

BRB No. 05-0354 BLA

MARTHA C. WILLIAMS	)	
(Widow of ALEXANDER WILLIAMS)	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 11/30/2005
	)	
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 on Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC.), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (01-BLA-1003) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) rendered 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). This survivor’s claim is before the Board for the second time. The procedural history of this case is set forth in the administrative law judge’s Decision and Order. Pursuant to an appeal by employer, the Board affirmed the administrative law judge’s finding that the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4) and death due to pneumoconiosis at Section 718.205(c), but vacated the administrative law judge’s finding of clinical pneumoconiosis based on x-ray at Section 718.202(a)(1) and his discrediting of

the negative CT scan. Because the administrative law judge's finding of pneumoconiosis was based on his consideration of all the evidence pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and the administrative law judge did not properly consider the x-ray and CT scan evidence, the Board vacated the award of benefits and remanded the case for reconsideration of all the evidence relevant to the existence of pneumoconiosis, *i.e.*, x-ray, CT scan, and medical opinion evidence.

On remand, the administrative law judge found that although the x-ray and CT scan evidence failed to establish the existence of clinical pneumoconiosis, the medical opinion evidence, *i.e.*, the opinion of Dr. Rasmussen, the miner's treating physician, buttressed by the opinion of Dr. Cohen established the existence of legal pneumoconiosis (a finding previously affirmed by the Board) and further found that, on weighing the relevant evidence together, the existence of legal pneumoconiosis was established. *See Compton*, 211 F.3d 203, 22 BLR 2-162. Finding the existence of pneumoconiosis established, the administrative law judge also found that claimant was entitled to the presumption that pneumoconiosis arose out of coal mine employment at Section 718.203(b), and that death was due to pneumoconiosis (a finding previously affirmed by the Board). Accordingly, the administrative law judge awarded benefits on this survivor's claim.

On appeal, employer contends that the administrative law judge erred in relying on the opinions of Drs. Rasmussen and Cohen, to find the existence of pneumoconiosis, when their findings, which were based on positive x-ray, were contradicted by the administrative law judge's finding on remand that x-ray and CT scan evidence did not establish the existence of pneumoconiosis. Employer also contends that the administrative law judge should have reconsidered the issue of death due to pneumoconiosis since that finding is contingent on a proper finding of pneumoconiosis and the Board vacated the administrative law judge's finding of pneumoconiosis and remanded the case for reconsideration of pneumoconiosis. Claimant, in response, urges affirmance of the administrative law judge's award of survivor's benefits. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not file a response brief.<sup>1</sup>

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

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<sup>1</sup> The administrative law judge's finding that the evidence fails to establish the existence of clinical pneumoconiosis by x-ray and CT-scan evidence is affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In finding the existence of legal pneumoconiosis established, the administrative law judge stated:

[a]lthough my analysis of the chest x-ray and CT scan evidence has changed since my last opinion, I find that my new opinion of no clinical pneumoconiosis does not change any of my analyses regarding the medical opinion evidence that clearly establishes the existence of legal pneumoconiosis. In coming to that conclusion, I again place great weight on the opinion of Dr. Rasmussen, claimant's treating physician, buttressed by the opinion of Dr. Cohen that the miner had pneumoconiosis.

Decision and Order on Remand at 7.

The administrative law judge went on to find that, on weighing the relevant evidence together, *i.e.*, x-ray, CT scan, and medical opinion evidence pursuant to *Compton*, the existence of legal pneumoconiosis was established.

In considering all the evidence, the administrative law judge permissibly concluded that the x-ray and CT scan evidence addressed only clinical pneumoconiosis, while the opinions of Drs. Rasmussen and Cohen established that the miner had legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Compton*, 211 F.3d 203, 22 BLR 2-162; *see also Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988). Incorporating his earlier findings, the administrative law judge found that Dr. Rasmussen's opinion was entitled to greater weight because he set out the clinical findings and observations upon which he diagnosed the existence of legal pneumoconiosis, *i.e.*, Dr. Rasmussen concluded that coal mine employment was at least one factor in causing the miner's severe chronic obstructive pulmonary disease. Additionally, the administrative law judge properly accorded greater weight to Dr. Rasmussen's opinion based on Dr. Rasmussen's status as the miner's treating physician. 20 C.F.R. §718.104(d); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

Likewise, the administrative law judge permissibly found that Dr. Cohen's finding of pneumoconiosis buttressed Dr. Rasmussen's. Dr. Cohen specifically acknowledged that even though a majority of the x-ray readings were negative, it did not change his opinion that the miner had clinical and physiological evidence of pneumoconiosis. Further, Dr. Cohen diagnosed the existence of legal pneumoconiosis, *i.e.*, an obstructive pulmonary disease due

to coal dust exposure and cigarette smoking.

The administrative law judge is charged with weighing the evidence and his findings will not be disturbed if they are supported by substantial evidence. Accordingly, the administrative law judge could find that the medical opinion evidence in this case outweighed the x-ray and CT scan evidence and find the existence of pneumoconiosis established. *Compton*, 211 F.3d 203, 22 BLR 2-162; see *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). We affirm, therefore, the administrative law judge's finding, after weighing all the evidence, that the opinions of Drs. Rasmussen and Cohen established the existence of legal pneumoconiosis. *Compton*, 211 F.3d 203, 22 BLR 2-162. We reject, as misplaced, employer's argument that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Cohen because their findings of clinical pneumoconiosis were based on positive x-ray evidence when the administrative law judge found that the x-ray and CT scan evidence did not establish the existence of clinical pneumoconiosis since, in addition to finding the existence of clinical pneumoconiosis, both doctors also diagnosed the existence of legal pneumoconiosis, 20 C.F.R. §718.201. Those findings are separate from their findings of clinical pneumoconiosis. Moreover, as employer concedes, both opinions cite to extensive medical data upon which they based their findings of legal pneumoconiosis, including, in the case of Dr. Rasmussen, what appear to be records of treatment. Likewise, contrary to employer's argument, Dr. Rasmussen found the evidence established the existence of legal pneumoconiosis despite his recognition that there were disparities in the x-ray readings. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Employer next asserts that the administrative law judge erred in failing to reweigh the evidence to determine whether it established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) since we previously vacated the administrative law judge's finding of pneumoconiosis and remanded the case for reconsideration of that issue. We disagree.

Contrary to employer's assertion, we previously affirmed the administrative law judge's finding that the evidence establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *Williams*, BRB No. 03-0458 BLA, slip op. at 8. This finding now constitutes the law of the case. See *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Moreover, the administrative law judge's finding of death due to pneumoconiosis was based on his finding that the existence of legal pneumoconiosis was established based on doctors' opinions which he again credited. See 20 C.F.R. §§718.201, 718.205(c)(5). We reject, therefore, employer's argument's that the administrative law judge erred in failing to reconsider whether the evidence established that the miner's death was due

to pneumoconiosis. We, therefore, affirm the administrative law judge's finding of pneumoconiosis and death due to pneumoconiosis and affirm the award of survivor's benefits.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge