

BRB No. 08-0229 BLA

A.B.)
(Widow of J.B.))
)
Claimant-Respondent)

v.)

DATE ISSUED: 11/25/2008

ANTHRACITE TECHNOLOGY,)
INCORPORATED)

and)

ROCKWOOD INSURANCE COMPANY c/o)
INSERVCO)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order Awarding Survivor's Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Raymond F. Kiesling (Carpenter McCadden & Lane, LLP), Wexford, Pennsylvania, for employer/carrier.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits (2007-BLA-05186) of Administrative Law Judge Janice K. Bullard (the administrative law judge) 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).¹ The administrative law judge credited the miner with thirty-two years of coal mine employment and adjudicated the survivor's claim under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that the x-ray and medical opinion evidence were sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and, when weighed together, satisfied claimant's burden of proof under 20 C.F.R. §718.202(a). The administrative law judge further determined that the presumption that the miner's pneumoconiosis arose out of coal mine employment, set forth in 20 C.F.R. §718.203(b), was invoked and was not rebutted. The administrative law judge also found that claimant proved that pneumoconiosis was a substantially contributing factor leading to the miner's death under 20 C.F.R. §718.205(c)(2). Accordingly, benefits were awarded.

Employer argues on appeal that the administrative law judge did not properly weigh the medical opinion evidence under Sections 718.202(a)(4) and 718.205(c)(2). Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's allegation that Dr. Miller's opinion is insufficient, as a matter of law, to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to Section 718.205(c)(2).²

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 applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant is the miner's widow, who filed her claim for survivor's benefits on November 7, 2005. Director's Exhibit 2.

² We affirm the administrative law judge's finding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(1), as it is not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's coal mine employment was in Pennsylvania. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

In order to establish entitlement to survivor's benefits, 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(a); *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). For survivors' claims filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). A miner's death will be considered to be due to pneumoconiosis if the presumption set forth at 20 C.F.R. §718.304 is applicable. See 20 C.F.R. §§718.205(c)(3), 718.304. 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).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Kibelstis, Renn, and Miller. At the request of the Department of Labor, Dr. Kibelstis examined the miner on October 10, 2001, in conjunction with a claim for benefits under the Act filed by the miner.⁴ Director's Exhibit 7. Dr. Kibelstis, a B reader, classified the x-ray he obtained as 1/1 and diagnosed pneumoconiosis and chronic obstructive pulmonary disease. *Id.*

Dr. Renn, a B reader who is also Board-certified in Pulmonary Medicine, reviewed x-rays dated January 9, 2001, April 5, 2004, and July 14, 2004 and a CT scan dated April 23, 2004. Dr. Renn determined that the January 9, 2001 film could not be

⁴ The miner filed several claims for benefits under the Act prior to 1989. Living Miner's Exhibits 1-4. Upon consideration of a duplicate claim filed on June 18, 1985, Administrative Law Judge Paul H. Teitler denied benefits in a Decision and Order issued on July 14, 1989, on the ground that the miner did not establish that he had pneumoconiosis or that he was totally disabled. Living Miner's Exhibit 100. The miner's subsequent request for modification was denied by Administrative Law Judge Frank D. Marden in a Decision and Order dated February 21, 1995, because the miner did not prove that he was suffering from pneumoconiosis. Living Miner's Exhibit 189. The miner's second request for modification was finally denied by Administrative Law Judge Robert D. Kaplan in a Decision and Order issued on July 28, 1998, on the ground that the newly submitted evidence did not support a finding of pneumoconiosis or total disability. Unmarked Exhibit. The miner filed another application for benefits on March 26, 2001, which was finally denied by the district director on August 5, 2002, as the miner did not establish total disability or total disability due to pneumoconiosis. Unmarked Exhibit.

read for pneumoconiosis due to its poor quality. Employer's Exhibit 1. With respect to the films obtained on April 5, 2004 and July 14, 2004, Dr. Renn completed ILO forms on May 7, 2007, checking a box to indicate that both films contained parenchymal abnormalities consistent with pneumoconiosis. Employer's Exhibits 3, 4. Dr. Renn also interpreted both films as showing opacities corresponding to shape/size t and u, appearing in all lung zones in a profusion of 3/3. *Id.* In a medical report dated May 10, 2007, Dr. Renn indicated, however, that "there are no rounded opacities that would be consistent with a pneumoconiosis, such as coal workers' (CWP)." Employer's Exhibit 1. Dr. Renn further stated that the CT scan obtained on April 23, 2004 was "the most informative radiographic study" and that it revealed idiopathic pulmonary fibrosis and extensive centrilobular, panlobular, and bullous emphysema, most likely caused by cigarette smoking. *Id.* Dr. Renn also indicated that the CT scan showed the presence of honeycombing, which "would not be consistent with coal workers' pneumoconiosis." *Id.*

Employer deposed Dr. Renn on June 15, 2007. Employer's Exhibit 6. When asked if the x-rays he reviewed showed that the miner had coal workers' pneumoconiosis, Dr. Renn replied "no," and stated that he completed the ILO forms as he did because the 2000 ILO system requires physicians to indicate "whether or not there are parenchymal abnormalities consistent with pneumoconiosis, even if they believe the process is due to some other disease, such as, in this case, idiopathic pulmonary fibrosis, and then explain why it is not pneumoconiosis." *Id.* at 13-14.

Dr. Miller, who is Board-certified in Internal Medicine, treated the miner from January 2001 until his death on October 23, 2005. Director's Exhibit 8. In a report dated May 29, 2006, Dr. Miller referred to the miner's employment and smoking histories, chest x-rays obtained in 2001 and April 2004, and the miner's receipt of state workers' compensation benefits for coal workers' pneumoconiosis. *Id.* Dr. Miller indicated that, when compared to a 2001 x-ray, the April 2004 x-ray showed "the new development of interstitial fibrosis." *Id.* Dr. Miller also referred to a CT scan procured in April 2004, noting that it reflected the presence of "extensive bullous emphysema, especially in the upper lobes, and interstitial fibrosis, especially in the lower lobes." *Id.* Dr. Miller further referenced a consultation report by Dr. Fisk, a pulmonologist, who followed claimant's respiratory condition beginning in May 2004. Director's Exhibits 8, 10. Dr. Miller noted that Dr. Fisk diagnosed coal workers' pneumoconiosis, citing Dr. Fisk's statement that the miner had "scarring in the lower lungs likely due to anthrasilicosis (Coal Worker's Pneumoconiosis) since he had extensive rock dust exposure as a driller." Director's Exhibit 8 quoting Director's Exhibit 10 at 17. Dr. Miller indicated that it was his opinion that the miner had anthracosilicosis.⁵

⁵ Pursuant to 20 C.F.R. §718.201(a)(1), the definition of clinical pneumoconiosis "includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis,

The administrative law judge determined that Dr. Kibelstis's diagnosis of pneumoconiosis was entitled to "some weight" under Section 718.202(a)(4) because "neither Dr. Kibelstis's x-ray reading nor his report have [sic] been challenged." Decision and Order at 9. Regarding Dr. Renn's opinion, the administrative law judge found that it was entitled to "little weight," as Dr. Renn's ILO readings of the films dated April 5, 2004 and July 14, 2004 were "at odds" with his medical report and deposition testimony. *Id.* at 8. The administrative law judge further determined that Dr. Renn's opinion was based upon "a limited amount" of x-ray and CT scan evidence because Dr. Renn did not review the October 10, 2001 film that Dr. Kibelstis interpreted as positive for pneumoconiosis or "the various medial records and reports diagnosing the Miner with pneumoconiosis." *Id.* The administrative law judge also noted that Dr. Renn did not address whether pneumoconiosis and honeycombing can both be present in the lungs or whether coal dust exposure can cause idiopathic pulmonary fibrosis. *Id.* at 9. The administrative law judge accorded greatest weight to the opinion of Dr. Miller, finding that it was based upon a more comprehensive review of the record. *Id.* The administrative law judge further determined that Dr. Miller's opinion was entitled to "increased weight" due to his status as the miner's treating physician. *Id.* Based upon her findings with respect to the opinions of Drs. Kibelstis, Renn, and Miller, the administrative law judge concluded that claimant established the existence of pneumoconiosis at Section 718.202(a)(4).

Employer argues that the administrative law judge erred in finding that Dr. Miller's opinion outweighed Dr. Renn's opinion. Employer maintains that Dr. Renn's opinion was of greater probative value under Section 718.202(a)(4) because he had more information than Dr. Miller had and personally reviewed the x-rays and the April 23, 2004 CT scan. Employer also asserts that the administrative law judge should have discredited Dr. Miller's opinion because he relied solely upon Dr. Fisk's diagnosis of anthrasilicosis, without indicating that he was aware that Dr. Fisk had questioned this diagnosis in subsequent treatment notes. Employer further contends that there is no indication of how often Dr. Miller treated the miner after the miner's initial visit in January 2001.

Contrary to employer's assertion, the administrative law judge was not required to give more weight to Dr. Renn's opinion because he read three x-rays and a CT scan, while Dr. Miller relied upon radiological interpretations performed by other physicians. *See Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986);

arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). "Anthrasilicosis," the term used by Dr. Fisk, is an alternate spelling of anthrosilicosis.

Cole v. East Kentucky Collieries, 20 BLR 1-50 (1996); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985). In addition, employer has not identified any additional medical evidence reviewed by Dr. Renn that was not available to Dr. Miller. Employer does note that, unlike Dr. Miller, Dr. Renn was aware that the miner's claims for benefits under the Act were denied because the miner did not establish that he had pneumoconiosis and that x-rays submitted in conjunction with claims filed prior to 2001 were read as negative for pneumoconiosis. Employer's argument is unavailing, as this evidence was not of record in the survivor's claim and, therefore, could not properly form the basis for a physician's opinion in the survivor's claim. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i); see *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting) (*aff'd on recon.*). Moreover, the rejection of the miner's prior claims did not preclude a determination that the miner subsequently developed pneumoconiosis. See *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (Motion for Recon.) (*en banc*). Because employer does not raise any other allegations of error regarding the administrative law judge's finding that Dr. Renn's opinion, that the miner did not have pneumoconiosis, is entitled to little weight, we affirm the administrative law judge's finding. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Employer maintains correctly, however, that the administrative law judge did not adequately address the entirety of the opinion in which Dr. Miller diagnosed pneumoconiosis. As indicated, Dr. Miller relied upon the diagnosis of anthrasilicosis set forth in Dr. Fisk's treatment report dated May 11, 2004. Director's Exhibit 8. In that report, Dr. Fisk stated that the miner had "scarring in the lower lungs likely due to anthrasilicosis (Coal Worker's Pneumoconiosis) since he had extensive rock dust exposure as a driller." Director's Exhibit 10 at 17. The administrative law judge did not consider the significance of the fact that in later reports, Dr. Fisk stated that the miner's "scarring could be due to anthrasilicosis from rock dust exposure as a driller but often that is upper lobe predominant which this is not" and diagnosed pulmonary fibrosis due to "multiple possible causes." Director's Exhibits 10 at 12, 12. In addition, we cannot affirm the administrative law judge's finding that Dr. Miller's opinion was entitled to greatest weight because it was based upon a more comprehensive review of the record, i.e., "Dr. Miller reviewed evidence which Dr. Renn did not."⁶ Decision and Order at 9.

⁶ The administrative law judge also stated, "[m]uch of this evidence supported a finding of pneumoconiosis." Decision and Order at 9. In this regard, the administrative law judge noted that Dr. Miller "compared the Miner's chest x-rays from 2001 and 2004," while Dr. Renn did not review Dr. Kibelstis's positive reading of the October 10, 2001 x-ray. Decision and Order at 6, 8. It is not clear that Dr. Kibelstis's x-ray reading was the one that Dr. Miller reviewed, as Dr. Miller did not identify the precise date of the 2001 x-ray. Director's Exhibit 8. It appears that the record contains two films obtained

Specifically, we hold that because the administrative law judge did not explicitly identify the additional evidence, we cannot determine whether her finding is rational and supported by substantial evidence.

Accordingly, we vacate the administrative law judge's finding that Dr. Miller's opinion was entitled to greatest weight under Section 718.202(a)(4) and remand the case to the administrative law judge for reconsideration of Dr. Miller's opinion. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). On remand, the administrative law judge must determine whether Dr. Miller's diagnosis of pneumoconiosis is reasoned and documented in light of the evidence of record, including the entirety of Dr. Fisk's treatment notes.⁷ In so doing, the administrative law judge must identify the evidence with specificity and set forth the rationale underlying her findings in accordance with the Administrative Procedure Act (APA), 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), 30 U.S.C. §932(a). Because the administrative law judge did not identify the evidence supporting her determination that Dr. Miller's opinion was entitled to additional weight based upon his status as a treating physician, the administrative law judge must also reconsider the factors set forth in 20 C.F.R. §718.104(d), providing a detailed explanation of her findings. See *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Mancia v. Director, OWCP*, 130 F.3d 579, 590-91 (3d Cir. 1997).

Pursuant to Section 718.205(c)(2), employer argues that the administrative law judge further erred in discrediting Dr. Renn's opinion, that pneumoconiosis played no

in 2001. As indicated, Dr. Kibelstis read an x-ray taken on October 10, 2001 as positive for pneumoconiosis. Director's Exhibit 7. Dr. Renn interpreted a film dated January 9, 2001 as unreadable. Employer's Exhibit 1. The administrative law judge also referred to the fact that Dr. Miller reviewed medical records that were not made available to Dr. Renn. It is not apparent that the miner's hospital and treatment records support a diagnosis of pneumoconiosis, as they contain references to the miner's history of coal workers' pneumoconiosis, but do not contain explicit diagnoses of the disease, other than the diagnosis of anthrasicosis appearing in Dr. Fisk's May 11, 2004 report. Director's Exhibits 10-12.

⁷ A documented opinion is one that sets forth the clinical findings, observations, facts and other data upon which the physician based his or her diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1294 (1984). A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Id.*

role in the miner's death, and in crediting Dr. Miller's opinion, that anthracosilicosis was a contributing factor in the miner's death. Employer asserts that Dr. Miller's opinion is insufficient, as a matter of law, to satisfy claimant's burden of proof, as Dr. Miller did not actually state that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death.

Because the administrative law judge relied upon her findings with respect to Dr. Miller's opinion under Section 718.202(a)(4) when considering the medical evidence relevant to Section 718.205(c), and we have vacated those findings, we must also vacate the administrative law judge's determination that claimant established that the miner's death was due to pneumoconiosis at Section 718.205(c)(2). The administrative law judge must reconsider this issue on remand in light of the findings she makes under Section 718.202(a)(4). We reject, however, employer's argument that Dr. Miller's opinion cannot satisfy claimant's burden of proving that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2).

Section 718.205(c)(2) provides, in relevant part, that a claimant can establish that the miner's death was due to pneumoconiosis by proving that "pneumoconiosis was a substantially contributing cause or factor leading to the miner's death[.]" 20 C.F.R. §718.205(c)(2). Pursuant to Section 718.205(c)(5), pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Kramer*, 305 F.3d at 205, 22 BLR at 2-471; *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). As the Director asserts, a physician's opinion need not actually contain the language set forth in Section 718.205(c)(2), (5), to constitute evidence sufficient to establish the requisite causal relationship between pneumoconiosis and the miner's death. It is sufficient if an administrative law judge, in his or her role as fact-finder, finds that the physician's conclusions regarding the cause of the miner's death are equivalent to a determination that pneumoconiosis actually hastened the miner's death. *Id.*

In the present case, Dr. Miller indicated on the death certificate that anthracosilicosis was a significant condition contributing to death. Director's Exhibit 6. In a letter dated January 23, 2006, Dr. Miller indicated, "anthracosilicosis was definitely a contributing factor in the [miner's] death." Director's Exhibit 9. In a subsequent report, dated May 29, 2006, Dr. Miller stated that the miner's anthracosilicosis "contributed to his chronic respiratory failure and, ultimately, to his death." Director's Exhibit 8. The administrative law judge rationally determined that Dr. Miller's statements regarding the role anthracosilicosis played in the miner's demise satisfied the terms of Section 718.205(c)(2), (5). *Kramer*, 305 F.3d at 205, 22 BLR at 2-471; Decision and Order at 12; Director's Exhibits 8, 9. This finding is not, however, equivalent to a rational determination that Dr. Miller's statements are reasoned and documented, an issue that the administrative law judge must reconsider on remand.

Accordingly, the administrative law judge's Decision and Order Awarding Survivor's Benefits is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge