

BRB No. 02-0240 BLA

HESTER SMITH	)	
(Widow of CHALLIS SMITH)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARLAN FUEL COMPANY,	)	DATE ISSUED:
INCORPORATED	)	
	)	
and	)	
	)	
GREAT WESTERN RESOURCES	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for claimant.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (99-BLA-0830) of Administrative Law Judge Robert L. Hillyard awarding benefits on a survivor's 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).<sup>1</sup> This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited the miner with thirty-three and one-half years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) (2000) and 718.203(b) (2000). The administrative law judge also found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge awarded benefits.

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<sup>1</sup>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.

In response to employer's appeal, the Board affirmed the administrative law judge's unchallenged length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a) (2000) and 718.203(b) (2000). Citing *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995) and *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993), the Board rejected employer's contention that the administrative law judge did not apply the correct standard for determining whether the miner's death was due to pneumoconiosis. The Board also affirmed the administrative law judge's determination that the opinions of Drs. Broudy, Fino, Naeye and Younes, that pneumoconiosis did not contribute to the miner's death, are entitled to little weight at 20 C.F.R. §718.205(c) (2000).<sup>2</sup> Nonetheless, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.205(c) (2000) because the administrative law judge did not fully address whether Dr. Morgan's opinion, that pneumoconiosis contributed to the miner's death, is adequately reasoned and documented. Thus, the Board remanded the case to the administrative law judge to reconsider Dr. Morgan's opinion. The Board instructed the administrative law judge that because Dr. Jones relied, in part, upon Dr. Morgan's opinion, he must reconsider Dr. Jones's opinion if he determines on remand that Dr. Morgan's opinion is not adequately reasoned and documented. *Smith v. Harlan Fuel Co.*, BRB No. 00-0560 BLA (May 31, 2001)(unpub.). On remand, the administrative law judge found the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant<sup>3</sup> responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's

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<sup>2</sup>The administrative law judge discredited the opinions of Drs. Broudy and Fino because they are based upon evidence which was not intended to be diagnostic of pneumoconiosis. [2000] Decision and Order at 15, 16. Further, the administrative law judge discredited Dr. Naeye's opinion because Dr. Naeye did not personally examine the miner. *Id.* at 15. Lastly, the administrative law judge discredited Dr. Younes's opinion because it is not reasoned and documented. *Id.* at 16.

<sup>3</sup>Claimant is the widow of the miner, Challis Smith, who died on January 20, 1998. Director's Exhibits 1, 8. The miner filed a claim on March 2, 1992. Director's Exhibit 29. On April 1, 1988, Administrative Law Judge Bernard J. Gilday, Jr. issued a Decision and Order awarding benefits in the miner's claim. *Id.* Claimant filed a survivor's claim on February 24, 1998. Director's Exhibit 1.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.<sup>4</sup> See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §718.203; *Boyd, supra*.

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Specifically, employer asserts that Dr. Morgan's opinion is not reasoned and documented. We disagree. The record consists of reports by Drs. Broudy, Fino, Hudson, Jones, Morgan, Naeye and Younes, as well as a death certificate signed by Dr. Morgan. Whereas Drs. Broudy, Fino, Naeye and Younes opined that pneumoconiosis did not contribute to the miner's death, Director's Exhibit 24; Employer's Exhibits 1, 2, 4, Drs. Jones and Morgan<sup>5</sup> opined that pneumoconiosis contributed to the miner's death,<sup>6</sup> Director's

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<sup>4</sup>Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- ...
- (5) 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).

<sup>5</sup>In a report dated January 4, 1999, Dr. Morgan opined that pneumoconiosis was a contributing factor to the development of the miner's recurrent respiratory infections and he opined that the miner's ultimate death was due to lung cancer. Director's Exhibit 20. In a

Exhibits 20, 21. In addition, in a deposition dated May 11, 1999, Dr. Hudson testified that it was doubtful that pneumoconiosis hastened the miner's death but he did acknowledge that an argument could be made that the miner handled his pneumonia a little bit worse because of pneumoconiosis, and thus, the miner died earlier than he would have died if he did not have simple coal workers' pneumoconiosis or chronic obstructive pulmonary disease.<sup>7</sup> Employer's Exhibit 3 (Dr. Hudson's Deposition at 16-17). After determining that Dr. Morgan's opinion is reasoned and documented, the administrative law judge again accorded determinative weight to Dr. Morgan's opinion because he was the miner's treating physician.

In its prior Decision and Order, the Board noted that "[i]n the first of two letters, Dr. Morgan indicated that pneumoconiosis was a 'direct cause' of and 'participant' in the miner's death, as the disease altered the miner's lung function 'to the point that he could not tolerate any other lung problems.' Director's Exhibit 20." *Smith v. Harlan Fuel Co.*, BRB No. 00-0560 BLA, slip op. at 5 (May 31, 2001)(unpub.). The Board also noted that "[i]n the second letter, Dr. Morgan did not opine that pneumoconiosis played a role in the miner's demise, but stated that the miner had pneumoconiosis which was a 'contributing factor to the development of his recurrent respiratory infections' and that the miner's 'ultimate death' was due to lung cancer. Director's Exhibit 21." *Id.* However, further review of the record

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subsequent report dated January 29, 1999, Dr. Morgan opined that "[the miner's] co-worker [sic] (black lung) disease was a direct cause and participant in his death." Director's Exhibit 21.

<sup>6</sup>In a death certificate, Dr. Morgan indicated that the miner's death was caused by aspiration pneumonia and CNS hemorrhage. Director's Exhibits 8, 19, 29.

<sup>7</sup>In his prior decision, the administrative law judge discounted Dr. Hudson's opinion because he found that it is equivocal and because he found that Dr. Hudson did not sufficiently state which evidence he relied on in reaching his opinion. [2000] Decision and Order at 16.

indicates that the Board mischaracterized the chronological order of Dr. Morgan's reports in its prior Decision and Order. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Thus, the administrative law judge considered the correct chronological order of the reports of Dr. Morgan in reconsidering whether Dr. Morgan's opinion is reasoned and documented. In his decision on remand, the administrative law judge stated, "[i]nasmuch as the Board found that Dr. Morgan's 'second letter' did not opine that pneumoconiosis played a role in the [m]iner's demise, I note that the Board reversed the order of these letters, both in content and cited exhibit numbers." [2001] Decision and Order on Remand at 4. The administrative law judge therefore concluded that "[w]hen read in the correct order, Dr. Morgan's January 29, 1999 letter, which states that pneumoconiosis was a direct cause of the [m]iner's death, clarifies his previous letter dated January 4, 1999, which states that the [m]iner's pneumoconiosis was a contributing factor to the development of his recurrent respiratory infections." *Id.*

Although Dr. Morgan's treatment notes do not contain a diagnosis of pneumoconiosis or attribute any of the miner's pulmonary conditions to coal dust exposure, the administrative law judge found that Dr. Morgan's treatment notes do not diminish the probative value of Dr. Morgan's subsequent opinion that pneumoconiosis contributed to the miner's death. The administrative law judge stated that "[u]pon further review of the hospital records, I find that Dr. Morgan's treatment notes were completed for the purpose of diagnosing the extent and location of the [m]iner's lung cancer and post-surgical results." *Id.* at 5. Dr. Morgan's treatment notes do not focus on whether the miner suffered from pneumoconiosis. Consequently, Dr. Morgan's failure to mention pneumoconiosis in his treatment notes does not necessarily lead to the conclusion that the miner did not suffer from pneumoconiosis during the time that Dr. Morgan treated him. Therefore the administrative law judge reasonably found that "they are not probative of Dr. Morgan's final conclusions regarding pneumoconiosis as a contributing cause of death." *Id.*

Employer asserts that the hospital records do not support Dr. Morgan's opinion that pneumoconiosis contributed to the miner's death.<sup>8</sup> In its prior Decision and Order, the Board agreed with employer's assertion that the administrative law judge did not fully address whether Dr. Morgan's opinion is adequately reasoned and documented. The Board stated that "[t]his omission is significant, as the basis of Dr. Morgan's opinion is not apparent." *Smith v. Harlan Fuel Co.*, BRB No. 00-0560 BLA, slip op. at 4 (May 31, 2001)(unpub.). Hence, the Board remanded the case to the administrative law judge to reconsider Dr.

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<sup>8</sup>As previously noted, the Board affirmed the administrative law judge's prior finding that the opinions of Drs. Broudy, Fino, Naeye and Younes are entitled to little weight under 20 C.F.R. §718.205(c). *See Smith v. Harlan Fuel Co.*, BRB No. 00-0560 BLA, slip op. at 5 n.6 (May 31, 2001)(unpub.).

Morgan's opinion under 20 C.F.R. §718.205(c).<sup>9</sup> However, on remand the administrative law judge disagreed with the Board's declaration that neither report of Dr. Morgan references to any data supporting Dr. Morgan's conclusions. The administrative law judge stated:

[w]ith reference to the Board's statement that Dr. Morgan failed to reference data supporting his conclusions, I note that Dr. Morgan attached twelve pages of supporting medical data to his January 4, 1999 letter, as well as a handwritten note referencing the attached documentation. Included in the twelve pages of medical data are hospital reports from East Tennessee Baptist Hospital, which were sent to Dr. Morgan following his referral of the [m]iner for treatment of his squamous cell carcinoma. The hospital reports from East Tennessee Baptist Hospital include: 1) a pre-admission history and physical report completed by Dr. Richard C. Neal which included *coal miners' pneumoconiosis* in the diagnosis; 2) an operative report dated July 18, 1996, completed by Dr. Neal, which diagnosed *coal miners' pneumoconiosis*; and 3) a discharge summary which listed the date of discharge as July 24, 1996, and included *coal miners' pneumoconiosis* in the diagnosis. The diagnosis is based on family, social, medical histories, history of present illness, physical examination, x-rays, and laboratory tests. The records note that on July 18, 1996, a biopsy revealed anthracosis.

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<sup>9</sup>As noted by the Board, "[t]he documentation in the record regarding Dr. Morgan's opinion consists of treatment notes, the death certificate dated January 20, 1998, and two brief letters, prepared in January of 1999." *Smith v. Harlan Fuel Co.*, BRB No. 00-0560 BLA, slip op. at 4 (May 31, 2001)(unpub.).

[2001] Decision and Order on Remand at 4-5 (emphasis added). Since the administrative law judge adequately explained why he found that Dr. Morgan's opinion, that pneumoconiosis contributed to the miner's death, is reasoned and documented based upon the records from East Tennessee Baptist Hospital, we reject employer's assertion that the hospital records do not support Dr. Morgan's opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Moreover, since the administrative law judge properly accorded determinative weight to Dr. Morgan's opinion because Dr. Morgan was the miner's treating physician, we affirm the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).<sup>10</sup> *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR 2- (6th Cir. 2002); *Griffith, supra*; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>10</sup>The administrative law judge stated that “[b]ased on his treatment of the [m]iner for at least one and one-half years, Dr. Morgan had an understanding of the [m]iner's condition.” [2001] Decision and Order on Remand at 5.

BETTY JEAN HALL  
Administrative Appeals Judge