**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0141 BLA

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| JOYCE ANN BLACKBURN<br>(Widow of JAMES BLACKBURN)<br><br>Claimant-Petitioner<br><br>v.<br><br>SCOTTS BRANCH COAL COMPANY,<br>Self-Insured Through MAPCO,<br>INCORPORATED c/o ALLIANCE COAL<br>CORPORATION<br><br>Employer/Carrier-<br>Respondents<br><br>DIRECTOR, OFFICE OF WORKERS'<br>COMPENSATION PROGRAMS, UNITED<br>STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 11/12/2015<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Glenn Martin Hammond and Matthew R. Hall (Glenn Martin Hammond Law Office), Pikeville, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.
PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (08-BLA-05794) of Administrative Law Judge Joseph E. Kane rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving a survivor's claim filed on August 28, 2007, is before the Board for the second time.

In the initial decision, Administrative Law Judge Alan L. Bergstrom credited the miner with 23.8 years of coal mine employment,[2] and found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Judge Bergstrom also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).[3] Accordingly, Judge Bergstrom awarded benefits.

Pursuant to employer's appeal, the Board vacated Judge Bergstrom's determination that claimant established that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Specifically, the Board held that Judge Bergstrom did not adequately explain his credibility determinations in evaluating the medical opinions. The Board therefore remanded the case for reconsideration of whether claimant established the existence of pneumoconiosis based on the medical opinion evidence under 20 C.F.R. §718.202(a)(4), taking into account the physicians' comparative credentials, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Blackburn v. Scotts Branch Coal Co.*, BRB No. 10-0121 BLA, slip op. at 6-7 (Oct. 29, 2010) (unpub.). Because Judge Bergstrom had to reweigh the medical opinion evidence with respect to the existence of pneumoconiosis, the Board also vacated his finding pursuant to 20 C.F.R. §718.205(b), and instructed him to reconsider whether the miner's death was due to pneumoconiosis, if reached. *Blackburn*, slip op. at 7-9.

[1] Claimant is the widow of the miner, who died on June 5, 2007. Director's Exhibit 11.

[2] The miner's last coal mine employment was in Kentucky. Director's Exhibits 3-5. Accordingly, the Board will apply the law 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).

[3] After Administrative Law Judge Alan L. Bergstrom issued his decision, the Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The provisions that were applied by Judge Bergstrom at 20 C.F.R. §718.205(c) are now set forth at 20 C.F.R. §718.205(b).

Finally, the Board noted that Congress had recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he had a totally disabling respiratory impairment, there will be a rebuttable presumption that his death was due to pneumoconiosis.[4] 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4). In light of the potential applicability of the Section 411(c)(4) presumption, the Board instructed Judge Bergstrom, on remand, to determine whether claimant was entitled to invocation of the Section 411(c)(4) presumption and, if so, whether employer rebutted the presumption. *Blackburn*, slip op. at 9-10.

On remand, because Judge Bergstrom was unavailable, the case was reassigned, without objection, to Administrative Law Judge Joseph E. Kane (the administrative law judge). Although the administrative law judge credited the miner with more than fifteen years of qualifying coal mine employment, the administrative law judge found that claimant did not establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant failed to invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and thus could not establish entitlement to benefits pursuant to Section 411(c)(4). The administrative law judge further found that the evidence did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.[5]

[4] Section 1556 of Public Law No. 111-148 also reinstated Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), providing that a survivor is automatically entitled to benefits if the miner was determined to be eligible to receive benefits at the time of his death. However, claimant cannot benefit from this provision, as both the miner's claims for benefits were denied. Closed Living Miner's Claims 1, 2.

[5] As claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge did not reach the issue of whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

On appeal, claimant challenges the administrative law judge's evaluation of the medical opinion evidence in finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[6]

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).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(b); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). If the Section 411(c)(4) presumption is invoked and is not rebutted, a miner's death will be considered to be due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4). Alternatively, a miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(b)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Conley v. Nat'l Mines Corp*., 595 F.3d 297, 303-04, 24 BLR 2-257, 2-266-67 (6th Cir. 2010).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence failed to establish the existence of clinical or legal pneumoconiosis.[7] On remand, in his consideration of whether the medical opinion

[6] Claimant does not challenge the administrative law judge's findings that the evidence does not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and that, therefore, claimant could not invoke the Section 411(c)(4) presumption. Claimant also raises no challenge to the administrative law judge's findings that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine

evidence established the existence of pneumoconiosis, the administrative law judge considered the medical opinions of Drs. King, Myers, Caffrey, and Vuskovich, together with the miner's hospitalization and treatment records. Dr. King[8] diagnosed the miner with both clinical and legal pneumoconiosis. Dr. Myers[9] diagnosed the miner with clinical pneumoconiosis and chronic obstructive pulmonary disease (COPD), but did not address the cause of the COPD. In contrast, Dr. Caffrey[10] opined that the miner "possibly" had clinical pneumoconiosis but did not diagnose legal pneumoconiosis, and Dr. Vuskovich[11] opined that the miner did not suffer from pneumoconiosis of any kind.

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employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[8] Dr. King treated the miner from January 17, 1997 through June 5, 2007. While Dr. King's treatment records reflect that he diagnosed the miner with coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD) on multiple occasions, they do not address the cause of the COPD. *See* Director's Exhibit 18 at 3, 30, 31, 40, 40, 41, 45, 64, 65, 113, 115, 118, 122, 124, 127, 129, 132, 138, 142. Dr. King also completed a "Treating Physician Questionnaire," dated December 3, 2007, on which he indicated that the miner had an occupational lung disease that was caused by coal mine employment, based on "Radiographic findings" and "work exposure to coal dust." Director's Exhibit 16 at 2. In response to the question of whether the miner's chronic lung disease was causally related in whole, or in part, to the inhalation of coal mine dust, Dr. King responded, "Lung disease due to inhalation of coal dust, wholly." When asked whether coal mining and some other factor, such as smoking, had caused the miner's lung disease, Dr. King responded, "[Patient] was non-smoker according to [patient's] history." Director's Exhibit 16 at 2.

[9] Dr. Myers diagnosed the miner with "Coal workers' pneumoconiosis, Category 2/1-p/q" and COPD on November 5, 1986, and stated that the miner's "silicosis results from his entire exposure history." Director's Exhibit 13 at 1.

[10] Dr. Caffrey opined that it was "possible" that the miner suffered from simple clinical coal workers' pneumoconiosis that did not cause any discernible disability, but did not diagnose legal pneumoconiosis. Employer's Exhibit 3 at 4-5. Rather, Dr. Caffrey attributed the miner's chronic lung disease to smoking. *Id*. at 3-4.

Finally, the miner's hospitalization and treatment records list coal workers' pneumoconiosis and COPD among the diagnosed conditions, but do not address the cause of the COPD. The administrative law judge found that each of the medical opinions was inadequately reasoned and documented, and therefore concluded that the medical opinion evidence did not establish the existence of clinical or legal pneumoconiosis. Decision and Order on Remand at 20-22. Further, the administrative law judge found that as the hospital and treatment records did not contain a well-reasoned opinion supporting the diagnoses of clinical pneumoconiosis, or addressing the cause of the miner's COPD, the treatment records were inconclusive as to the existence of pneumoconiosis. Decision and Order on Remand at 20.

Claimant asserts that the administrative law judge erred in declining to credit the opinion of Dr. King, that the miner suffered from clinical and legal pneumoconiosis. Specifically, claimant asserts that the administrative law judge's finding, that Dr. King's opinion is not sufficiently documented and reasoned to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), is not supported by substantial evidence. Claimant's Brief at 6-8. Claimant further asserts that, "As [the miner's] treating physician for a number of years, Dr. King's account of [the miner's] condition and his attendant medical opinions are more credible and persuasive than those given by, for instance, an evaluator that only reviewed [the miner's] medical records on one occasion," and should have been accorded great weight. *Id*. at 7-8. We disagree.

Contrary to claimant's contention, the administrative law judge was not required to accord controlling weight to Dr. King's opinion as to the existence of clinical and legal pneumoconiosis merely because Dr. King was the miner's treating physician. The regulations provide that "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician'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). Moreover, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has made clear that "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003) (holding that the "case law and applicable regulatory scheme clearly provide that [the administrative law judge] must evaluate treating physicians just as they consider other

[11] Dr. Vuskovich opined that the miner did not have clinical pneumoconiosis, and that his respiratory impairment was due to cardiovascular disease, gastroesophageal reflux disease, long term use of aspirin and naproxen, a massive blood transfusion, and the aspiration of blood. Employer's Exhibit 4 at 21-23.

experts"). Thus, the administrative law judge was required to evaluate the documentation and reasoning underlying Dr. King's opinion.

Relevant to the existence of clinical pneumoconiosis, the administrative law judge correctly noted that Dr. King's treatment notes list "coal workers' pneumoconiosis" among the miner's diagnosed conditions. Decision and Order on Remand at 9; Director's Exhibit 18 at 45, 65, 132, 138, 142. Additionally, in a "Treating Physician Questionnaire," Dr. King stated that claimant "was diagnosed with [coal workers' pneumoconiosis] prior to my becoming his attending physician" and that "subsequent [chest x-rays and scans] continued to document [coal workers' pneumoconiosis with] fibrosis." Decision and Order on Remand at 21; Director's Exhibit 16 at 2. The administrative law judge further noted, however, that, contrary to Dr. King's assertion, while many of the physicians who treated the miner noted abnormalities on his x-rays, none definitively diagnosed pneumoconiosis. Decision and Order on Remand at 21. The administrative law judge permissibly concluded that, therefore, even assuming Dr. King had independently diagnosed clinical pneumoconiosis, and had not simply carried forward the diagnosis from the miner's medical records, the basis for Dr. King's diagnosis of clinical pneumoconiosis was unclear. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order on Remand at 21; Director's Exhibit 16 at 2. As it is supported by substantial evidence, we affirm the administrative law judge's determination that Dr. King's diagnosis of clinical pneumoconiosis was undocumented and entitled to little weight. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305-06, 23 BLR 2-261, 2-283 (6th Cir. 2005; Decision and Order on Remand at 21; Director's Exhibit 16 at 2.

Relevant to the existence of legal pneumoconiosis, the administrative law judge found that Dr. King appeared to conclude that the miner's chronic lung disease was due to coal mine dust exposure because the "[miner] was [a] non-smoker according to [his] history." Decision and Order on Remand at 21; Director's Exhibit 16 at 2. The administrative law judge further noted, however, Dr. King's characterization of the miner's smoking history was in contrast to his own finding, based on claimant's testimony and the record as a whole, that the miner had a fifty pack-year smoking history. Decision and Order on Remand at 5, 21. Moreover, Dr. King's own treatment records document that the miner was a smoker in the past. Director's Exhibit 18 at 21, 30, 40. Because Dr. King did not account for the miner's smoking history, the administrative law judge permissibly concluded that Dr. King's opinion that the miner's COPD was due to coal mine dust exposure was inadequately documented and explained, and entitled to little weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 710, 22 BLR 2-537, 2-547-48 (6th Cir. 2002); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 21; Director's Exhibit 16 at 2.

The determination of whether a medical opinion is adequately reasoned and documented is for the administrative law judge as the factfinder to decide, *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Clark*, 12 BLR at 1-155, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the administrative law judge's determination to discredit the opinion of Dr. King, relevant to the existence of legal pneumoconiosis, it is affirmed. *See Martin*, 400 F.3d at 305-06, 23 BLR at 2-283.

As claimant raises no further challenges to the administrative law judge's weighing of the evidence, we affirm the administrative law judge's finding that claimant failed to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-218 (6th Cir. 2012). Further, as the existence of pneumoconiosis is a necessary element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we

affirm the administrative law judge's conclusion that claimant's entitlement to benefits is precluded under the Act. *See Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge