April 20, 1992. Director's Exhibit 14. In a Decision and Order dated January 5, 1995, Administrative Law Judge Ralph A. Romano (the administrative law judge) awarded benefits in the miner's claim. *Id.* The Board affirmed the administrative law judge's award of benefits. *Riedel v. Int'l Anthracite Corp.*, BRB No. 95-0909 BLA (July 11, 1995)(unpub.).

⁴The revisions to the regulation at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

v. Int'l Anthracite Corp., BRB Nos. 03-0584 BLA and 03-0584 BLA-A (June 16, 2004)(unpub.). However, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge again denied benefits. On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant also contends that the administrative law judge erred in failing to consider whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Worker's Compensation Programs, has declined to participate in this appeal.

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

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.⁵ See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

⁵Section 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
 - (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.

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The relevant medical evidence consists of a death certificate⁶ and the medical opinions of Drs. Fisk, Kraynak, Levinson, Prince, Scalia, and Vollmer. However, based on the Board's remand instructions, the administrative law judge only considered the opinions of Drs. Levinson, Prince, Scalia, and Vollmer. The administrative law judge credited Dr. Levinson's opinion, that pneumoconiosis did not cause, contribute to, or hasten the miner's death, over the contrary opinions of Drs. Prince, Scalia, and Vollmer. Consequently, the administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

Citing *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004), claimant contends that administrative law judge erred in failing to give proper consideration to the opinions of Drs. Fisk and Kraynak based on their status as the miner's treating physicians. In *Soubik*, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician. *Soubik*, 366 F.3d at 226, 23 BLR at 2-101. However, the court has also indicated that automatic preferences are disfavored. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Thus, the opinions of treating and examining physicians should not be presumed to be correct, entitled to the greatest weight or considered to have the most probative value. Rather, the administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to the opinions of the examining physicians, when warranted. See 20 C.F.R. §718.104(d); *Mancia*, 130 F.3d at 590-1, 21 BLR at 2-238; *Lango*, 104 F.3d at 577, 21 BLR at 2-20-1.

In his 2003 Decision and Order, the administrative law judge discredited Dr. Fisk's opinion, that a case could be made that anthracosilicosis was a contributing cause of the

⁶Dr. Padiyar completed the miner's death certificate. Dr. Padiyar listed squamous cell carcinoma of the lungs and anthracosilicosis as the immediate causes of the miner's death. Director's Exhibit 2. Dr. Padiyar also listed chronic obstructive lung disease, coronary artery disease, and hypercholesterolemia as other significant conditions that contributed to the miner's death. *Id.* In his 2003 Decision and Order, the administrative law judge found that "the death certificate by itself is entitled to no weight." 2003 Decision and Order at 10. Claimant did not challenge the administrative law judge's handling of the death certificate when the case was previously before the Board. Although the administrative law judge, on remand, did not weigh the death certificate with the other medical opinions, he noted that the opinions of Drs. Levinson and Prince are based, in part, on the death certificate. 2004 Decision and order at 4-6.

miner's death from lung cancer, because he found that it was equivocal. 2003 Decision and Order at 10; Claimant's Exhibit 8. Further, although the administrative law judge considered Dr. Kraynak's status as the miner's treating physician, he discredited the doctor's opinion, that coal workers' pneumoconiosis caused the miner's death, because he found that it was not reasoned. 2003 Decision and Order at 9; Claimant's Exhibit 1. In its June 16, 2003 Decision and Order, the Board held that the administrative law judge acted within his discretion as trier-of-fact in finding that Dr. Fisk's opinion is equivocal. *Riedel*, BRB Nos. 03-0584 BLA and 03-0584 BLA-A, slip op. at 3. The Board also held that the administrative law judge acted within his discretion as trier-of-fact in finding that Dr. Kraynak's opinion is not reasoned because Dr. Kraynak did not adequately explain the basis for his opinion that the miner's pneumoconiosis was a factor in the decision not to perform surgery to remove a cancerous tumor in the miner's lung. *Riedel*, BRB Nos. 03-0584 BLA and 03-0584 BLA-A, slip op. at 4. In addition, the Board held that the administrative law judge did not err in declining to accord determinative weight to the Dr. Kraynak's opinion based on his status as the miner's treating physician. *Riedel*, BRB Nos. 03-0584 BLA and 03-0584 BLA-A, slip op. at 3-4. Thus, since the administrative law judge, in this case, provided valid bases for discrediting the opinions of Drs. Fisk and Kraynak, namely, he properly found that Dr. Fisk's opinion is equivocal, *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987), and Dr. Kraynak's opinion is not sufficiently reasoned, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), we reject claimant's contention that the administrative law judge erred in failing to accord determinative weight to the opinions of Drs. Fisk and Kraynak based on their status as the miner's treating physicians. *Mancia*, 130 F.3d at 590-1, 21 BLR at 2-238; *Lango*, 104 F.3d at 577, 21 BLR at 2-20-1.

Next, claimant asserts that the administrative law judge erred in failing to follow the Board's remand instructions to reconsider the opinions of Drs. Levinson,⁷ Prince,⁸ Scalia,⁹ and Vollmer¹⁰ at 20 C.F.R. §718.205(c) in accordance with the Administrative Procedure Act

⁷Dr. Levinson opined that pneumoconiosis did not cause, contribute to, or hasten the miner's death. Director's Exhibits 6, 18; Employer's Exhibits 4-6.

⁸Dr. Prince opined that anthracosilicosis was a substantially contributing factor of the miner's death from respiratory failure. Claimant's Exhibit 3.

⁹Dr. Scalia opined that coal workers' pneumoconiosis was a substantial contributing factor to the miner's death. Claimant's Exhibit 1.

¹⁰Although Dr. Vollmer opined that the miner's lung disease was a significant contributor to his demise, he did not render an opinion with regard to the cause of the miner's

(APA). Specifically, claimant argues that the administrative law judge failed to provide an adequate explanation for discrediting the opinions of Drs. Prince, Scalia, and Vollmer. We disagree. The administrative law judge acted within his discretion in according greater weight to Dr. Levinson's opinion than to the contrary opinions of Drs. Prince, Scalia, and Vollmer because he found that Dr. Levinson's opinion is better documented and reasoned.¹¹ *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller*, 6 BLR at 1-1294. The administrative law judge also acted within his discretion in according greater weight to Dr. Levinson's opinion than to the contrary opinions of Drs. Scalia and Vollmer based upon Dr. Levinson's superior qualifications.¹²

lung disease. Claimant's Exhibit 7. Dr. Vollmer stated, "[a]s an emergency physician, I do not have the qualifications or expertise to determine the degree to which [the miner's] lung disease was the result of his anthracosilicosis versus his cigarette smoking." *Id.* Dr. Vollmer therefore stated, "I defer to my pulmonary colleagues for their opinion on this matter." *Id.*

¹¹The administrative law judge stated that "Dr. Levinson's opinion is based upon solid evidence, including but not limited to his examination of the miner, the death certificate and the medical records from Geisinger Medical Center." 2004 Decision and Order at 6. In contrast, the administrative law judge stated that Dr. Price did not explain how he reached the conclusion that the miner's anthracosilicosis was a substantial contributing factor to his death from respiratory failure, as opposed to the other conditions he discussed earlier in his reports, including squamous cell carcinoma, steroid dependent arthritis, coronary artery disease and peripheral vascular disease. *Id.* at 7. Further, the administrative law judge stated that Dr. Scalia's treatment reports are vague with regard to the cause or suspected cause of the miner's symptoms. *Id.* Lastly, the administrative law judge stated, "I also find Dr. Vollmer's opinion troublesome because it differs substantially from a report that he signed when the miner was admitted into the hospital prior to his death, which does not focus on pneumoconiosis at all." *Id.*

¹²Dr. Levinson is Board-certified in internal medicine and pulmonary disease. Director's Exhibits 6, 18; Employer's Exhibits 4, 6. Although Dr. Scalia is Board-certified in internal medicine and pediatrics, he is not a pulmonary specialist. Claimant's Exhibit 2. The record does not contain Dr. Vollmer's credentials. However, Dr. Vollmer's report does indicate that he was an attending physician in the Department of Emergency Medicine at the time he treated the miner. Claimant's Exhibit 7. Nonetheless, the administrative law judge reasonably explained why he did not find Dr. Vollmer's treating opinion compelling in this case. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). In considering Dr. Vollmer's report, the administrative law judge stated:

Martinez v. Clayton Coal Co., 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Therefore, we hold that the administrative law judge properly weighed the conflicting opinions of Drs. Levinson, Prince, Scalia, and Vollmer at 20 C.F.R. §718.205(c) in accordance with the APA. See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); see also *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981).

Finally, claimant asserts that the administrative law judge erred in failing to consider whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The Third Circuit has held that, on modification, the regulation empowers the administrative law judge to make a *de novo* review of factual determinations which requires that, at a minimum, the administrative law judge must review all of the evidence of record and “further reflect” on whether any mistakes of fact were made in the previous adjudication of the case. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). In this case, the prior denial was based on claimant’s failure to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Although the administrative law judge did not render an explicit finding that there was not a mistake in a determination of fact at 20 C.F.R. §725.310 (2000), he considered the relevant medical opinion evidence at 20 C.F.R. §718.205(c) on the merits. Thus, since the administrative law judge properly found that the evidence is insufficient to establish that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c) on the merits, we hold that the administrative law judge implicitly found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

In view of our affirmance of the administrative law judge’s finding that the evidence is insufficient to establish that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718, *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we affirm the administrative

Ordinarily, Dr. Vollmer’s opinion would be entitled to more weight due to the fact that he did treat the miner, although only for a short time. But as [e]mployer points out in its brief, Dr. Vollmer admits that he does not “have the qualifications or expertise to determine the degree to which [the miner’s] lung disease was the result of his anthracosilicosis versus his cigarette smoking,” and deferred to his “pulmonary colleagues for their opinion on this matter.”

law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge