

BRB No. 08-0319 BLA

D.B.)
(Widow of A.B.))
)
Claimant-Respondent)
)
v.)
)
SANDY FORK MINING COMPANY,)
INCORPORATED)
)
and)
) DATE ISSUED: 11/26/2008
TRAVELERS INSURANCE COMPANY)
)
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 Benefits of Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-6202) of
Administrative Law Judge Alice M. Craft 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). In a Decision and Order dated December 28,
2007, the administrative law judge credited the miner with twenty-five years of coal mine

employment¹ and found that claimant established the existence of both simple, clinical pneumoconiosis, and legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to coal dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in her analysis of the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). 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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had twenty-five years of coal mine employment, and that the existence of

¹ The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

simple, clinical pneumoconiosis arising out of coal mine employment was established by medical opinion and computerized tomography (CT) scan evidence pursuant to 20 C.F.R. §§718.107, 718.202(a)(4), 718.203(b). *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). Ordinarily, affirmance of the administrative law judge's finding that the existence of clinical pneumoconiosis was established would obviate the need to review her findings as to the existence of legal pneumoconiosis pursuant to 20 C.F.R. Section 718.202(a)(4). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case, errors made by the administrative law judge in analyzing the medical opinions at 20 C.F.R. §718.202(a)(4) for the existence of legal pneumoconiosis affected her consideration of the evidence relevant to the cause of the miner's death pursuant to 20 C.F.R. §718.205(c). We will therefore address employer's arguments relevant to legal pneumoconiosis.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Moore and Rosenberg. Dr. Moore, the miner's treating physician and a Board-certified internist, diagnosed both clinical pneumoconiosis, and legal pneumoconiosis, in the form of both COPD and emphysema, due in part to coal dust exposure. Director's Exhibit 14; Claimant's Exhibit 1; Decision and Order at 7-8. By contrast, Dr. Rosenberg, who is Board-certified in Internal Medicine, Pulmonary Disease, and Occupational Medicine, opined that the miner suffered from only clinical pneumoconiosis, and that the miner's COPD was due solely to smoking. Employer's Exhibit 3 at 27; Decision and Order at 8-9. Employer's Exhibit 3 at 26-27; Decision and Order at 8-9.

The administrative law judge found that Dr. Moore's opinion was well documented and reasoned, and, as the opinion of the miner's treating physician, "should be given controlling weight." Decision and Order at 12. The administrative law judge then found that Dr. Rosenberg concurred with Dr. Moore's diagnosis of clinical pneumoconiosis. Construing the opinions "to encompass diagnoses of both clinical and legal pneumoconiosis," the administrative law judge concluded that claimant had "established pneumoconiosis on the basis of medical opinion evidence." Decision and Order at 11-12.

Employer initially contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Specifically, employer contends that the administrative law judge mischaracterized the opinion of Dr. Rosenberg as encompassing a diagnosis of legal pneumoconiosis. Employer asserts that the administrative law judge further erred by automatically crediting Dr. Moore's opinion as that of a treating physician, without critically analyzing the physician's opinion. Employer's Brief at 18-24. Employer's arguments have merit.

As employer correctly asserts, Dr. Rosenberg did not concur with Dr. Moore's diagnosis of legal pneumoconiosis, but specifically opined that the miner's COPD, in the form of bullous emphysema, was due to smoking. Employer's Exhibits 1, 2, 3. Without resolving this conflict in the medical opinion evidence, the administrative law judge stated: "I construe these opinions to encompass diagnoses of both clinical and legal pneumoconiosis." Decision and Order at 12. We therefore hold that the administrative law judge mischaracterized Dr. Rosenberg's opinion as encompassing a diagnosis of legal pneumoconiosis. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Since the administrative law judge's errors in weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4) affected her consideration of the evidence relevant to the cause of the miner's death, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and instruct her to reweigh the medical opinions on remand and determine whether claimant has established the existence of legal pneumoconiosis.

We further find merit in employer's argument that the administrative law judge erred in according "controlling weight" to Dr. Moore's opinion because he was the miner's treating physician. Employer's Brief at 11-13. In evaluating Dr. Moore's opinion, the administrative law judge initially noted that Dr. Moore is a Board-certified internist "and he devoted a significant amount of study" to pulmonary diseases. In addition, the administrative law judge noted that Dr. Moore had treated the miner for over ten years, on over forty occasions, and concluded that:

Based on the relevant social, medical, employment, and smoking histories, and based on his experience with the Miner and his pulmonary condition, he repeatedly and consistently diagnosed the Miner with COPD and pneumoconiosis. His conclusions were supported by the objective evidence, including CT scans, [pulmonary function studies], and the Miner's symptomology. I find that his opinion is well documented and reasoned, and should be given controlling weight.

Decision and Order at 11-12.

The regulation requires that in addition to considering the factors set forth at 20 C.F.R. §718.104(d)(1)-(4), relevant to the nature and duration of the miner's relationship with the treating physician, and the frequency and extent of the treatment, the administrative law judge must also consider the credibility of the treating doctor's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). Further, as employer asserts, an administrative law judge must evaluate the opinions of treating physicians just as they consider those of other experts. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003). While the record reflects that Dr. Moore had treated the miner numerous times, and personally examined him, the determination of whether an

opinion is reasoned and documented requires the fact finder to examine the validity of a medical opinion's reasoning in light of the studies conducted and the objective indications upon which the medical conclusion is based. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). However, the administrative law judge did not specifically analyze the underlying support for Dr. Moore's opinion that the miner has legal pneumoconiosis.

In his medical treatment notes, Dr. Moore consistently diagnosed pneumoconiosis and COPD, but did not discuss the cause of the miner's COPD. In a medical report dated August 24, 2004, Dr. Moore indicated by check mark that the miner suffered from both clinical and legal pneumoconiosis, and stated that he was able to separate the effects of coal dust from the effects of smoking on the miner's respiratory condition based on the fact that the miner quit smoking in 1978. By deposition, Dr. Moore stated that CT scans confirmed that the miner had both coal workers' pneumoconiosis and COPD, in the form of emphysema. Dr. Moore testified that the miner's emphysema was due to both cigarette smoking and coal dust exposure, because the miner quit smoking in 1978, yet his condition continued to deteriorate. Dr. Moore subsequently acknowledged, however, that the CT scans and x-rays, upon which his diagnosis of emphysema was based, indicated that the emphysema was the bullous form of the disease, which Dr. Moore agreed was the type of emphysema associated with cigarette smoking. Claimant's Exhibit 1 at 14-15.

As the administrative law judge did not discuss this apparent inconsistency in Dr. Moore's opinion or describe the objective evidence she found lent support to Dr. Moore's conclusions, we hold that the administrative law judge on remand must reconsider the weight to be accorded to Dr. Moore's opinion based on his status as the miner's treating physician, consistent with 20 C.F.R. §718.104(d)(5) and *Williams*.

Moreover, as noted above, the administrative law judge's improper finding that claimant established the existence of legal pneumoconiosis affected her analysis of the medical opinions relevant to cause of the miner's death pursuant to 20 C.F.R. 718.205(c), in that it effectively, and impermissibly, shifted the burden to employer to establish that the miner's death was not due in part to coal dust exposure. Employer's Brief at 19.

The medical evidence relevant to the cause of the miner's death consists of the miner's death certificate, and the opinions of Drs. Moore and Rosenberg. The miner's death certificate lists the immediate cause of death as cardiopulmonary arrest, due to ventricular fibrillation, due to COPD. Director's Exhibit 11; Decision and Order at 7. The death certificate indicates that no autopsy was performed. Director's Exhibit 11. Dr. Moore concluded that pneumoconiosis contributed to the miner's fatal episode of respiratory failure. Director's Exhibit 14; Claimant's Exhibit 1; Decision and Order at 7-8. By contrast, Dr. Rosenberg opined that the miner's clinical pneumoconiosis was too

minimal to have played any role in his death. Employer's Exhibit 3 at 27; Decision and Order at 8-9. Dr. Rosenberg opined that the miner's death was due to an acute exacerbation of his underlying airways disease, representing a combination of smoking-related COPD, in the form of bullous emphysema, and asthma or asthmatic bronchitis, superimposed on airways disease related to the miner's past tuberculosis.² Employer's Exhibit 3 at 26-27; Decision and Order at 8-9. In finding the medical evidence sufficient to establish that pneumoconiosis hastened the miner's death, the administrative law judge credited the opinion of Dr. Moore, as well-documented and reasoned, and based on his status as the miner's treating physician. The administrative law judge then found the opinion of Dr. Rosenberg to be inadequately explained, and thus not well-reasoned. Decision and Order at 16-17.

Pursuant to 20 C.F.R. §718.205(c), employer asserts that substantial evidence does not support the administrative law judge's determination that pneumoconiosis hastened the miner's death. Employer's contention has merit. In evaluating the medical opinions pursuant to 20 C.F.R. §718.205(c), the administrative law judge discredited Dr. Rosenberg's opinion, that pneumoconiosis or coal dust exposure played no role in the miner's death, in part because the physician "failed to adequately explain why he discounted entirely the effect that the Miner's 25 years of coal mine dust exposure had on his COPD, especially in light of the fact that he concluded that the miner had coal workers' pneumoconiosis." Decision and Order at 13. As noted above, however, the administrative law judge did not make a proper determination that claimant had established the existence of legal pneumoconiosis. Moreover, in an analogous situation, the United States Court of Appeals for the Sixth Circuit in *Williams* stated that the administrative law judge had erred in criticizing a physician for failing to adequately explain why the miner's lengthy coal mine employment had not also contributed to his lung condition. *Williams*, 338 F.3d at 515, 22 BLR at 2-651. The court reasoned that it made "no sense" to assume that because a physician does not explain why the miner's coal dust exposure did not cause his lung impairment, then coal dust must have contributed. *Williams*, 338 F.3d at 515, 22 BLR at 2-651. As employer asserts, the burden rests with claimant to establish that pneumoconiosis hastened the miner's death. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); see *White v. Director, OWCP*, 6 BLR 1-368 (1983); Employer's Brief at 19.

² The administrative law judge erroneously concluded her summary of Dr. Rosenberg's opinion stating: "He argued that the Miner's coal workers' pneumoconiosis caused an acute exacerbation of his underlying airways diseases, smoking-related COPD, and asthma." Decision and Order at 9. The record reflects that Dr. Rosenberg did not state that coal workers' pneumoconiosis caused the acute exacerbation of the miner's airways disease. Employer's Exhibit 3 at 26.

In addition, while it is within the purview of the administrative law judge to determine whether an opinion is adequately explained, *Clark*, 12 BLR at 1-155, contrary to the administrative law judge's finding, Dr. Rosenberg provided the basis for his conclusions, stating that the miner's coal workers' pneumoconiosis, as seen on CT scan, was too minimal to cause any impairment in lung function. *Tackett*, 7 BLR at 1-703; Employer's Exhibit 3 at 31. Dr. Rosenberg further explained that the miner's pattern of obstruction was not characteristic of obstruction related to coal dust exposure, that the description of the emphysema seen on CT scan was not that of an emphysematous process related to coal dust exposure, but of smoking-related disease, and that the miner's medical records reflected treatment with corticosteroids and bronchodilators, medications not used to treat the form of obstruction related to coal dust exposure. Dr. Rosenberg concluded that it was these facts, in combination with the miner's history of tuberculosis, which can contribute to obstruction by causing scarring of the airways, that led him to conclude that coal dust did not play a role in the miner's obstructive impairment.

While the administrative law judge found that Dr. Rosenberg "failed to adequately explain" his opinion, the administrative law judge did not explain why the doctor's explanation was not credible. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Moreover, Dr. Rosenberg did not "discount entirely" the possible effect of coal dust exposure, but stated that, even assuming that the miner had some minimal focal or coal dust-related emphysema, not evident on the CT scan, and associated airways disease, the coal dust-related impairment would not have been clinically significant in relationship to the marked airflow obstruction demonstrated by the miner's pulmonary function studies. Employer's Exhibit 3 at 27. Finally, contrary to the administrative law judge's additional finding, Dr. Rosenberg explained that he was able to attribute the miner's pulmonary condition to smoking, even though the miner quit smoking in 1978, but continued working in the mines until 1988 or 1989, because frequently, smoking-related airways disease progresses even after smoking has ceased. Employer's Exhibit 3 at 33; Decision and Order at 13-14. Again, the administrative law judge did not explain why Dr. Rosenberg's opinion was less persuasive than Dr. Moore's statement that he attributed the miner's COPD to coal dust exposure because the miner's condition continued to progress after he stopped smoking. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Claimant's Exhibit 1 at 10.

In light of the above-referenced errors, we vacate the administrative law judge's findings at 20 C.F.R. §718.205(c) and remand this case for the administrative law judge to reconsider all of the medical opinion evidence pursuant to the standards set forth in *Williams* and *Rowe*, after she has reconsidered whether the evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the 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

BETTY JEAN HALL
Administrative Appeals Judge