

BRB No. 97-1729 BLA

VICTORIA L. MALAGARA )  
(Widow of DOMINICK MALAGARA) )

Claimant-Respondent )

v. )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT OF )  
LABOR )

Petitioner )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr. (Bednarz Law Offices), Wilkes-Barre, Pennsylvania, for claimant.

J. Matthew McCracken (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits (96-BLA-1118) of Administrative Law Judge Ralph A. Romano 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). Claimant, the miner's widow, filed a survivor's claim in October, 1994.<sup>1</sup> Director's Exhibit 1. After crediting the miner with five years of coal mine employment, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3). However, the administrative law judge found that the medical

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<sup>1</sup> The miner filed claims in February, 1974 and July, 1982. Both claims were denied. Director's Exhibit 26. The miner died on April 9, 1993. Director's Exhibit 3.

opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the miner's pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §718.203(c). Finally, the administrative law judge found that pneumoconiosis hastened the miner's death. See 20 C.F.R. §718.205(c)(2); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Accordingly, benefits were awarded, commencing April 1, 1993, pursuant to 20 C.F.R. §725.503(c).

The Director appeals, arguing that the administrative law judge erred in finding that the miner had pneumoconiosis under Section 718.202(a)(4) and his death was hastened by pneumoconiosis under Section 718.205(c)(2). Claimant has submitted a response brief, advocating affirmance of the administrative law judge's Decision and Order - Awarding Benefits.<sup>2</sup>

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 the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the

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<sup>2</sup> We affirm the administrative law judge's findings regarding years of coal mine employment, causation of pneumoconiosis pursuant to 20 C.F.R. §718.203(c), and date of onset of benefits under 20 C.F.R. §725.503(c), inasmuch as these findings are not contested on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In addition, we affirm the administrative law judge's finding that the irrebuttable presumption at 20 C.F.R. §718.304 is not applicable, inasmuch as it is uncontested on appeal. See *Skrack, supra*.

miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). As the administrative law judge noted, the United States Court of Appeals for the Third Circuit has held that evidence that establishes that pneumoconiosis hastened the miner's death satisfies the portion of Section 718.205(c)(2) which requires proof that pneumoconiosis was a substantially contributing cause or factor in the miner's death.<sup>3</sup> See *Lukosevicz, supra*; Decision and Order at 9.

In addition to hospital records, the medical opinion evidence in this case consists of a death certificate and the opinions of four doctors. The death certificate, signed by Dr. Weiser, lists the cause of the miner's death as massive hemorrhage, due to tracheal malacia, due to tracheostomy tube, due to chronic obstructive pulmonary disease. Director's Exhibit 4. The record contains two reports by Dr. Aquilina, dated 1983, Director's Exhibit 26, as well as a deposition of Dr. Aquilina taken in June, 1997. Claimant's Exhibit 2. In a May, 1983 report, Dr. Aquilina diagnosed anthracosilicosis, and also diagnosed respiratory dysfunction due solely to the miner's coal dust exposure. Director's Exhibit 26. In his August, 1983 report, Dr. Aquilina diagnosed anthracosilicosis and coal worker's pneumoconiosis. *Id.* At his June, 1997 deposition, Dr. Aquilina stated that while the primary cause of the miner's death was a massive hemorrhage caused by a pulmonary artery catheter, Claimant's Exhibit 2, Deposition at 10-11, pneumoconiosis was a direct contributor to the cause of the miner's death. *Id.* at 25. Dr. Aquilina stated that tobacco abuse and exposure to coal dust caused the miner's chronic lung disease, which required a tracheotomy and placing the miner on a respirator for an extended period of time, which then caused complications. *Id.* at 23, 25.

Dr. Sahillioglu examined the miner in December, 1976 and diagnosed cor pulmonale and chronic obstructive pulmonary disease. Dr. Sahillioglu affirmed that the miner's condition was not related to dust exposure in coal mine employment. However, Dr. Sahillioglu also stated that while the miner's respiratory impairment is "most likely due to patient's chronic smoking abuse history, ... to what extent the patient's previous employment in the coal mines has contributed to patient's respiratory impairment cannot be determined with certainty." Director's Exhibit 26. Dr. James, who examined the miner in December, 1980, diagnosed disabling chronic obstructive lung disease "probably" caused by cigarettes. Director's Exhibit 15. Dr. Spagnolo, in a letter dated in November, 1995, opined that the miner died during placement of a catheter into his pulmonary artery. Dr. Spagnolo stated that the miner's lung condition was not significantly related to or substantially aggravated by his very limited coal dust exposure during his coal mine employment or to "a pneumoconiosis." Dr. Spagnolo found that the miner did not have "a

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as the miner's coal mine employment occurred in Pennsylvania. See Director's Exhibits 14, 26; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pneumoconiosis.” Director’s Exhibit 17.

In finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4), the administrative law judge gave little weight to the opinions of Drs. Sahillioglu and James as their reports were over twenty-one and seventeen years old respectively. The administrative law judge also noted that Dr. Aquilina did not possess qualifications equivalent to those of Dr. Spagnolo. The administrative law judge however found that Dr. Aquilina’s 1997 deposition diagnosing pneumoconiosis was entitled to greater weight than Dr. Spagnolo’s contrary 1995 report because Dr. Aquilina had examined the miner on multiple occasions and reviewed all of the medical reports while Dr. Spagnolo merely reviewed the medical records. Decision and Order at 8.

In challenging the administrative law judge’s finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), the Director argues that the administrative law judge erred in discrediting the opinions of Drs. Sahillioglu and James as being too old, in contrast to Dr. Aquilina’s opinion. Director’s Brief at 7; see Decision and Order at 8. The Director states that because Dr. Aquilina had not seen the miner since 1983, his opinion was entitled to no more weight than the opinions of Drs. Sahillioglu and James.

We reject the Director’s contention that because Dr. Aquilina examined the miner in 1983, the opinions of Drs. James, Sahillioglu and Aquilina are entitled to equal weight. Unlike Drs. James and Sahillioglu, Dr. Aquilina had the opportunity to review the recent medical evidence. Claimant’s Exhibit 2. The administrative law judge permissibly discounted the opinions of Drs. Sahillioglu and James on the basis that they were twenty-one and seventeen years old. See *Bowman v. Clinchfield Coal Co.*, 15 BLR 1-22, 1-27 n.7 (1991); *Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-666 (1983); see also *Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990). Moreover, the administrative law judge permissibly credited Dr. Aquilina’s opinion over Dr. Spagnolo’s opinion based on the fact that Dr. Aquilina had the opportunity to examine the miner on multiple occasions in addition to reviewing the miner’s medical records, while Dr. Spagnolo only reviewed the miner’s records. See *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). We therefore affirm the administrative law judge’s weighing of the medical opinion evidence under Section 718.202(a)(4).

However, we note that the United States Court of Appeals for the Third Circuit has held that all types of relevant evidence must be weighed together at Section 718.202(a) to determine whether the miner has pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.2d 22, 21 BLR 2-104 (3d Cir. 1997). In the instant case, the administrative law judge made separate findings under the four subsections of Section 718.202(a), but did not ultimately weigh the evidence together as required under *Williams*. *Id.* Therefore, we vacate the administrative law judge’s finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis based on his findings at Section 718.202(a)(4), and remand the case to the administrative law judge for further consideration of the relevant evidence under Section 718.202(a)(1)-(4) consistent with

*Williams.*

The Director also challenges the administrative law judge's finding that the evidence was sufficient to establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2). The administrative law judge found that the placement of the catheter in the miner, which led to the hemorrhage that caused his death, was necessitated by the miner's legal pneumoconiosis and, therefore, that pneumoconiosis hastened death. Decision and Order at 9-10; Claimant's Exhibit 2, Deposition at 25; Director's Exhibit 26. The administrative law judge found that, prior to the placement of the catheter, the miner had been hospitalized for approximately one year due to his chronic obstructive pulmonary disease. Director's Exhibit 5. The administrative law judge credited Dr. Aquilina's opinion that this type of long term care leads to complications such as the possibility of developing renal failure, and stated that the catheter was being placed to investigate the possibility of renal failure or congestive heart failure. Claimant's Exhibit 2, Deposition at 24, 31-32; Director's Exhibit 5. The administrative law judge found that Dr. Spagnolo did not address whether there was any relationship between the miner's chronic obstructive lung disease and the placement of the catheter and that Drs. Sahillioglu and James did not address the cause of death. Director's Exhibits 15, 17, 26.

The Director argues that the administrative law judge erred by "blindly" accepting the opinion of Dr. Aquilina. Director's Brief at 11. The Director states that the administrative law judge failed to consider whether Dr. Aquilina's opinion is supported by the hospital records, noting that the miner had kidney trouble and heart disease well before he was placed on a ventilator.<sup>4</sup> *Id.* at 9-11. The Director also states that Dr. Aquilina admitted that congestive heart failure was another possible source of the miner's renal failure, and that the records from the miner's final hospitalization indicate that the miner had a history of arteriosclerotic heart disease with a history of congestive heart failure. *Id.* at 10; Director's Exhibit 5. The Director further avers that Dr. Aquilina did not state that the miner's particular condition was the cause of the ruptured artery. Director's Brief at 11. We reject the Director's contention that the administrative law judge did not sufficiently analyze Dr. Aquilina's report. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). As noted by the administrative law judge, Dr. Aquilina explained in his deposition how his review of the miner's records supported the physician's view that the miner's death was related to pneumoconiosis.<sup>5</sup> Claimant's Exhibit 2. We therefore affirm

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<sup>4</sup> The miner was placed on a ventilator during his final hospitalization of one year. Director's Exhibit 5.

<sup>5</sup> Dr. Aquilina stated in his deposition on June 11, 1997 that the miner suffered from severe lung disease when he treated the miner in 1982-1983 and that the miner was already oxygen-dependent at that time. Claimant's Exhibit 2, Deposition at 7. Dr. Aquilina also stated that the miner's hospital records showed that the miner's death was directly due to the placement of the catheter, a diagnostic tool to see whether congestive heart disease was playing any role in the miner's illness. *Id.* at 11. Dr. Aquilina further stated that:

the administrative law judge ' s weighing of the evidence under Section 718.205(c)(2). See *Lukosevicz, supra*.

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... the fact that because of his terminal lung disease required that he be placed on a ventilator with a tracheostomy and then the possibility of developing renal failure, these are all known complications of this, this type of long-term care. You have a gentleman basically bedridden on a ventilator for an extended period of time like this, then other organ system failures just fall in line. *Id.* at 24.

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge