BRB No. 99-0705 BLA

JUDY G. LILLY (Widow of HARRY W. LILLY)	)	
Claimant- Respondent	)	
	)	DATE ISSUED:
v.	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Terri L. Bowman (Arter & Hadden LLP), Washington, D.C., for employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1648) of Administrative Law Judge Linda S. Chapman awarding benefits with respect to a miner's claim and 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).[1] The administrative law judge credited the miner with eighteen years of coal mine employment and initially determined that the autopsy report prepared by Dr. Dy was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2). The administrative law judge then determined that the evidence of record supported a finding that pneumoconiosis was a contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2). With respect to the miner's claim, the administrative law judge noted that the miner's request for modification of a prior denial was before him. The administrative law judge considered the newly submitted evidence and determined that inasmuch as it was sufficient to establish the existence of pneumoconiosis, the element of entitlement previously adjudicated against the miner, a change in conditions was demonstrated pursuant to 20 C.F.R. §725.310(a). Regarding the merits of entitlement in the miner's claim, the administrative law judge found that the miner was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment and that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were awarded on both the miner's claim and the survivor's claim.

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[1]The miner filed an application for benefits on September 14, 1993. Director's Exhibit 1. In a Decision and Order issued by Administrative Law Judge Edward J. Murty, Jr., on November 30, 1995, benefits were denied on the ground that the miner failed to establish the existence of pneumoconiosis. Director's Exhibit 50. Following the Board's dismissal of the miner's appeal as untimely filed, the miner requested modification of the denial of benefits. Director's Exhibit 59; *Lilly v. Eastern Associated Coal Corp.*, BRB No. 96-0589 BLA (Sept. 9, 1996)(unpub. Order). The miner died on November 2, 1996, before his request was considered by the district director. Dr. El-Harake prepared the death certificate and identified lung cancer and chronic obstructive pulmonary disease as the causes of death. Director's Exhibit 68. Claimant, the miner's widow, filed a claim for survivor's benefits on November 21, 1996. Director's Exhibit 64. The survivor's claim and the miner's request for modification were consolidated and transferred to the Office of Administrative Law Judges for a hearing.

Employer argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.204(b) and 718.205(c)(2). Claimant has responded and urges affirmance of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs, has also responded, contending that employer's assertion that the administrative law judge applied an incorrect standard under Section 718.205(c)(2) is without merit.[2]

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. 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).

With respect to the administrative law judge's findings under both Sections 718.204(b) and 718.205(c)(2), employer asserts that the administrative law judge did not apply the appropriate standards in determining whether the miner's total disability and death were related to pneumoconiosis. Employer also argues that the administrative law judge erred in crediting Dr. Dy's diagnosis of moderate coal workers' pneumoconiosis over the diagnoses of mild pneumoconiosis proffered by Drs. Kleinerman, Fino, and Renn. Employer further maintains that the administrative law judge determined incorrectly that Dr. Kleinerman relied upon an assumption contrary to the Act in rendering his opinion. In addition, employer alleges that the administrative law judge erred in finding that Dr. Renn did not adequately explain his conclusions.
Employer further alleges that the administrative law judge mechanically accorded more weight to Dr. Rasmussen's opinion, based upon his status as a treating physician, without addressing the extent to which Dr. Rasmussen's conclusions were reasoned and documented.

[2]We affirm the administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.203(b), 718.204(c), and 725.310(a), as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

These contentions have merit, in part. With respect to the standards of proof used by the administrative law judge, contrary to employer's assertion, the administrative law judge applied the appropriate precedent in assessing whether claimant established that pneumoconiosis was a contributing cause of the miner's death pursuant to Section 718.205(c)(2). The administrative law judge noted correctly that the relevant standard was set forth by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). Decision and Order at 4. In *Shuff*, the court held that pneumoconiosis is considered a substantially contributing cause of death pursuant to Section 718.205(c)(2) if it actually hastened the miner's death. *See also Kirk v. Director, OWCP,* 86 F.3d 1151, 20 BLR 2-276 (4th Cir. 1996). In so doing, the court indicated that it concurred with the approach of the United States Court of Appeals for the Third Circuit in *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); a case in which the Third Circuit held that a medical opinion in which the physician acknowledged that pneumoconiosis shortened the miner's life, albeit briefly, could be sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's demise. The Fourth Circuit recently reaffirmed its approval of this standard in *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR at 2-587 (4th Cir. 1999), stating that "[i]f pneumoconiosis actually serves to hasten death in any way, pneumoconiosis is a 'substantially contributing cause.'" 176 F.3d at 757, 21 BLR at 2-593. Thus, employer is not correct in maintaining that the administrative law judge should have required claimant to demonstrate more than a *de minimis* contribution by pneumoconiosis in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.

With respect to Section 718.204(b), employer asserts that the administrative law judge did not apply the proper standard in determining that the miner's totally disabling pulmonary impairment was caused by pneumoconiosis. This contention has merit. In *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), the Fourth Circuit held that pursuant to Section 718.204(b), a claimant must prove by a preponderance of the evidence that pneumoconiosis was at least a contributing cause of the miner's totally disabling respiratory or pulmonary impairment. *See also Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-267 (4th Cir. 1996). The court further explained that pneumoconiosis must be a necessary condition of the miner's total disability, indicating that if the miner would have been disabled to the same degree and by the same time in his life if he had never been a miner, then benefits must be denied. *See Robinson*, *supra*.

In the present case, the administrative law judge stated that:

> I find that while the degree of respiratory impairment caused by Mr. Lilly's pneumoconiosis cannot be quantified, and that his smoking history also contributed to his respiratory disability, his pneumoconiosis played a part in that disability as well.

Decision and Order at 19-20. The administrative law judge's finding that the degree of respiratory impairment attributable to pneumoconiosis cannot be quantified renders her determination on this issue ambiguous. Inasmuch as the administrative law judge did not explicitly determine, in accordance with *Robinson*, whether pneumoconiosis was a necessary cause of the miner's totally disabling impairment, we vacate the administrative law judge's finding under Section 718.204(b). On remand, the administrative law judge must reconsider whether claimant has established by a preponderance of the evidence that pneumoconiosis was at least a contributing cause of the miner's total disability under the standard set forth in *Robinson*.[3]

Regarding the administrative law judge's assessment of the medical opinions of record under Sections 718.204(b) and 718.205(c)(2), employer argues that the administrative law judge erred in mechanically according greater

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[3]The irrebuttable presumption of total disability and death due to pneumoconiosis is not available in the present case, as the record does not contain a diagnosis of complicated pneumoconiosis. 20 C.F.R. §§718.202(a)(3), 718.205(c)(3), 718.304. Without making a finding of complicated pneumoconiosis or a massive lesion, Dr. Dy described on autopsy a macule that was one centimeter in size, which does not satisfy the regulatory standard for the diagnosis of complicated pneumoconiosis. Director's Exhibit 69; 20 C.F.R. §718.304; *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988).

weight to Dr. Dy's diagnosis of moderate pneumoconiosis, based upon his status as autopsy prosector, and in relying upon this finding to discredit the opinions of Drs. Fino, Kleinerman, Renn, and Tuteur. We agree. The administrative law judge indicated that inasmuch as Dr. Dy diagnosed moderate anthracotic pneumoconiosis in the miner's left lung upon gross examination and the other physicians did not have the opportunity to conduct a gross examination, Dr. Dy's finding was entitled to determinative weight regarding the extent of the miner's pneumoconiosis. Decision and Order at 17; Director's Exhibit 69. The administrative law judge further determined that any conclusions regarding disability and death causation premised upon a finding of mild or only microscopically detectable pneumoconiosis were of little probative value. *Id*. at 17-19. The administrative law judge did not, however, resolve the conflict between Dr. Dy's description of moderate pneumoconiosis on gross examination and Dr. Kleinerman's statement that microscopic examination is required in order to determine whether the black pigment observed on gross examination represents pneumoconiosis. Employer's Exhibit 7 at 14. Because the administrative law judge did not address this issue, we vacate the administrative law judge's findings under Sections 718.204(b) and 718.205(c)(2). *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). On remand, the administrative law judge must reconsider the relevant medical opinions in light of her determination as to the extent of the miner's pneumoconiosis as established by the medical evidence of record.

Employer is also correct in asserting that the alternative rationales that the administrative law judge provided for discrediting the opinions of Drs. Kleinerman and Renn are not valid.[4] With respect to Dr. Kleinerman's opinion, the

[4]The administrative law judge acted rationally in discrediting the opinions of Drs. Lockey, Ranavaya, and Weiss, however, on the grounds that Dr. Lockey did not explicitly state whether pneumoconiosis contributed in some fashion to the miner's total disability or death, Dr. Weiss did not offer an opinion as to whether pneumoconiosis contributed to the disabling obstructive impairment which played a role in the miner's demise, and Dr. Ranavaya did not provide an explanation of his determination that pneumoconiosis did not contribute to the miner's disability or death. Decision and Order at 18; Director's Exhibit 70; Employer's Exhibits 2, 3; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Moreover, the administrative law judge acted within her discretion in finding that Dr. Zaldivar's opinion was not relevant to 20 C.F.R. §§718.204(b) and 718.205(c)(2), as Dr. Zaldivar did not find the miner totally disabled and was not asked to offer an opinion as to the cause of the miner's death. Decision and

administrative law judge found that inasmuch as Dr. Kleinerman relied upon the assumption that pneumoconiosis cannot cause an obstructive impairment, his determination that the miner's total disability and death were not related to pneumoconiosis was entitled to little weight. Decision and Order at 18 n.7, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); Employer's Exhibits 4, 7. Dr. Kleinerman did not, however, exclude the possibility that coal dust exposure can cause an obstructive impairment. Rather, he stated in his deposition testimony that simple pneumoconiosis must be more extensive than he felt was present in this case in order for it to cause or contribute to an obstructive ventilatory defect. Employer's Exhibit 7 at 21, 32; *see Stiltner v. Island Creek Coal Co.*, 86 F.3d 377, 20 BLR 2-246 (4th Cir. 1996). Therefore, we vacate the administrative law judge's finding regarding Dr. Kleinerman's opinion. On remand, the administrative law judge must reconsider Dr. Kleinerman's opinion under Sections 718.204(b) and 718.205(c)(2).

With respect to Dr. Renn's opinion, the administrative law judge stated that it was entitled to little weight on the ground that the doctor did not offer a supporting rationale or discussion of how the medical evidence supported his conclusion that the miner's disabling impairment was consistent with emphysema caused solely by cigarette smoking. Decision and Order at 18-19; Director's Exhibit 35; Employer's Exhibits 9, 10. The administrative law judge's finding is not supported by substantial evidence. Dr. Renn indicated in his written report, and explained more fully at his deposition, that the miner's pulmonary function and lung volume studies did not produce the proportional reductions in volumes and flows and total lung capacity consistent with emphysema caused by coal dust exposure. Director's Exhibit 35; Employer's Exhibit 9 at 10. In light of the fact that the administrative law judge did not accurately characterize Dr. Renn's opinion, we vacate her finding. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge must reconsider Dr. Renn's opinion on remand.

Finally, employer alleges that the administrative law judge erred in mechanically according greater weight to Dr. Rasmussen's opinion based upon his role as a treating physician, without fully addressing the extent to which Dr. Rasmussen's conclusions are reasoned and documented. This contention has merit. In considering Dr. Rasmussen's opinion, that pneumoconiosis was a contributing cause of the miner's totally disabling impairment and death, the administrative law judge noted that Dr. Rasmussen has extensive experience in the treatment of coal miners, has published several articles on coal workers'

Order at 16; Director's Exhibit 20; *see Clark*, *supra*.

pneumoconiosis, and treated the miner for three years. Decision and Order at 19; Director's Exhibits 9, 59; Claimant's Exhibit 2. The administrative law judge also indicated that Dr. Rasmussen referred to the results of objective studies obtained in 1993 and 1994 in explaining his findings. *Id*. The administrative law judge relied upon these factors to accord determinative weight to Dr. Rasmussen's opinion and to find that total disability and death due to pneumoconiosis were established. Decision and Order at 19-20. The administrative law judge did not, however, provide an explanation of how these factors actually rendered Dr. Rasmussen's conclusions more credible than those of Drs. Fino, Renn, and Kleinerman. These physicians possess equal or superior qualifications and publication histories and discussed how the objective evidence of record as a whole supported their opinions.

Thus, it appears that the administrative law judge's assessment of Dr. Rasmussen's opinion does not accord with the decisions of the United States Court of Appeals for the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In both *Hicks* and *Akers*, the Fourth Circuit indicated its disapproval of deferring to treating or examining physicians without meaningfully addressing "the qualifications of the respective physicians, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Akers*, 131 F.3d at 441, 21 BLR at 2-275-2-276. We vacate the administrative law judge's findings with respect to Dr. Rasmussen's opinion, therefore, and instruct the administrative law judge to reconsider this opinion on remand. We reject, however, employer's assertion that the administrative law judge should have discredited Dr. Rasmussen's opinion because it is expressed in equivocal terms. Although Dr. Rasmussen qualified his conclusions at times and indicated that it was difficult to separate impairment caused by smoking from impairment caused by coal dust exposure, he stated several times that it was his opinion that coal dust exposure was a contributing cause of the miner's total disability and death. Director's Exhibit 9; Claimant's Exhibit 2 at 11, 15-17. Under these circumstances, the administrative law judge was not required to discredit Dr. Rasmussen's opinion. *See Mays, supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits on the miner's claim and the survivor's claim is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge