BRB No. 02-0845 BLA

LINDA MORGAN (Widow of NOBLE MORGAN) Claimant-Petitioner v. ELKAY MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/12/2003 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, the miner's widow,[1] appeals the Decision and Order - Denying Benefits (00-BLA-0544) of Administrative Law Judge Robert J. Lesnick (the administrative law judge) on a survivor's claim[2] 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).[3] The administrative law judge found at least ten years of coal mine employment. Considering the claim on its merits under 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of pneumoconiosis at 20 C.F.R §718.202(a)(1) and (a)(4). The administrative law judge also found that "[I]n view of the conflicting findings by well-credentialed pathologists," Decision and Order at 17, the autopsy evidence neither precludes nor establishes the existence of pneumoconiosis and thus fails to carry claimant's burden at 20 C.F.R. §718.202(a)(2). The administrative law judge further found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and that claimant established that the miner's pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203. With regard to the cause of the miner's death, the administrative law judge found that claimant failed to establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death under 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge committed reversible error by crediting the opinions of physicians who did not diagnose pneumoconiosis, to find that the miner's death was not due to pneumoconiosis. Employer responds, and seeks affirmance of the decision below. In the event that the Board remands the case, employer requests that employer's challenge to its designation as the responsible operator be addressed.[4] On August 15, 2003, employer filed an Advisory of New Precedent asserting the

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[1] The miner=s death certificate indicates that he died on July 7, 1999 due to lobar pneumonia. Director=s Exhibit 6.

[2] Claimant filed this claim on July 29, 1999. Director=s Exhibit 1.

[3] 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.

[4] The administrative law judge found that in view of his denial of benefits on the merits of the claim, the responsible operator issue was moot. Decision and Order at 3 n.3. In the event the administrative law judge on remand awards benefits, he must address the responsible operator issue.

relevance of *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003), a case recently issued by the United States Court of Appeals for the Sixth Circuit.[5] The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202, 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). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Pursuant to the revised regulation at 20 C.F.R. §718.205(c)(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)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

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[5] We decline to address the relevance of *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003) in light of our decision to remand the case. Employer may assert its position regarding the relevance of *Williams* before the administrative law judge on remand.

Citing *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002),[6] claimant contends that the medical opinions relied upon by the administrative law judge to find that claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c), can carry little or no weight. Specifically, claimant argues that the opinions of Drs. Caffrey, Bush, Crouch, Oesterling, Spagnolo, Fino and Castle cannot support a denial of benefits in the instant case where these physicians did not diagnose pneumoconiosis and the administrative law judge found the existence of the disease established. The administrative law judge relied on the opinions of Drs. Caffrey, Bush, Crouch, Oesterling, Spagnolo, Fino and Castle, who found that the miner did not have pneumoconiosis and that even assuming the presence thereof, pneumoconiosis did not cause, contribute to, or hasten death. The administrative law judge found that these medical opinions are better reasoned and documented than Dr. Green's contrary opinion that the miner's simple coal workers' pneumoconiosis, established by the pathological evidence, hastened death. Claimant's

[6] The United States Court of Appeals for the Fourth Circuit held in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), that a medical opinion that disability is not caused in part by pneumoconiosis may not establish that disability was not caused at least in part to pneumoconiosis, where the physician finds neither legal or medical pneumoconiosis nor any symptoms due to coal mine employment, and thus, the opinion directly contradicts the administrative law judge's finding that the miner has pneumoconiosis arising out of coal mine employment. The Fourth Circuit held that where both Drs. Dahhan and Castle opined that the miner did not have legal or medical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal dust exposure, their opinions were in direct conflict with the administrative law judge's finding that the miner suffered from pneumoconiosis arising out of coal mine employment, thus bringing the requirements of *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) into play. *Scott*, 289 F.3d at 269, 22 BLR at 2-383-384. Specifically, the Fourth Circuit in *Scott* stated that under *Toler*, the administrative law judge could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most. *Scott*,289 F.3d at 269, 22 BLR at 2-383-384. The Fourth Circuit thus held that the administrative law judge did not provide sufficient specific and persuasive reasons to credit the opinions of Drs. Dahhan and Castle and that even if he had, the administrative law judge accorded those opinions far more than the little weight they are allowed under *Toler*. *Id*. at 269, 22 BLR at 2-383-384.

Exhibit 1.[7] The administrative law judge explained:

> Not only did they analyze more medical data, but also, their opinions regarding this issue are far more consistent with the objective clinical test results, such as the pulmonary function studies and arterial blood gas tests, which indicate that the miner only had a minimal respiratory or pulmonary impairment less than two years prior to his death (*i.e.* near the time he was treated for colon cancer); and, that the miner's pneumoconiosis, if found on autopsy, was of such minimal or mild extent, that it did not have any significant effect on the miner's respiratory or pulmonary condition, nor play any role in his death. In view of the foregoing, I find that the Claimant has failed to establish death due to pneumoconiosis under [20 C.F.R.] §718.205(c), or by any other means.

Decision and Order at 20.

Claimant contends that although the administrative law judge found that the opinions of Drs. Caffrey, Bush, Crouch, Oesterling, Spagnolo, Fino and Castle are well reasoned, under *Scott* these medical opinions cannot suffice as substantial evidence in support of a denial of benefits, given the physicians' mistaken belief that pneumoconiosis was not present. Claimant asserts that since Dr. Green is the sole pathologist of record to render a well-reasoned and credible opinion as to the cause of the miner's death, Dr. Green's opinion, even if based on less medical data than those contrary opinions relied upon by the administrative law judge, is entitled to be "deemed as substantial evidence" under *Scott* and "to be controlling." Claimant's Brief at 12. Claimant also submits that, contrary to the administrative law judge's determination, Dr. Green's opinion that the miner's pneumoconiosis hastened death, is well documented. Claimant urges the Board to remand the case for the entry of an award of benefits "in accordance with the dictates of *Scott*,"

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[7] The administrative law judge found that Dr. Green was a "well-credentialed pathologist" and correctly determined that Dr. Green is the only physician of record who unequivocally related the miner's death to pneumoconiosis. Decision and Order at 19. Dr. Racadag, who performed the autopsy that was limited to the miner's lungs, diagnosed acute bronchopneumonia and lobar pneumonia, mild simple coal workers' pneumoconiosis with focal emphysema, and pleural adhesions. Director's Exhibit 7. With regard to the cause of the miner's death, Dr. Racadag stated, "The above conditions probably contributed to the patient's morbidity and subsequent demise." *Id.* The record thus supports the administrative law judge's finding that Dr. Racadag's opinion as to the cause of the miner's death was equivocal and poorly reasoned. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

because, claimant asserts, the record contains no credible medical opinion that pneumoconiosis was not a causative factor in the miner's death. Claimant's Brief at 13.

Employer argues that *Scott* is not applicable because *Scott* addresses the cause of a miner's disability, whereas the instant case concerns the cause of a miner's death. Employer asserts, alternatively, that if *Scott* applies, it is distinguishable on its facts. Specifically, employer argues the physicians upon whose opinions the administrative law judge relied to deny benefits, found symptoms consistent with legal pneumoconiosis. Employer thus asserts that these physicians' opinions regarding cause of death may be credited by the administrative law judge, consistent with the decisions of the United States Court of Appeals for the Fourth Circuit in *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995) and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995).[8]

[8] In *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) and in *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), the administrative law judge relied on opinions from physicians who did not find coal workers' pneumoconiosis to determine the disability causation issue. The Fourth Circuit found, in both cases, that the administrative law judge's reliance on such medical opinions was appropriate because the physicians' opinions that the miner did not have coal workers' pneumoconiosis did not necessarily contradict the administrative law judge's determination that the miner had legal pneumoconiosis. *Ballard*, 65 F.3d at 1195, 19 BLR at 2-318; *Hobbs*, 45 F.3d at 821-22, 19 BLR at 2-92. The Fourth Circuit noted, in both cases, that the legal definition of pneumoconiosis is broader than the medical definition of pneumoconiosis and coal workers' pneumoconiosis is only one of the diseases that qualifies as legal pneumoconiosis. *Ballard*, 65 F.3d at 1193, 19 BLR at 2-318-319; *Hobbs*, 45 F.3d at 821, 19 BLR at 2-91-92. Thus, because the physicians had diagnosed the miners with, or found symptoms consistent with legal pneumoconiosis, the Fourth Circuit held that the administrative law judge could properly rely on their opinions, despite the decision in *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995)(administrative law judge could give weight to medical opinions finding that the miner's disability is not due to pneumoconiosis and that the miner did not have pneumoconiosis, only if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most.)

Specifically, employer notes that Drs. Naeye, Caffrey, Bush, Crouch and Oesterling "did find a minimal amount of black pigment present, diagnostic of anthracosis, thus meeting the new, revised definition of pneumoconiosis," [footnote omitted] Employer's Brief at 8, and that as a result of their review of the miner's records, Drs. Spagnolo, Fino, and Castle "noted, relied upon, and incorporated into their reports symptoms of shortness of breath, cough, daily sputum production, wheezing, and orthopnea," [footnote omitted] Employer's Brief at 9. Employer further notes that the administrative law judge actually found Dr. Naeye's opinion supportive of a finding of the existence of pneumoconiosis because Dr. Naeye stated that the pigment found in the miner's lungs is "diagnostic of anthracosis." *See* Employer's Exhibit 2.[9]

The court in *Scott* found that the facts therein followed the facts in *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), where the physicians' opinions credited by the administrative law judge opined that claimant did not have legal or medical pneumoconiosis, in direct contradiction to the administrative law judge's finding that claimant had pneumoconiosis arising out of coal mine employment. The court in *Scott* indicated that under *Toler*, the administrative law judge could only give weight to medical opinions which found that claimant did not have legal or medical pneumoconiosis and did not include a diagnosis of any condition aggravated by coal dust or findings of symptoms related to coal dust exposure, if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight. *Scott*, 289 F.3d 269, 19 BLR 2-83.

[9] At his October 10, 2000 deposition, Dr. Naeye actually testified as follows:

> Question: You noted that there were no very fine free silica crystals admixed with the pigment in the lungs and no surrounding halos of focal emphysema. The significance of the absence of those conditions is what, Dr. Naeye?
>
> Answer: Well, that just means that you can't make the diagnosis of coal workers' pneumoconiosis because if there's just pigment, that is anthracosis. And anthracosis does not effect (sic) lung function or cause any disability or contribute to death.
>
> You have to have some evidence of real tissue damage. And the two obvious evidences are fibrosis mixed with the black pigment and halos of focal emphysema around the black deposits.

We find merit in claimant's contention that *Scott* constitutes controlling authority determinative of the issue in this case, namely whether the medical opinions relied upon by the administrative law judge to find that claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c), constitute substantial evidence sufficient to support the administrative law judge's denial of survivor's benefits. While the *Scott* and *Toler* cases involved claimant's burden to establish the cause of disability rather than the cause of death, both cases are substantially similar to the instant case, where the administrative law judge found that claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c) based on the opinions of physicians who did not diagnose the miner with pneumoconiosis, the existence of which the administrative law judge found established at 20 C.F.R. §718.202(a).

Moreover, the Fourth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), issued its decision in *Scott* on May 2, 2002, subsequent to the administrative law judge's February 28, 2002 hearing, but before the administrative law judge's August 27, 2002 Decision and Order – Denying Benefits. The record shows that claimant's counsel specifically argued, in his April 29, 2002 post-hearing brief, filed while the case was pending before the administrative law judge, that insofar as employer's experts opine that the miner did not have pneumoconiosis, a finding contrary to the relevant objective evidence, their opinions as to the cause of death should be given little weight. Claimant's April 29, 2002 Brief at 16.

Further, we do not find persuasive employer's assertion that the evidence relied upon by the administrative law judge to find that claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c) can, in fact, constitute substantial evidence in

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Employer's Exhibit 5 at 26. Dr. Naeye then reiterated the opinion, set forth in his written report, that the changes he saw in the miner's lung tissue slides were insufficient to warrant a diagnosis of coal workers' pneumoconiosis. *Id*; Employer's Exhibit 2. Dr. Naeye also testified that even were he to assume the presence of simple pneumoconiosis or that part of the miner's chronic bronchitis was due to coal mine employment, as Dr. Green found, it "would not have had any role whatsoever" in the miner's death. Employer's Exhibit 5 at 30, 31. Dr. Naeye further testified that the miner had no chronic lung disease arising out of his occupational exposure to coal mine dust. *Id.* at 30-31, 42-43.

The administrative law judge in the instant case did not rely on Dr. Naeye's opinion at 20 C.F.R §718.205(c). Consequently, we need not further address employer's argument regarding Dr. Naeye's opinion.

support of the denial of benefits because, consistent with *Hobbs* and *Ballard*, these physicians found symptoms consistent with legal pneumoconiosis. The record shows that each physician relied upon by the administrative law judge specifically found no impairment, symptom, or lung tissue destruction that was due to pneumoconiosis, coal mine employment, or the deposits of coal dust seen in the miner's lung tissue. Specifically, Drs. Caffrey, Bush, Crouch, Oesterling, Spagnolo, Fino and Castle, reached a conclusion that the miner did not have pneumoconiosis by relying on an interpretation of the pathological evidence. Drs. Castle and Spagnolo downplayed the importance of the x-ray evidence, since there is autopsy evidence. Dr. Castle testified that while he had previously read the August 1, 1997 x-ray as positive for simple pneumoconiosis, he came to the ultimate conclusion that the miner did not have pneumoconiosis based on his subsequent review of the pathological evidence which shows that the miner did not have pneumoconiosis and which is "the gold standard" by which to determine the issue. Employer's Exhibit 11 at 15-16. Dr. Spagnolo opined that because no x-ray had been read by "university based radiologists experienced in the evaluation of chest x-rays of individuals with occupational lung disease," he did not believe that there is "sufficient reliable evidence to make a diagnosis of pneumoconiosis from these reports of the chest radiographs." Employer's Exhibit 1.

Claimant also challenges the administrative law judge's weighing of the pathology report of Dr. Green, upon which claimant relies to meet her burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge found that employer's experts "had the benefit of analyzing more medical data than Dr. Green," Decision and Order at 19, and thus determined that their opinions were due greater weight. The administrative law judge's finding that employer's experts analyzed "more medical data" than Dr. Green is not supported by the record. Dr. Green reviewed the lung tissue slides taken on autopsy, the autopsy report, Dr. Ranavaya's September 30, 1999 report, records from the miner's June 1997 hospitalization, outpatient notes from October 1997, and the miner's death certificate. Some of employer's experts reviewed the pathological evidence only, *e.g.* Drs. Crouch and Oesterling, Employer's Exhibits 6, 7.[10] We hold, therefore, that the administrative law judge erred by according greater weight to employer's experts' opinions over Dr. Green's opinion on the basis that employer's experts reviewed more medical data.

Furthermore, we find error in the administrative law judge's additional finding that employer's experts' opinions regarding the cause of the miner's death are "far more

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[10] Moreover, it appears from the record that each pathologist of record relied on the autopsy evidence to determine the presence or absence of pneumoconiosis. *See* Director's Exhibit 7, Claimant's Exhibit 1, Employer's Exhibits 2-7.

consistent with the objective clinical test results such as the pulmonary function studies and arterial blood gas tests, which indicate only a minimal respiratory or pulmonary impairment less than two years prior to his death (*i.e.* near the time he was treated for colon cancer)…," Decision and Order at 20. Contrary to employer's suggestion, the fact that the miner may not have been totally disabled and only mildly impaired two years before his death does not establish that the miner did not have pneumoconiosis and that pneumoconiosis did not play a role in his death. Moreover, the Board has held that an administrative law judge may not substitute his opinion for that of the medical experts. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Based on the foregoing and in light of *Scott*, we vacate the administrative law judge's findings at 20 C.F.R. §718.205(c) and remand this case. On remand, the administrative law judge is instructed to reconsider the weight and credibility of the evidence relevant to claimant's burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge