

PART IV

ADMINISTRATIVE PROCESSING OF CLAIMS, POWERS AND DUTIES OF THE ADMINISTRATIVE LAW JUDGE

D. EVALUATION AND WEIGHING OF EVIDENCE

4. MEDICAL REPORTS

f. Treating Physicians

A properly documented report by the miner's attending physician *may* be given additional weight on the basis that an attending physician is probably more familiar with a claimant's medical condition than a physician who examines or treats a claimant only episodically. ***Schaaf v. Matthews***, 574 F.2d 157, 160 (3d Cir. 1978); ***Onderko v. Director, OWCP***, 14 BLR 1-2 (1989); ***Honaker v. Jewell Ridge Coal Corp.***, 2 BLR 1-947, 1-954 (1980); ***Schultz v. Youghioghny and Ohio Coal Co.***, 1 BLR 1-660, 1-665 (1978). Thus, the length of time a particular physician treats a claimant is a valid factor to be considered in the weighing process. ***Gomola v. Manor Mining and Contracting Corp.***, 2 BLR 1-130, 1-135 (1979); *see also* 20 C.F.R. §410.471.

The principle that an attending physician's report *may* be accorded greater probative value, however, should not be applied mechanically without regard to the other evidence of record. ***Halsey v. Richardson***, 441 F.2d 1230, 1236 (6th Cir. 1971); *see* ***Wetzel v. Director, OWCP***, 8 BLR 1-139 (1985); ***Burns v. Director, OWCP***, 7 BLR 1-597 (1984).

CASE LISTINGS

[fact-finder may properly credit opinion of treating physician diagnosing pulmonary condition over opinion of non-examining physician who based opinion in part on hospital records] ***Sacolick v. Rushton Mining Co.***, 6 BLR 1-930 (1984).

[adjudicator not required to discount non-attending physician's opinion in favor of treating physician] ***Wetzel v. Director, OWCP***, 8 BLR 1-139 (1985); ***Burns v. Director, OWCP***, 7 BLR 1-597 (1984).

[length of time doctor treated miner important factor in evaluating opinion because of

correlative degree of familiarity with miner] **Revnack v. Director, OWCP**, 7 BLR 1-771 (1985).

[hospital records silent as to existence of pulmonary condition may be probative as to its non-existence] **Allen v. Union Carbide Corp.**, 8 BLR 1-393 (1985).

DIGESTS

The administrative law judge may credit the opinion of a treating physician over that of a non-examining physician. **Onderko v. Director, OWCP**, 14 BLR 1-2 (1989).

The Board has recognized that a physician's status as treating physician is just one of the factors to be considered in rendering a decision. **Tedesco v. Director, OWCP**, 18 BLR 1-103 (1994).

The Court held that the administrative law judge must have a medical reason for preferring one physician's conclusion over another's and, therefore, reiterated its disapproval of any mechanical rule to prefer the opinion of a treating physician solely because the physician is the treating physician, see *Consolidation Coal Co. v. Director, OWCP* [Sisson], 54 F.3d 434, 19 BLR 2-155 (7th Cir. 1995); *Peabody Coal Co. v. Director, OWCP* [Railey], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992). The Court held that according greater weight to a treating physician's opinion simply because treating physicians are (by definition) familiar with patients' medical condition during life is circular reasoning that is just a restatement of a mechanical preference for the treating physician's opinion and, instead, held that a treating physician's opinion must be supported by medical reasons if they are to be given legal effect. The Court noted that "[t]reating physicians often succumb to the temptation to accommodate their patients (and their survivors) at the expense of third parties such as insurers, which implies attaching a discount rather than a preference to their views." **Peabody Coal Co. v. McCandless**, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).

The Third Circuit reversed the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c), and remanded the case. The majority held that the administrative law judge erroneously rejected the opinions of two treating physicians. The majority held that the administrative law judge did not view Dr. Kraynak's qualified testimony in the context of his opinion, and that the fact that Dr. Abdul-Al may not have examined the miner on the last day of the miner's life did not warrant the administrative law judge's rejection of his opinion on this basis where the record shows that Dr. Abdul-Al saw the miner in the hospital at or about the time of his death and was a treating physician. The majority also determined that contrary to the administrative law judge's indication, Dr. Simelaro's consulting report focuses on how the miner's anthracosilicosis caused fibrosis which lead to cardiac

dysfunction. The majority held that the administrative law judge erroneously deferred to Dr. Spagnolo's contrary opinion partly based on his credentials which did little to resolve the question of whether substantial evidence supported the administrative law judge's conclusion. The majority determined that the fact that Dr. Spagnolo comprehensively analyzed "the cardiac factors" was not pertinent to the issue of whether the miner's pneumoconiosis substantially contributed to or hastened his death. **Balsavage v. Director, OWCP**, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002).

Circuit Judge Roth dissented, and would hold that the administrative law judge permissibly credited Dr. Spagnolo's reasoned opinion, that there was no evidence that pneumoconiosis contributed in any way to the miner's death, because the physician's opinion was comprehensive and he possessed superior credentials. **Balsavage v. Director, OWCP**, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002).

The Seventh Circuit affirmed the administrative law judge's award of survivor's benefits under 20 C.F.R. §718.205(c). The Seventh Circuit determined that the correct application of nonmutual collateral estoppel precluded employer from arguing that the miner did not have pneumoconiosis, a fact established by the award of benefits in the miner's claim. Regarding the cause of the miner's death, the Seventh Circuit rejected employer's argument that the administrative law judge improperly relied on the opinion of Dr. Ridge, the miner's physician. Dr. Ridge was a general practitioner who treated neither the miner's cancer nor his pulmonary disease and referred the miner to specialists for both. Dr. Ridge opined that the acceleration seen in the miner's demise due to cancer was attributable to his weakened state which was due to pneumoconiosis. The court cited the Department of Labor's observation, when promulgating the regulation at 20 C.F.R. §718.205(c)(5), that persons weakened by pneumoconiosis "may expire quicker from other diseases," see 65 Fed.Reg. 79,920, 79,950 (Dec. 20, 2000), and referred to Dr. Ridge's advantage of observing whether a pulmonary problem "sapped" the miner's ability to withstand the effects of the cancer. One judge concurred in the opinion, declining to join the portions of the decision wherein the court discussed hypothetical ways in which employer might have prevailed. **Zeigler Coal Co. v. Director, OWCP [Villain]**, 312 F.3d 332 (7th Cir. 2002).

In this Fourth Circuit case, the majority held that a remand of the case was required because the administrative law judge did not weigh together all of the evidence regarding the existence of pneumoconiosis as required under **Island Creek Coal Co. v. Compton**, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The majority held that the administrative law judge must consider the weight of the x-ray evidence, which he properly determined to be negative, against the weight of the medical opinion evidence upon which he relied to find the existence of pneumoconiosis established in this case. The majority also held that the administrative law judge accorded undue weight to a treating physician's opinion by erroneously finding that "generally [a treating physician's] opinion would ordinarily be entitled to more weight." The majority determined that substantial evidence did not support the administrative law judge's finding that this

physician, who had treated the miner for ten years, possessed comparable credentials to the other physicians of record. A dissenting judge would have held that although the administrative law judge erred, substantial evidence supports the administrative law judge's factual findings and decision to accord greater weight to the opinion of the miner's treating physician. **Consolidation Coal Co. v. Held**, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002).

The Sixth Circuit reversed the Board's Decision and Order in which the Board affirmed the administrative law judge's award of survivor's benefits. The Sixth Circuit held that the Board erred in affirming the administrative law judge's reliance on the opinion of the miner's treating physician to find that claimant established death due to pneumoconiosis under 20 C.F.R. §718.205(c), because the administrative law judge improperly gave preference to the treating physician's opinion based on his status. The Sixth Circuit determined that the miner's treating physician's opinion, that pneumoconiosis hastened the miner's demise because the miner's lack of oxygen and retention of carbon dioxide had an effect on all parts of his body, "suffers from several serious problems that render his opinion an inadequate basis for the ALJ's conclusion," slip op. at 12, and "[even] if [the opinion] is an accurate medical conclusion, it is legally inadequate," slip op. at 13. The Sixth Circuit indicated that under the treating physician's interpretation, pneumoconiosis would virtually always "hasten' death at least some minimal degree. The Sixth Circuit held, "Legal pneumoconiosis only hastens death if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Id.* The Sixth Circuit thus concluded that the miner's treating physician's opinion is conclusory and inadequate. The Sixth Circuit also reviewed its cases and those of other circuit courts of appeal, as well as the regulation at 20 C.F.R. §718.104(d). The Sixth Circuit concluded that there is no rule requiring deference to the opinion of a treating physician in black lung claims, and indicated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." Slip op. at 9. **Eastover Mining Co. v. Williams**, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

The administrative law judge failed to give a treating physician's report "the additional deference it was due as the opinion of a treating physician." Although the treating physician had only seen the miner three times over a six-month period, that was "three more times and six months more than [the consulting physician] saw him." Despite the fact that "treating physicians' opinions are assumed to be more valuable than those of non-treating physicians," the administrative law judge ignored the treating physician's clinical expertise. **Soubik v. Director, OWCP**, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004)(Roth, J., dissenting).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.104(d) is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 861, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.104(d) does not mandate that the opinion of a treating physician be given controlling weight, but merely permits an administrative law judge to accord controlling weight to a treating physician's opinion based on the credibility of the opinion in light of its reasoning and documentation. Claimant retains the burden of proving both the existence of pneumoconiosis and the credibility of the treating physician's opinion. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 870-871, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

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