BRB No. 08-0868 BLA

J.K. (Widow of T.K.) Claimant-Respondent v. U.S. STEEL MINING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/08/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

William J. Evans and Susan Baird Motschiedler (Parsons Behle & Latimer), Salt Lake City, Utah, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-6099) of Administrative Law Judge Richard K. Malamphy (the administrative law judge) awarding benefits on a subsequent miner's claim[1] and a survivor's claim filed pursuant to

[1] The miner filed his first claim in April 1995. Director's Exhibit 22. This claim was finally denied by a claims examiner on August 7, 1995 because the evidence did not establish that the miner had pneumoconiosis, that the disease was caused at least in part

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).[2] This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited the miner with at least 40 years of coal mine employment based on the parties' stipulation, and adjudicated both claims pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[3] Consequently, the administrative law judge found that the new evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[4] Accordingly, the administrative law judge denied benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[5] Accordingly, the administrative law judge denied benefits in the survivor's claim.

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by coal mine work, and that the miner was totally disabled by the disease. *Id*. The miner filed his current claim on September 7, 2000. Director's Exhibit 1.

[2] 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.

[3] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[4] The revisions to the regulation at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001, *see* 20 C.F.R. §725.2, and thus do not apply to this claim.

[5] The administrative law judge also stated, "[s]ince I cannot find on this record

In response to claimant's appeal, the Board affirmed the administrative law judge's unchallenged findings that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). [*J.K.*] *v. U.S. Steel Mining Co.*, BRB No. 06-0460 BLA, slip op. at 5 n.7 (Apr. 27, 2007)(unpub.). However, the Board vacated the administrative law judge's finding that the new evidence did not establish a material change in conditions at 20 C.F.R. §725.309 (2000) because the administrative law judge did not apply the proper standard, as set forth in *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), and remanded the case for further consideration of the evidence thereunder. [*J.K.*], slip op. at 5. The Board also vacated the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). [*J.K.*], slip op. at 8. The Board therefore vacated the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim. Further, the Board denied claimant's request for reconsideration *en banc*. [*J.K.*] *v. U.S. Steel Mining Co.*, BRB No. 06-0460 BLA (Sept. 27, 2007)(unpub. order on recon.).

On remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) in both the miner's claim and the survivor's claim. Consequently, the administrative law judge found that the new evidence established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). On the merits, the administrative law judge found that the evidence established the existence of legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(c). The administrative law judge also found that the evidence established that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits in the miner's claim. Regarding the survivor's claim, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) in both the miner's claim and the survivor's claim. Employer also challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) in the miner's claim. Further, employer challenges the administrative law judge's finding that the evidence established death due

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that [the miner] suffered from pneumoconiosis, I accordingly must find that he was not disabled from it, nor did it contribute to or hasten his death." 2006 Decision and Order at 20.

to pneumoconiosis at 20 C.F.R. §718.205(c) in the survivor's claim. Claimant[6] responds, urging affirmance of the administrative law judge's award of benefits in both claims.[7] The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[8] 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) in both the miner's claim and the survivor's claim. The administrative law judge considered the death certificate signed by Dr. Horwitz and the opinions of Drs. Poitras,[9] Horwitz, and Farney. In the death certificate, Dr. Horwitz listed severe chronic

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[6] Claimant is the widow of the miner, who died on March 18, 2003. She filed her survivor's claim on August 7, 2003. Director's Exhibits 33, 35.

[7] Employer also filed a brief in reply to claimant's response brief, reiterating its prior contentions.

[8] The record indicates that the miner was employed in the coal mining industry in Utah. Director's Exhibit 2. Accordingly, the law of the United States Court of Appeals for the Tenth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[9] While the administrative law judge considered the opinion of Dr. Poitras in the miner's claim, he did not consider the doctor's opinion in the survivor's claim because

obstructive pulmonary disease (COPD) as a significant condition contributing to the miner's death. Director's Exhibit 35. In reports, Drs. Poitras and Horwitz opined that the miner had severe COPD related to coal dust exposure and smoking. Director's Exhibits 7, 8; Claimant's Exhibits 1, 6. By contrast, in his report, Dr. Farney opined that the miner did not have legal pneumoconiosis[10] or any pulmonary condition significantly related to or substantially aggravated by dust exposure in his coal mine employment. Employer's Exhibit 1. Dr. Farney further opined that the miner had COPD related to cigarette smoke exposure. *Id*.

The administrative law judge gave great weight to Dr. Poitras's opinion because he found that it was well-reasoned. 2008 Decision and Order on Remand at 4. The administrative law judge also gave great weight to Dr. Horwitz's opinion because of his status as the miner's treating physician. *Id*. Further, the administrative law judge gave some weight to the death certificate because he found that it was consistent with Dr. Horwitz's medical opinion. *Id*. at 5. In addition, although the administrative law judge found that "Dr. Farney did not adequately explain how he dismissed 40 years of coal dust exposure as a potential contributing cause of the [m]iner's severe COPD," the administrative law judge gave some weight to Dr. Farney's opinion because of his credentials. *Id*. at 6. The administrative law judge therefore found that the opinions of Drs. Poitras and Horwitz outweighed Dr. Farney's contrary opinion. Hence, the administrative law judge found that the preponderance of the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in reversing his prior findings that were not vacated by the Board because they are the law of the case. Specifically, employer asserts that the administrative law judge arbitrarily reversed his prior finding that Dr. Farney considered all of the possible causative factors of the miner's lung disease. Employer also asserts that the administrative law judge arbitrarily reversed his original findings that credited Dr. Farney's assumptions about the miner's smoking and occupational histories. Employer further asserts that the administrative law judge erred by failing to take into account Dr. Farney's criticism of Dr. Horwitz's reliance on the medical literature. Employer additionally asserts that the administrative law judge arbitrarily reversed his original finding that Dr. Poitras's opinion was flawed because it was based on a discredited x-ray. Lastly, employer asserts that the

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"[it] was not designated for consideration in the survivor's claim." 2008 Decision and Order on Remand at 6 n.3.

[10] Dr. Farney also opined that the miner did not have clinical pneumoconiosis. Employer's Exhibit 1.

administrative law judge arbitrarily reversed his prior findings that credited Dr. Farney's superior qualifications, and by failing to properly weigh all of the physicians' qualifications.

In the original Decision and Order, the administrative law judge found that the evidence did not establish the existence of clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) in both the miner's claim and the survivor's claim. 2006 Decision and Order at 19, 20. In its Decision and Order, however, the Board vacated the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remanded the case for further consideration of the evidence thereunder. [*J.K.*], slip op. at 8. Thus, contrary to employer's assertions, the administrative law judge was not required to reconcile his current finding on remand with his prior finding, as the Board vacated the administrative law judge's prior finding and remanded the case for further consideration. *Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). In the Decision and Order on Remand, the administrative law judge properly conducted a *de novo* review of the medical opinion evidence of record, and rendered new findings in accordance with the Board's instructions.[11] *See* 20 C.F.R. §802.405(a); *cf. Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Consequently, we reject employer's assertion that the administrative law judge erred in reversing his prior findings that were not vacated by the Board because they are the law of the case.

Employer also argues that the administrative law judge erred in failing to consider whether Drs. Poitras and Horwitz reviewed all of the relevant medical evidence of record. Employer maintains that "[t]he record indicates that Dr. Farney was the only physician of the three [Drs. Poitras, Horwitz, and Farney] that reviewed all of the medical evidence." Employer's Brief at 32. Contrary to employer's assertion, the administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In this case, the administrative law judge noted the bases of the opinions by Drs. Poitras, Horwitz, and Farney. With regard to Dr. Poitras's opinion that the miner had legal pneumoconiosis, the administrative law judge stated that "Dr. Poitras based his diagnosis of COPD on objective evidence, and he documented which readings support his opinion." 2008 Decision and Order on Remand at 4. The administrative law judge also stated that "[Dr. Poitras] based his etiology opinion on the entirety of his examination and felt that both heavy smoking and prolonged coal dust exposure contributed to the [m]iner's obstruction." *Id.* Further, with respect to Dr. Horwitz's

[11] In the Decision and Order on Remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4). 2008 Decision and Order on Remand at 6.

opinion that the miner had legal pneumoconiosis, the administrative law judge stated that "[Dr. Horwitz] based his opinion on several years of treatment of the [m]iner including multiple examinations, chest x-rays, provided histories and objective testing results." *Id*. The administrative law judge additionally stated that "Dr. Horwitz based his opinion on objective evidence, and he documented which readings support his opinion." *Id*. Lastly, regarding Dr. Farney's opinion that the miner did not have legal pneumoconiosis, the administrative law judge stated that "Dr. Farney listed the records reviewed and the significant portion of each document he relied on." *Id*. at 5. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge acted within his discretion in considering the bases of the opinions by Drs. Poitras, Horwitz, and Farney, we reject employer's assertion that the administrative law judge erred in failing to consider whether Drs. Poitras and Horwitz reviewed all of the relevant medical evidence of record. *Kuchwara*, 7 BLR at 1-170.

Employer further argues that the administrative law judge erred in giving greater weight to Dr. Horwitz's opinion because Dr. Horwitz was the miner's treating physician. Specifically, employer asserts that the administrative law judge failed to adequately consider the criteria set forth at Section 718.104(d). Employer also asserts that the record does not indicate that Dr. Horwitz was in a better position to assess the etiology of the miner's lung condition based on Dr. Horwitz's status as the miner's primary care physician over the years.

Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). Moreover, there is neither a requirement nor a presumption that treating physicians' opinions be given greater weight than the opinions of other expert physicians. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc* motion for recon.).

In the original Decision and Order, the administrative law judge acknowledged that Dr. Horwitz treated the miner from 1998 until the time of the miner's death, but he did not address whether Dr. Horwitz's opinion was entitled to greater weight on this basis. 2006 Decision and Order at 19. Rather, the administrative law judge gave less weight to Dr. Horwitz's opinion, that the miner had COPD related to both coal dust exposure and cigarette smoking, because he found that it was based on three things: 1) the miner's own opinion that coal dust was responsible for his breathing problems; 2) a note from the miner's co-worker describing the miner's work conditions; and 3) the doctor's view that the miner's smoking history was "moderate." *Id*.

In the Board's previous Decision and Order, the Board held that the administrative law judge erred in according less weight to Dr. Horwitz's opinion because he mischaracterized Dr. Horwitz and improperly substituted his opinion for that of the medical experts. [*J.K.*] *v. U.S. Steel Mining Co.*, BRB No. 06-0460 BLA, slip op. at 7-8 (Apr. 27, 2007)(unpub.). The Board therefore vacated the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). [*J.K.*], slip op. at 8. Further, the Board instructed the administrative law judge, on remand, to apply the provisions set forth at 20 C.F.R. §718.104(d)[12] when considering whether Dr. Horwitz's opinion was entitled to additional weight based on his status as the miner's treating physician. [*J.K.*], slip op. at 8, n.11.

In the Decision and Order on Remand, the administrative law judge again acknowledged that Dr. Horwitz treated the miner from 1998 until his death in 2003. 2008 Decision and Order on Remand at 4. However, the administrative law judge did not specifically consider Dr. Horwitz's opinion in light of the criteria provided at 20 C.F.R. §718.104(d) to determine whether Dr. Horwitz's opinion was entitled to greater weight than Dr. Farney's contrary opinion. Rather, the administrative law judge noted various factors that a fact-finder may consider in weighing the opinion of a treating physician, and then stated that "Dr. Horwitz based his opinion on objective evidence, and he documented which readings support his opinion." *Id*. The administrative law judge also stated that "[Dr. Horwitz] had the advantage of years of treatment of the [m]iner to observe and record his condition over time." *Id*. The administrative law judge therefore stated, "[n]oting Dr. Horwitz's credentials, I give his well reasoned opinion great weight." *Id*. However, as employer argues, the administrative law judge did not explain why he gave greater weight to Dr. Horwitz's opinion than to Dr. Farney's contrary

[12] The criteria set forth at 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations.

opinion based on any of these factors.[13] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, because the administrative law judge failed to provide a valid basis for according greater weight to Dr. Horwitz's opinion than to Dr. Farney's contrary opinion, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) in both the miner's claim and the survivor's claim, and remand the case for further consideration of the evidence thereunder.

Further, because we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) in the miner's claim, we also vacate the administrative law judge's finding that the new evidence established a material change in conditions at 20 C.F.R. §725.309 (2000). On remand, the administrative law judge should consider the new evidence in accordance with the standard set forth in *Brandolino*, 90 F.3d at 1512, 20 BLR at 2-321. If the administrative law judge finds that the evidence establishes a material change in conditions at 20 C.F.R. §725.309 (2000), then he must consider the miner's claim on the merits. *Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

Finally, because we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) in the survivor's claim, we also vacate the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

[13] The administrative law judge stated that "Dr. Farney listed the records reviewed and the significant portion of each document that he relied on." 2008 Decision and Order on Remand at 5. In addition, the administrative law judge noted that Dr. Horwitz is a Board-certified internist, and Dr. Farney is a Board-certified internist and pulmonologist. *Id*. at 4, 5; Claimant's Exhibit 2; Employer's Exhibit 2.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated, and the case is remanded to the administrative law judge for further proceedings 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