BRB No. 05-0383 BLA

SUSAN M. DUGGER (Widow of CHESLEY DUGGER) Claimant-Petitioner v. OLD BEN COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/30/2005 DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMIITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (01-BLA-0336) of Administrative Law Judge Robert L. Hillyard denying benefits 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). This case has been before the Board previously. In his original Decision and Order, based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment at 20 C.F.R.

§§718.202(a)(1), (2), (4), 718.203(b), but insufficient to demonstrate the presence of complicated pneumoconiosis pursuant to Section 718.202(a)(3), or invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge also found that claimant failed to establish that pneumoconiosis caused or contributed to the miner's death pursuant to 20 C.F.R. §718.205(c) and denied benefits.

Claimant appealed and in *Dugger v. Old Ben Coal Co.*, BRB No. 03-0434 BLA (Apr. 29, 2004)(unpub.)(Dolder, J., dissenting), the Board remanded this case to the administrative law judge for reconsideration of whether claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304. The Board also vacated the administrative law judge's findings regarding Dr. Cohen's opinion as well as his determination that claimant failed to prove that pneumoconiosis was a cause of the miner's death pursuant to Section 718.205(c).

On remand, the administrative law judge found that the evidence was insufficient to demonstrate the presence of complicated pneumoconiosis pursuant to Section 718.202(a)(3), or invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge also found that claimant failed to establish that pneumoconiosis caused or contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, the presence of legal pneumoconiosis pursuant to Section 718.202(a)(4), or that pneumoconiosis contributed to the miner's death under Section 718.205(c). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this 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, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *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). 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)(2); *Peabody Coal Co v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).[1]

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

Claimant initially contends that the administrative law judge erred in his consideration of the x-ray evidence at Section 718.304. Claimant's Brief at 6-9. Section 718.304 provides that there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). The Board instructed the administrative law judge to consider Dr. Alexander's "Category A" interpretation of the x-ray dated July 18, 1999 in weighing the evidence relevant to Section 718.304(a). Claimant's Exhibit 3. In reviewing the x-ray evidence, the administrative law judge noted that the record contains thirty-two interpretations of twenty-five x-rays, and that Dr. Alexander's positive interpretation of the July 18, 1999 x-ray was the only interpretation as positive for complicated pneumoconiosis. Decision and Order at 5; Claimant's Exhibit 3. In considering the July 18, 1999 x-ray, the administrative law judge noted that while Dr. Alexander, who is a B reader[2] and Board-certified radiologist, interpreted this x-ray as showing a Category A

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's last coal mine employment took place in Illinois. Director's Exhibit 36; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health.

large opacity, the doctor rated the quality as poor and that Dr. Wiot, who is also dually-qualified, determined that the July 18, 1999 x-ray was unreadable and found only simple pneumoconiosis on the miner's x-ray and CT scans. Decision and Order at 6. The administrative law judge also discussed Dr. Wiot's testimony that the miner's x-rays taken in 1998 showed pneumoconiosis with low profusion and no large opacities, and his June 17, 1999 CT scan showed no large opacities. *Id.* Considering all of the relevant evidence, the administrative law judge rationally concluded that claimant failed to establish complicated pneumoconiosis based on the July 18, 1999 x-ray. This finding is affirmed. *Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Claimant also contends that the administrative law judge erred in finding the autopsy evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. The Board instructed the administrative law judge to determine whether Dr. Heidingsfelder's autopsy report, and associated supplemental correspondence with the district director, established the existence of complicated pneumoconiosis. Contrary to claimant's allegation of error, the basis for the administrative law judge's finding of no complicated pneumoconiosis by autopsy is clear. Specifically, the administrative law judge noted that in order for the autopsy evidence to support a finding of "massive lesions" pursuant to Section 718.304(b), an equivalency determination pursuant to Section 718.304(c) was required to determine if the lesions found at autopsy would, if viewed on a chest x-ray, reveal one or more large opacities (greater than 1 centimeter in diameter). In regard to the evidence, claimant argues that Dr. Heidingsfelder's autopsy finding is sufficient to support a finding of "massive lesions" pursuant to 20 C.F.R. §718.304(b). However, the administrative law judge, as fact-finder, must determine whether a physician has adequately described the condition comprehended by the regulatory term, "massive lesions." *Gruller v. Bethlehem Mines, Inc.*, 16 BLR 1-3 (1991). Although the administrative law judge recognized that Dr. Heidingsfelder's microscopic report described lesions over 1.0 cm., the administrative law judge concluded that Dr. Heidingsfelder did not state that these lesions would be viewed on a chest x-ray as large opacities (greater than 1 centimeter in diameter). Decision and Order on Remand at 8. Consequently, the administrative law judge rationally determined that Dr. Heidingsfelder's explanation was inadequately documented as it failed to provide sufficient basis upon which to interpret the significance of the report in accordance with the regulations, and was entitled to less weight. *Id.*

See 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Upon finding that Dr. Heidingsfelder's opinion was unreasoned, the administrative law judge considered the remaining medical opinions relevant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth at Section 718.304. In evaluating the opinions of the pathologists of record, the administrative law judge gave more weight to the combined opinions of Drs. Oesterling, Caffrey, and Naeye over the contrary opinion of Dr. Green. Decision and Order at 10. The administrative law judge noted that all of the physicians saw the same opacities and documented similar sizes and quantities of nodules. The administrative law judge rationally relied on the findings by a majority of the reviewing physicians with superior credentials who found that the "nodules observed did not represent complicated pneumoconiosis as defined in the regulations," and the administrative law judge found this conclusion bolstered by the negative x-ray and CT scan evidence. *Id.* The administrative law judge's weighing of the evidence relevant to invocation of the presumption at Section 718.304 was rational and he permissibly credited the reports of Drs. Oesterling, Caffrey, and Naeye over the contrary opinion of Dr. Green. *See Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). In addition, the administrative law judge reasonably determined that the opinions of Drs. Repsher, Fino, Renn, and Tuteur also supported the finding of no complicated pneumoconiosis by the pathologists and rationally found that the complicated pneumoconiosis was not established under Section 718.202(a)(3). Decision and Order on Remand at 11-12.

Claimant next contends that the administrative law judge erred in his evaluation of the medical opinion evidence in determining whether the existence of legal pneumoconiosis was established at Section 718.202(a)(4). The administrative law judge noted that the Board had instructed him to make a determination of whether the miner suffered from legal pneumoconiosis as defined in Section 718.201. Decision and Order on Remand at 13. Upon reviewing and discussing all of the relevant opinions on remand which included the opinions of Drs. Hall, Cohen, Oesterling, Green, Repsher, Fino, Renn, Tuteur, Caffrey, Naeye, and Heidingsfelder, as well as the death certificate, the administrative law judge found that the there was no credible evidence supporting a finding of the existence of legal pneumoconiosis as defined in the regulations. Decision and Order on Remand at 13-14. The only doctor to render an opinion favorable to claimant on this issue was Dr. Green. With respect to Dr. Green, the administrative law judge stated:

> Dr. Green opined that the Miner's substantial smoking history (70 pack years) and significant coal dust exposure (40 years) contributed to the emphysema shown at autopsy. Such a diagnosis, if reasoned, would meet the definition of legal pneumoconiosis. Dr. Green's opinion, however, is not well reasoned. Although Dr. Green reviewed the autopsy slides, he

> failed to explain the basis for his finding that both smoking and coal dust contributed to the Miner's emphysema. There was no explanation or documentation of his dual causation diagnosis. As such, it is an unsupported conclusion and not a reasoned opinion finding legal pneumoconiosis.

Decision and Order on Remand at 13.

Claimant challenges the administrative law judge's determination that Dr. Green failed to explain the basis for his conclusion, noting that Dr. Green stated his opinion was "based on numerous epidemiological and pathologic studies, that both smoking and coal mine dust would have contributed the [the miner's] emphysema." Claimant's Brief at 15. Contrary to claimant's assertion, the administrative law judge permissibly determined that Dr. Green's opinion attributing the miner's emphysema to both cigarette smoking and coal dust exposure was not well reasoned, because he failed to explain the basis for his conclusion. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, 22 BLR 2-409, 2-426 (7th Cir. 2002). The administrative law judge properly required claimant to prove that the miner's emphysema arose out of his coal mine employment and thus fell within the legal definition of pneumoconiosis pursuant to Sections 718.201 and 718.202(a). 20 C.F.R. §§718.201, 718.202(a); *see Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990). We therefore reject claimant's contention.

Claimant next contends that the administrative law judge erred in finding that the evidence failed to establish death due to pneumoconiosis pursuant to Section 718.205(c). In determining whether the miner's death was caused or hastened by pneumoconiosis, the administrative law judge found that the preponderance of the medical opinion evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The administrative law judge stated that:

> Taken as a whole, most physicians of record agree that the Miner suffered from simple coal workers' pneumoconiosis and that the Miner had significant cardiac problems and lung cancer, which resulted in bronchopneumonia and finally death. The well-reasoned opinions of Drs. Oesterling, Fino, Renn, and Tuteur opine that the Miner's simple coal workers' pneumoconiosis did not hasten the Miner's death. This diagnosis is corroborated by the opinions of Drs. Repsher and Caffrey. The opinions of Drs. Green, Cohen, and Naeye are not well reasoned. I find that the Claimant has not established that the Miner's death was due to pneumoconiosis as defined in [20 C.F.R.] §718.205(c).

Decision and Order on Remand at 19.

Contrary to claimant's assertion, the administrative law judge permissibly accorded less weight to Dr. Cohen's statement that the miner's pneumoconiosis contributed to his respiratory death in light of the administrative law judge's rational determination that Dr. Cohen's report suffered from several deficiencies and thus was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, we hold that the administrative law judge properly discredited Dr. Cohen's opinion regarding the cause of the miner's death because: he was inconsistent in his consideration of the 1987 pulmonary function testing; the doctor did not adequately address the miner's extensive smoking history; and Dr. Cohen based his opinion in part on the mistaken belief that the miner had complicated pneumoconiosis. *Clark*, 12 BLR at 1-155. Since the administrative law judge properly discredited Dr. Cohen's opinion, the only medical opinion of record supportive of a finding that the miner's death was due to pneumoconiosis, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). We therefore need not address claimant's other assertions regarding the other doctors' reports.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). In this case, the administrative law judge permissibly found that the evidence was insufficient to establish death due to pneumoconiosis because he found there were no credible medical opinions attributing the miner's death to pneumoconiosis. *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Consequently, we affirm the administrative

law judge's finding that the medical opinions of record failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Because claimant has not met her burden of proof on an essential element of entitlement under 20 C.F.R. Part 718 in this survivor's claim, benefits are precluded. 20 C.F.R. §718.205(c); *see Railey*, 972 F.2d 178, 16 BLR 2-121; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Trumbo*, 17 BLR 1-85; *Neeley*, 11 BLR 1-85. Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and in accordance with law. *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986).

Accordingly, the Decision and Order of the administrative law judge denying benefits in this survivor's claim is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge