BRB No. 03-0609 BLA

JUDENE CHILDRESS (Widow of JACK CHILDRESS) Claimant-Petitioner v. CHILDRESS CONSTRUCTION COMPANY and KENTUCKY EMPLOYERS' MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents and KENTLAND ELKHORN COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/29/2004 DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen Jr., Administrative Law Judge, United States Department of Labor.

Judene Childress, Dandridge, Tennessee, *pro se*.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for Childress Construction Company and its carrier.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for Kentland Elkhorn Coal Corporation.

Jennifer U. Toth (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] representing herself, appeals the Decision and Order (02-BLA-0224) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits on a 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).[2] This case involves a survivor's claim filed on January 7, 2000.[3] After crediting the miner with 33.67 years of coal mine employment, the administrative law judge designated Childress Construction Company as the responsible operator. In his consideration of the merits of the claim, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Childress Construction Company responds in support of the administrative law judge's denial of benefits. Kentland Elkhorn Coal Corporation (Kentland) responds in support of the administrative law judge's designation of Childress Construction Company as the responsible operator.

[1] Claimant is the surviving spouse of the deceased miner who died on November 12, 1999. Director's Exhibit 13.

[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] The miner filed a claim for benefits on October 14, 1998. Director's Exhibit 38. The district director denied the claim on February 2, 1999. *Id.*

Kentland also responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, noting that the administrative law judge erred when he retroactively applied the revised quality standards to Dr. Dennis's autopsy report. In a reply brief, Kentland argues that Dr. Dennis's autopsy report was also not in substantial compliance with the applicable quality standards.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *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 pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that the pneumoconiosis was due to coal mine employment pursuant to 20 CF.R §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

The four methods to establish the existence of coal workers' pneumoconiosis listed in the regulations include: (1) by x-ray evidence; (2) by biopsy or autopsy; (3) by application of the presumptions; and (4) by reasoned medical evidence and opinion. 20 C.F.R. §718.202; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002).

In his consideration of whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly found that all of the x-ray interpretations of record are negative for pneumoconiosis. Decision and Order at 11, 19-21. We, therefore, affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

[4] Because no party challenges the administrative law judge's designation of Childress Construction Company as the responsible operator, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge next considered whether the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).[5] Dr. Dennis performed the miner's autopsy on November 13, 1999. In his autopsy report dated December 21, 1999, Dr. Dennis did not complete sections of the report entitled "Clinical History" and "Gross Description." Director's Exhibit 14. Dr. Dennis, however, provided a detailed description of his microscopic findings. *Id.* Dr. Dennis's final pathological diagnoses included anthracosilocosis.[6] Director's Exhibit 14. Dr. Dennis stated that:

> [The miner] had significant anthracosilicosis demonstrated by pulmonary fibrosis, black pigment deposition anthracosilicosis and emphysematous changes that were both pan-acinar and central lobular.

Director's Exhibit 14.

In his consideration of whether the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge correctly noted that Dr. Dennis's autopsy report does not contain a detailed gross macroscopic description of the miner's lungs as required by 20 C.F.R. §718.106(a). Decision and Order at 20. The administrative law judge, therefore, found that Dr. Dennis's autopsy report was not in substantial compliance with the quality standards at 20 C.F.R. §718.106(a). *Id.* Citing 20 C.F.R. §718.101(b), the administrative law judge found that Dr. Dennis's autopsy report was, therefore, insufficient to support a finding of pneumoconiosis. *Id.*

The Director contends that the administrative law judge erred when he retroactively applied the revised quality standards to Dr. Dennis's autopsy report. We agree. Because Dr. Dennis prepared his autopsy report before January 20, 2001, the revised quality standards do not apply. *See* 20 C.F.R. §718.101(b).

The applicable standard, Section 718.106(a) (2000), provides that:

> A report of an autopsy or biopsy submitted in connection with a claim shall include a detailed gross macroscopic description and microscopic

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[5] The administrative law judge properly found that the biopsy evidence of record was insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 20.

[6] Anthracosilicosis constitutes "clinical" pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1).

> description of the lungs or visualized portion of a lung. If a surgical procedure has been performed to obtain a portion of the lung, the evidence shall include a copy of the surgical note and the pathology report of the gross and microscopic examination of the surgical specimen. If an autopsy has been performed, a complete copy of the autopsy report shall be submitted to the Office.

20 C.F.R. §718.106(a) (2000).

Section 718.106(b) (2000) provides that:

> No report of an autopsy or biopsy submitted in connection with a claim shall be considered unless the report complies with the requirements of this section, except that in the case of a miner who died prior to March 31, 1980, such reports shall be considered even when the reports are not in substantial compliance with the requirements of this section. Such nonconforming reports concerning miners who died prior to March 31, 1980, shall be accorded such weight and probative value as is appropriate in light of all of the evidence applicable to the individual case.

20 C.F.R. §718.106(b) (2000).

In *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), the Board held that while an administrative law judge should consider the quality standards found in Section 718.106 (2000), the standards are not mandatory and autopsy or biopsy reports could not be mechanically precluded from consideration by an administrative law judge solely because the evidence fails to comply with those standards. The Board explained that:

> To hold that the standards of Section 718.106 are mandatory would result in the exclusion of otherwise relevant probative and reliable evidence from consideration by the administrative law judge. Therefore, the standards set forth in Section 718.106 are to be considered and should be used as guidelines by the administrative law judge, and we encourage such a practice. *See Orek*, *supra*. In reviewing autopsy and biopsy evidence, the administrative law judge should determine whether the missing information is essential to the reliability or the probative value of the autopsy or biopsy report. If so, the administrative law judge may reject the report. If the missing information is not essential, the administrative law judge may consider and accept the report. Such a determination can only be made by

> the administrative law judge, as fact-finder, based on the unique facts of each case.

Dillon, 11 BLR at 1-114-115 (footnote omitted).

The Board also held that an administrative law judge is not limited to looking only to the four corners of an autopsy report in determining its reliability and may look to other supportive documents in the record in an attempt to cure any defects in the actual report. *Dillon*, 11 BLR at 1-115 n.1.[7]

In this case, the administrative law judge erred in mechanically discrediting Dr. Dennis's autopsy report solely because it did not contain a macroscopic description of the lungs as required by 20 C.F.R. §718.106(a) (2000). Consequently, we vacate the administrative law judge's finding that the autopsy evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and remand the case for further consideration. On remand, the administrative law judge is instructed to determine whether the missing macroscopic description is essential to the reliability or probative value of Dr. Dennis's autopsy report. Should the administrative law judge determine that the missing information is non-essential, he may consider and accept the autopsy report. Should the administrative law judge accept Dr. Dennis's autopsy report, he should reconsider whether this evidence, when considered with all the other relevant autopsy evidence of record, is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

The administrative law judge also properly found that claimant is not entitled to any of the presumptions arising under 20 C.F.R. §718.202(a)(3). Decision and Order at 20. Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, the Section 718.306 presumption is inapplicable because claimant did not file her survivor's claim before June 30, 1982. *See* 20 C.F.R. §718.306.

[7] The United States Court of Appeals for the Third Circuit has approved the Board's interpretation of 20 C.F.R. §718.106 (2000) set forth in *Dillon*. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002). The United States Court of Appeals for the Eleventh Circuit has accepted the Director's interpretation of 20 C.F.R. §718.106(b) (2000) as requiring only substantial compliance. *See Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536, 18 BLR 2-203 (11th Cir. 1993).

Finally, a finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[8] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). While Drs. Musgrave[9] and Dennis found that the miner suffered from pneumoconiosis, Director's Exhibits 18, 19, Drs. Broudy, Younes, Caffrey, Branscomb, Rosenberg, Naeye and Castle opined that the miner did not suffer from the disease. Director's Exhibits 27, 31, 32, 34, 37, 38, 41; Employer's Exhibits 3, 4.

Dr. Tamara L. Musgrave was the miner's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* In this case, the administrative law judge properly accorded less weight to Dr. Tamara Musgrave's opinion, that the miner suffered from pneumoconiosis, because he found that her opinion was not sufficiently reasoned.[10] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 21. The administrative law judge also properly credited the opinions of Drs. Broudy, Caffrey, Branscomb, Rosenberg, Naeye and Castle that the miner did not suffer from pneumoconiosis over Dr. Musgrave's contrary opinion based upon their superior

[8] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[9] The record contains reports from Dr. Tamara Musgrave and Dr. Yolanda Musgrave. Dr. Tamara L. Musgrave, the miner's treating physician, treated the miner for non-Hodgkin's lymphoma on a monthly basis from September of 1998 to October of 1999. *See* Director's Exhibits 14, 15, 41. Dr. Yolanda Musgrave, on the other hand, submitted a single pathology report dated August 7, 1998, wherein she found that a periaortic mass revealed findings consistent with non-Hodgkin's lymphoma. Director's Exhibit 17. The administrative law judge, in his summary of the medical evidence, misidentified Dr. Tamara Musgrave as Dr. Yolanda Musgrave. *See* Decision and Order at 13. However, because it is clear from the administrative law judge's discussion that he was actually referring to Dr. Tamara Musgrave, the administrative law judge's misidentification was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[10] In response to questions presented to her in a March 21, 2000 letter from the district director, Dr. Musgrave indicated, without explanation, that it was likely that the miner had an occupational lung disease caused by his coal mine employment. Director's Exhibit 18.

qualifications.[11] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 6.

In regard to Dr. Dennis's report, the administrative law judge stated that:

> Dr. Dennis also responded to interrogatories propounded to him by the OWCP. He relied upon his pathology report and upon limited records from Dr. Musgrave diagnosing lymphoma. Dr. Dennis concluded that the pathology present at autopsy certainly confirmed the presence of anthracosilicosis or CWP, as well as the presence of an [sic] emphysematous changes compatible with an occupational disease caused by coal mine employment. Dr. Dennis set forth clinical and pathological findings and observations. There was adequate data to support his findings. However, Dr. Dennis primarily based his opinion on the autopsy report that did not substantially comply with the quality standards necessary for an autopsy report found at §718.106(a). The autopsy report is insufficient to establish the existence of pneumoconiosis on its own under §718.101(b). Accordingly, it cannot serve as the primary basis to support a narrative opinion finding the existence of pneumoconiosis. Therefore, I find that Dr. Dennis' opinion is not entitled to probative weight.

Decision and Order at 21.

In light of our decision to vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(2) and remand the case for his reconsideration of the autopsy evidence, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4). On remand, should the administrative law judge consider and accept Dr. Dennis's autopsy report, he should also reconsider whether Dr. Dennis's narrative report, when considered with all of the other relevant medical opinion evidence, is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

On remand, should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) or (a)(4), he should address whether the evidence is sufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203

[11] Dr. Branscomb is Board-certified in Internal Medicine. Employer's Exhibit 1. Drs. Broudy, Rosenberg and Castle are Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibits 2-4. Drs. Caffrey and Naeye are Board-certified in Anatomical and Clinical Pathology. Director's Exhibit 41; Employer's Exhibit 12. Although Dr. Musgrave's qualifications are not found in the record, the administrative law judge identified her as an oncologist. Decision and Order at 22.

and whether the evidence is sufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration 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