BRB No. 00–0142 BLA

LILLIE MAE COUNTS (Widow of CLYDE E. COUNTS)	)	
Claimant-Petitioner	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
and	)	
EMPLOYERS SERVICES CORPORATION	)	
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 - Denial of Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Daniel Sachs, Springfield, Virginia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (98-BLA-1186) of Administrative Law Judge Daniel F. Sutton on a survivor's claim[1] filed pursuant to the

[1]Claimant, the miner's widow, filed the instant survivor's claim on December 8, 1997. Director's Exhibit 1. The miner's death certificate indicates that the miner died on July 19, 1997 due to cardiopulmonary arrest and carcinoma of prostate. Severe chronic

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). The administrative law judge credited the miner with forty-two years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found that the evidence failed to establish that the miner had pneumoconiosis under 20 C.F.R. §718.202(a). The administrative law judge thus determined, pursuant to *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993), that claimant did not meet her threshold burden to establish the existence of pneumoconiosis and thus, the administrative law judge did not reach the issue of the cause of the miner's's death under 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge, in weighing the medical opinions, considered only whether the reports mentioned "pneumoconiosis" and failed to recognize the distinction between medical pneumoconiosis and legal pneumoconiosis. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in the 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo*, *supra*; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under Section 718.205(c), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), held in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), that

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obstructive pulmonary disease and pneumoconiosis are listed as other significant conditions contributing to death but not resulting in the underlying causes. Director's Exhibit 4.

pneumoconiosis will be found to be a substantially contributing cause or factor in the miner's death where it is found to have actually hastened death.

Claimant contends that the administrative law judge failed to consider whether the medical opinion evidence shows that the miner had legal pneumoconiosis. Claimant argues as follows:

> Because earlier physicians' (sic) did not use pneumoconiosis in their notes to describe Mr. Count's condition, Judge Sutton concluded that Dr.Vanover's diagnosis was not well-documented or persuasive. Judge Sutton's failure to consider whether the well documented [sic] chronic obstructive pulmonary disease which was present in Mr. Count's lungs might constitute pneumoconiosis clouded the findings.

Claimant's Brief at 3.[2]

[2]We affirm the administrative law judge's finding of forty-two years of coal mine employment, as well as his determination that the evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) through (a)(3), as these findings are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Considering the medical opinions relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge initially discussed the definition of pneumoconiosis provided at 20 C.F.R. §718.201.[3] Decision and Order at 7. Notwithstanding the administrative law judge's discussion of what constitutes legal pneumoconiosis with regard to claimant's burden to establish the existence of pneumoconiosis, claimant correctly contends that the administrative law judge did not properly analyze the evidence. Specifically, in weighing the earlier medical opinions submitted with the miner's claim,[4] the administrative law judge indicated, *inter alia*, that "Dr. Kanwal found no pneumoconiosis in 1976 and 1980. While he did find pneumoconiosis in 1983, he failed to adequately explain his change of opinion." Decision and Order at 11. Contrary to the administrative law judge's characterization, the record shows that in 1983, Dr. Kanwal diagnosed chronic bronchitis, as well as coal dust exposure with pneumoconiosis, and attributed these conditions to the miner's coal mine employment. Director's Exhibit 21 at 13. The record also shows that in 1976, Dr. Kanwal diagnosed, *inter alia*, chronic obstructive and restrictive lung disease which he related to the miner's coal mine employment, Director's Exhibit 21-42 at 21, and, in 1980, Dr. Kanwal listed under "Impression" (1) chronic bronchitis (obstructive) symptomatic, and (2) coal dust exposure, history, Director's Exhibit 21-42 at 51. Dr. Kanwal's 1976 and 1980 opinions, if fully credited, may fall within the definition of pneumoconiosis as provided in Section 718.201. Thus, the administrative law judge erred when he indicated that Dr. Kanwal's 1983 opinion, diagnosing chronic bronchitis, as well as coal dust exposure with pneumoconiosis, which conditions he related to the miner's coal mine employment, constitutes a "change of opinion." *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); Decision and Order at 11.

Further, in according less weight to Dr. Vanover's diagnosis of pneumoconiosis, upon which claimant relies, the administrative law judge stated, *inter alia*, "Dr. Vanover is the only other physician to diagnose pneumoconiosis. Interestingly, medical records from hospitalizations in 1988, 1989 and 1993, where Dr. Vanover was not the attending

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[3]20 C.F.R. §718.201 provides, in pertinent part:

> For the purpose of the Act, *pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.

[4]By Decision and Order dated October 16, 1987, Administrative Law Judge Edward J. Murty denied the miner's claim based on the miner's failure to establish the existence of pneumoconiosis or total disability under 20 C.F.R. Part 718. Director's Exhibit 21at 1. By Order dated May 24, 1988, the Board dismissed as abandoned the miner's appeal from this decision. Director's Exhibit 21 at 62.

physician, pneumoconiosis (sic) is not listed as part of the diagnosis." Decision and Order at 11. While the record supports the administrative law judge's finding that the miner's hospital records from 1988, 1989 and 1993 do not include a diagnosis of "pneumoconiosis" *per substantial evidence*, Director's Exhibit 5; Employer's Exhibits 1, 27, chronic obstructive pulmonary disease is listed under "Past Medical History" in Dr. Prince's report of the miner's 1993 hospitalization. Director's Exhibit 5. Chronic obstructive pulmonary disease, if determined to be related to the miner's forty-two years of coal mine employment, would constitute pneumoconiosis under Section 718.201. 20 C.F.R. §718.201; *Doris Coal Co. v. Director, OWCP* [Stiltner], 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991).

Based on the foregoing, we vacate the administrative law judge's finding at Section 718.202(a)(4) and remand the case for reconsideration of the relevant evidence thereunder. If, on remand, the administrative law judge finds the existence of pneumoconiosis established at Section 718.202(a)(4), he must determine whether the relevant evidence establishes the existence of the disease under Section 718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000)(all types of relevant evidence must be considered together to determine the existence of pneumoconiosis at 20 C.F.R. §718.202(a)). If claimant is successful in meeting her burden to establish the existence of pneumoconiosis at Section 718.202(a), then the administrative law judge must determine whether claimant has met her burden to establish the requisite etiology under 20 C.F.R. §718.203. If so, the administrative law judge must also determine whether the evidence establishes that the miner died due to pneumoconiosis at Section 718.205(c) pursuant to *Shuff*.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge