BRB No. 03-0346 BLA

BERNIECE HYSLOP (Widow of HUGH B. HYSLOP)	)	
Claimant-Respondent	)	
v.	)	
OLD BEN COAL COMPANY	)	
	)	DATE ISSUED: 09/30/2004
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 Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Christopher R. McFadden (Sidley Austin Brown & Wood), Chicago, Illinois, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (96-BLA-1622) of Administrative Law Judge Clement J. Kichuk on claims 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] This case involves a miner's duplicate claim, as well as a survivor's claim for benefits.[2] The procedural history of this case was detailed in *Hyslop v. Old Ben Coal Co.*, BRB No. 99-0710 BLA (Sept. 27, 2000)(unpub.). On claimant's last appeal, the Board affirmed the findings of Administrative Law Judge Donald W. Mosser regarding the length of coal mine employment and that the evidence does not establish the existence of complicated pneumoconiosis. The Board rejected claimant's assertion that the opinions of Drs. Tuteur, Crouch, Naeye and Wiot must be rejected as a matter of law. However, the board held that Judge Mosser had not provided an adequate rationale for crediting the opinions of these physicians in his analysis of disability causation, and the Board vacated Judge Mosser's finding at 20 C.F.R. §718.204(b) (2000), and remanded the case for further consideration. The Board also rejected employer's contention that anthracosis is not pneumoconiosis. The Board affirmed Judge Mosser's finding that the autopsy evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). With regard to the survivor's claim, the Board found that Judge Mosser did not adequately explain his weighing of the evidence. The Board, therefore, vacated Judge Mosser's findings at 20 C.F.R. §718.205(c) (2000), and remanded the case for further consideration. *Hyslop v. Old Ben Coal Co.*, BRB No. 99-0710 BLA (Sept. 27, 2000)(unpub.).

Employer requested reconsideration of the Board's Decision and Order, asserting that the Board had not addressed its argument that entitlement is precluded as a matter of law under *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), because the miner was totally disabled by non-respiratory conditions prior to developing pneumoconiosis. The Board rejected employer's argument and held that this case is distinguishable from *Vigna*. Therefore, employer's Motion for Reconsideration was denied. *Hyslop v. Old Ben Coal Co.*, BRB No. 99-0710 BLA (Apr. 24, 2001)(Decision and Order on Reconsideration)(unpub.).

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant is Berniece Hyslop, the widow of Hugh B. Hyslop, the miner, who died on September 3, 1994. Director's Exhibit 2A.

On remand the case was reassigned to Administrative Law Judge Clement J. Kichuk, due to Judge Mosser's unavailability. Judge Kichuk (the administrative law judge) found the evidence sufficient to establish that the miner's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge also found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Consequently, the administrative law judge awarded benefits on both the miner's and the survivor's claims.

On appeal, employer contends that, in view of intervening case law, the Board must remand the case to the administrative law judge to reconsider whether the evidence establishes the existence of pneumoconiosis. Employer also maintains that the miner's old age and arthritis bar an award of benefits, even if he later developed disabling pneumoconiosis. In addition, employer alleges that the administrative law judge's rejection of several medical opinions is contrary to the Act and conflicts with the Board's remand instructions. Employer contends that the administrative law judge misstated the evidence and relied on impermissible rationales to find that the miner's disability and death were due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits on both the miner's and the survivor's claims. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's assertion that Judge Mosser previously erred by relying on more recent evidence based on the presumption that pneumoconiosis is generally progressive. The Director also notes that the term "anthracosis" sometimes refers only to the deposit of anthracotic pigment, rather than to a disease process.

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).

The Miner's Claim

Employer asserts that because of intervening case law, *i.e., Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), the Board must remand the case for the administrative law judge to reconsider the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Subsequent to the issuance of the Board's Decision and Order and our Decision and Order on Motion for Reconsideration, the United States Court of Appeals for the Seventh Circuit issued its decision in *McCandless*, wherein the court more fully explained its expectations regarding the administrative law judge's weighing of medical opinions. Employer's argument has merit. Judge Mosser's previous findings pursuant to Section 718.202(a)(2) (2000) do not satisfy the requirement that the

administrative law judge provide a medical reason for preferring the conclusion of one physician over another. *See McCandless*, 255 F.3d at 469, 22 BLR at 2-318. Consequently, we vacate Judge Mosser's finding that the existence of pneumoconiosis is established pursuant to Section 718.202(a)(2) (2000) and our prior affirmance of this finding. *Hyslop*, BRB No. 99-0710 BLA at 4, n.3. On remand, the administrative law judge must reconsider the evidence and determine whether it establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(2). If, on remand, the administrative law judge finds that the existence of pneumoconiosis is not established under Section 718.202(a)(2) by the autopsy evidence, he must re-evaluate the evidence to determine whether it establishes the existence of pneumoconiosis pursuant to any of the other methods provided under 20 C.F.R. §718.202(a).

We now turn to the issue of disability causation. Employer contends that the Board must reconsider its earlier rejection of its argument that the miner's advanced age and disabling arthritis took him outside the scope of the Act, as in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). *See Hyslop v. Old Ben Coal Co.*, BRB No. 99-0710 BLA (Apr. 24, 2001)(Decision and Order on Motion for Recon.)(unpub.), slip op. at 3. We reject employer's assertion that entitlement is precluded as a matter of law under *Vigna*. The Seventh Circuit has recently declined to apply the holdings in *Vigna* and *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995), to claims adjudicated under Part 718. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *see also Amax Coal Co. v. Director, OWCP* [*Peavler*], 801 F.2d 958 (7th Cir. 1986). Accordingly, we reject employer's assertion in this regard and we reaffirm our holding that entitlement is not precluded as a matter of law under *Vigna*.

Employer also asserts that the administrative law judge did not comply with the Board's remand order. Employer contends that the administrative law judge's finding that the opinions that do not diagnose anthracosis are hostile to the Act and regulations, conflicts with Seventh Circuit authority.[3] The administrative law judge accorded little

[3] The record contains medical opinions from numerous physicians. Dr. Cohen, who is Board-certified in Internal Medicine and Pulmonary Disease, diagnosed coal workers' pneumoconiosis and opined that the miner's forty years of exposure to coal dust was a significant contributor to numerous medical problems, including the miner's severe restrictive lung disease with diffusion impairment. Claimant's Exhibit 1. Dr. MacLennan, who is Board-certified in Internal Medicine and Cardiology, stated that the miner was totally and permanently disabled by black lung disease during the final years of his life. Director's Exhibit 5A. Dr. Gelhausen, who treated the miner and is Board-certified in Family Medicine, stated that the miner's health was extremely compromised by his respiratory failure, and opined that the miner was totally disabled due to pneumoconiosis. Director's Exhibit 4A. Dr. Selby, who is Board-certified in Internal

weight to the opinions of Drs. Tuteur, Naeye and Crouch, whom he identifies as "physicians who find that coal worker's (sic) pneumoconiosis was not present, despite the finding of anthracosis." 2003 Decision and Order at 14. The administrative law judge found that these opinions run contrary to the definition of pneumoconiosis in the Act and regulations. The administrative law judge also found that these physicians fail to acknowledge anthracosis is accepted for the purposes of the Act, as "coal workers' pneumoconiosis." 2003 Decision and Order at 14. The Seventh Circuit has held that a medical opinion is hostile to the Act where the doctor's opinion is affected by his subjective personal opinion about pneumoconiosis, specifically a physician who states that he will never diagnose the existence of pneumoconiosis in the absence of a positive x-ray, or who states that simple pneumoconiosis can never be totally disabling. *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). We hold that the opinions of Drs. Crouch, Tuteur and Naeye do not fall within this definition of hostility. *See Blakley*, 54 F.3d 1313, 19 BLR 2-192. In addition, we vacate the administrative law judge's finding that Drs. Crouch, Tuteur and Naeye do not "acknowledge that anthracosis is accepted for the purposes of the Act, as coal worker's (sic) pneumoconiosis." 2003 Decision and Order at 14. The administrative law judge misconstrued the opinions of

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Medicine, diagnosed minimal coal workers' pneumoconiosis, and opined that the miner was not totally disabled from a respiratory or pulmonary standpoint. Dr. Selby suggested that any impairment the miner had due to shortness of breath was likely due to his congestive heart failure. Employer's Exhibits 1, 19. Dr. Crouch, who is Board-certified in Anatomic Pathology, stated that the pathologic changes of coal workers' pneumoconiosis were not identified, and he concluded that the miner's occupational dust exposure would not have caused any functional impairment or respiratory disability. Employer's Exhibit 1. Dr. Naeye, who is Board-certified in both Anatomic and Clinical Pathology, stated that "[n]one of the characteristic findings of coal workers' pneumoconiosis (CWP) are present in this man's lungs….Being absent, CWP could not have prevented this man from doing hard physical work…." Employer's Exhibit 2, *see also* Employer's Exhibit 18. Dr. Tuteur, who is Board-certified in Internal Medicine and Pulmonary Disease, opined that the miner did not suffer from coal workers' pneumoconiosis or any coal mine dust related disease. Dr. Tuteur opined that although the miner was disabled during his life, neither coal workers' pneumoconiosis, nor any coal mine dust-related disease process contributed to his disability. Employer's Exhibits 3, 23. Dr. Wiot opined that the miner did not have coal workers' pneumoconiosis and he stated that he would therefore expect no impairment related to coal workers' pneumoconiosis. Employer's Exhibit 22.

Drs. Crouch and Tuteur in finding that these physicians discussed anthracosis. *See generally Beatty v. Danri Corp & Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); Employer's Exhibits 1, 3. Moreover, the administrative law judge must reconsider Dr. Naeye's opinion to determine whether the physician, in fact, diagnosed anthracosis, or whether he merely found black pigment. Employer's Exhibits 2, 18. In light of the foregoing, we vacate the administrative law judge's finding that claimant has established total disability due to pneumoconiosis.

Employer also alleges error by the administrative law judge in relying on the opinion of Dr. Heidingsfelder, asserting that the administrative law judge erred by adopting Judge Mosser's "inaccurate finding that no doctor, including Drs. Naeye and Crouch, disputed the diagnosis of anthracosis." Employer's Brief at 26. We have previously addressed Dr. Heidingsfelder's opinion, which diagnoses "chronic lung disease consistent with environmental lung disease (Black Lung Disease)." Director's Exhibit 12A. The Board held that "substantial evidence supports the administrative law judge's finding that employer's consulting pathologists, Drs. Naeye and Crouch, did not contradict the prosector's finding of anthracosis…." *Hyslop*, BRB No. 99-0710 BLA, slip op at 4, n.3. Since employer has not set forth any valid exception to the law of the case doctrine, we adhere to our previous holding regarding Dr. Heidingsfelder's opinion and we decline to further address employer's contentions in this regard. *See Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting).

We now turn to employer's assertions regarding Dr. Cohen's opinion. Employer asserts that the administrative law judge's crediting of Dr. Cohen's opinion on the issue of disability causation, on the grounds that Dr. Cohen's opinion is more consistent with the miner's coal mine employment history, "simply reflects an impermissible substitution of his expertise for the experts." Employer's Brief at 28. We disagree. Rather than substituting his opinion for the opinions of Drs. Tuteur, Selby, Naeye and Crouch, as employer asserts, the administrative law judge quoted Dr. Cohen's statement that "it makes little sense to attribute this patient's extensive pulmonary fibrosis to 'idiopathic' or unknown cause, when he has nearly 40 years exposure to a known cause of fibrosis, coal dust." 2003 Decision and Order at 14, *quoting* Claimant's Exhibit 1. Further, we reject employer's assertion that Dr. Cohen's opinion is contrary to the regulations because the physician "presumes that coal dust must have mattered." Employer's Brief at 29. Dr. Cohen considered the miner's coal mine employment as well as the miner's cigarette smoking, and his opinion regarding the cause of the miner's disability is not equivocal.[4]

[4] Employer's reliance on *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994), to support its assertion that the administrative law judge erred in relying on Dr. Cohen's opinion on the basis that Dr. Cohen's opinion was more consistent with

Claimant's Exhibit 1. We, therefore, reject employer's assertions regarding the administrative law judge's crediting of Dr. Cohen's opinion.

Employer asserts that the administrative law judge "erred when he relied upon the doctors' treating status to support his finding of disability causation." Employer's Brief at 29. Employer notes that 20 C.F.R. §718.104(d) does not apply to medical opinions developed prior to January 19, 2001. Employer also challenges the administrative law judge's finding that board-certified experts who treated [the miner] diagnosed disability due to pneumoconiosis." Employer's Brief at 29. Employer contends that the opinions of Drs. Gelhausen and MacLennan regarding disability causation are not reasoned or credible, and asserts that the opinions of Drs. Murthy and Heidingsfelder do not support a finding of disability causation at Section 718.204(c).

As employer asserts, the opinions of Drs. Murthy and Heidingsfelder do not address the issue of disability causation. Director's Exhibits 9A, 12A, 34. Therefore, it was error for the administrative law judge to find that these opinions support a finding that the miner's disability was due to pneumoconiosis.[5] Regarding the qualifications of the physicians, the administrative law judge stated that "several of the physicians who find the disease to be present and to have been disabling are board-certified," 2003 Decision and Order at 14. In fact, only Dr. Murthy is a Board-certified pulmonologist.[6] On remand, the administrative law judge must explain the relevance of the physicians' areas of expertise to his findings if, in weighing the medical opinion evidence on remand,

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the miner's lengthy coal mine employment history, is misplaced. The issue in *Fitts* was the existence of pneumoconiosis. In the instant case, the administrative law judge's findings at issue relate to the cause of the miner's disability.

[5] The requirement that special consideration be accorded to a treating physician's report, contained in Section 718.104(d), applies only to evidence developed after January 19, 2001. *See* 20 C.F.R. §718.101(b). Since the record does not contain any evidence developed after January 19, 2001, this provision does not apply in this case. The Seventh Circuit has held that it is irrational to prefer the opinion of a treating physician over the opinion of a non-treating physician solely because one physician is the treating physician. *See Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *see also Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).

[6] Dr. Murthy is Board-certified in Internal Medicine and Pulmonary Disease, while Dr. Gelhausen is Board-certified in Family Medicine, and Dr. MacLennan is Board-certified in Internal Medicine and Cardiology. Director's Exhibits 4A, 5A, 9A.

he relies on the Board-certification of the physicians. In addition, in reconsidering whether the evidence establishes that the miner's disability was due to pneumoconiosis, the administrative law judge must consider all of the relevant evidence, determine whether each medical opinion is documented and well-reasoned, and specifically explain his conclusions.

Finally, in view of our holdings regarding the existence of pneumoconiosis and disability causation, we vacate the administrative law judge's material change in conditions finding. On remand, the administrative law judge must determine whether claimant has established a material change in conditions, 20 C.F.R. §725.309(d) (2000); *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). If the administrative law judge finds a material change in conditions established, he should then determine whether claimant has established entitlement to benefits on the merits of the miner's claim.

The Survivor's Claim

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §§718.201, 718.202, 718.203, 718.205(a)(1)-(3); *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). 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). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that 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 Section 718.304, is applicable. 20 C.F.R. §718.205(c)(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(c)(5); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992).

Employer contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis based on the opinion of the prosector, despite the contrary holding in *McCandless*. Employer asserts that Dr. Heidingsfelder's opinion does not address the cause of the miner's death and that this opinion, therefore, does not support a finding of death due to pneumoconiosis. Employer maintains that the administrative law judge erred by relying on the opinions of Drs. Cohen, Long, Murthy and MacLennan without determining whether these opinions are reasoned and

documented. Employer asserts that none of these opinions is reasoned on the question of the cause of the miner's death.

We agree with employer that Dr. Heidingsfelder's opinion does not address the cause of the miner's death. *See* Director's Exhibits 3A, 12A. Because this opinion does not support a finding of death due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge's reliance upon this opinion to find that the miner's death was due to pneumoconiosis was misplaced. We, therefore, vacate the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and remand the case for further consideration of this issue. In view of this holding, employer's arguments regarding the administrative law judge's decision to accord greater weight to the opinion of the prosector are rendered moot.

Employer also challenges the administrative law judge's reliance on the opinions of Drs. Cohen, Long, Murthy and MacLennan, without first determining whether the opinions of these physicians are reasoned and documented. As employer asserts, the administrative law judge has not made a clear finding in this regard. *See* 2003 Decision and Order at 16. On remand, the administrative law judge must consider each medical opinion and determine whether it is reasoned and documented, and he must describe his weighing of the evidence pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge