

BRB No. 04-0600 BLA

WILMA ELMS	)	
(Widow of NORVELL ELMS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 04/29/2005
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
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 Mollie W. Neal,  
Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for  
claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C.,  
for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant<sup>1</sup> appeals the Decision and Order on Remand (94-BLA-1327) of Administrative Law Judge Mollie W. Neal denying benefits in 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>2</sup> This case is before the Board for the fourth time. In the initial decision, the administrative law judge credited the miner with thirty-five and three-quarters years of coal mine employment. Applying the regulations at 20 C.F.R. Part 718 (2000), 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)(4) (2000), 718.203(b) (2000). The administrative law judge further found the evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2) (2000). Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding and her findings at Sections 718.202(a)(1)-(3) (2000) and 718.205(c)(1) and (c)(3) (2000). *Elms v. Peabody Coal Co.*, BRB No. 97-0795 BLA (Feb. 24, 1998)(unpub.). However, the Board vacated the administrative law judge's findings pursuant to Sections 718.202(a)(4) (2000) and 718.205(c)(2) (2000) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) (2000) and to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2) (2000). Accordingly, the administrative law judge again awarded benefits.

In response to employer's second appeal, the Board vacated the administrative law judge's determination that the existence of pneumoconiosis was established at Section 718.202(a)(4) (2000). *Elms v. Peabody Coal Co.*, BRB No. 99-1060 BLA (July 14, 2000)(unpub.). The Board also vacated the administrative law judge's finding that the evidence was sufficient to establish that

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<sup>1</sup>Claimant is Wilma Elms, the widow of the miner, Norvell Elms. Claimant filed her claim for benefits on August 25, 1993. Director's Exhibit 12.

<sup>2</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.

pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2) (2000).

On remand for the second time, the administrative law judge found that Dr. Sloan's opinion, that the miner suffered from pneumoconiosis, in conjunction with the opinions of Drs. Jones, Long and Moore, outweighed Dr. Renn's contrary opinion. The administrative law judge, therefore, found the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge also found claimant entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment, and that the presumption was not rebutted. The administrative law judge further found the weight of the medical opinion evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 718.205(c)(2) and, accordingly, awarded benefits.

In response to employer's third appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Elms v. Peabody Coal Co.*, BRB No. 01-0868 BLA (July 31, 2002)(unpub.)(*Elms III*). Based on the decision of the United States Court of Appeals for the Seventh Circuit<sup>3</sup> in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7<sup>th</sup> Cir. 2001), the Board reversed "the administrative law judge's determination that Dr. Sloan's medical opinion is a reasoned opinion sufficient to support claimant's burden in this case." *Elms III*, slip op. at 5. Moreover, in light of its holding regarding Dr. Sloan, the Board vacated "the administrative law judge's finding that the opinions of Drs. Long and Jones [were] well-reasoned and documented because they [were] consistent with Dr. Sloan's opinion." *Id.* The Board also "agree[d] with employer that the administrative law judge improperly rejected Dr. Renn's opinion." *Id.* Accordingly, the Board vacated the administrative law judge's findings pursuant to Section 718.202(a)(4) and 718.205(c)(2) and remanded the case for further consideration. *Id.* at 5-6.

On remand for the third time, the administrative law judge found the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). 2004 Decision and Order on Remand at 5. Additionally, the administrative law judge found the medical evidence insufficient to establish that pneumoconiosis was a substantially contributing cause of the

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<sup>3</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because claimant's coal mine employment occurred in Illinois. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

miner's death pursuant to 718.205(c)(2). *Id.* at 5-6. Accordingly, the administrative law judge denied benefits.

On appeal, claimant currently contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant's Brief at 4-11. Claimant also asserts that the administrative law judge erred in failing to find that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). *Id.* at 11. Employer responds, urging affirmance of the administrative law judge's denial 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. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge committed numerous errors in finding the evidence insufficient to establish the existence of pneumoconiosis. Claimant argues that the administrative law judge erred in finding Dr. Jones's opinion insufficient to establish the existence of pneumoconiosis. Based upon a review of the evidence, Dr. Jones diagnosed coal workers' pneumoconiosis. Claimant's Exhibit 9. The administrative law judge found that Dr. Jones's opinion was insufficient to establish the existence of pneumoconiosis because he failed to address the miner's smoking history or to point to any specific medical findings that supported his diagnosis.<sup>4</sup> 2004 Decision and Order on Remand at 5. The administrative law judge also found that the Dr. Jones failed to explain why the miner's respiratory symptoms, which he concluded were attributable to coal dust exposure, could not have been due to other potential factors. *Id.* Contrary to claimant's assertion,

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<sup>4</sup>Contrary to claimant's contentions, the administrative law judge did not discredit Dr. Jones's opinion because he was not aware of the miner's smoking history, but rather she found that Dr. Jones did not explain why the miner's former smoking history was not a cause of his respiratory problems. 2004 Decision and Order on Remand at 5. Similarly, the administrative law judge did not require Dr. Jones to *rule out* all other potential causes of the miner's lung disease. Rather, the administrative law judge required Dr. Jones to *adequately explain* why the miner's respiratory symptoms were due to coal dust exposure rather than other potential factors. *Id.*

notwithstanding Dr. Jones's reference to the miner's treatment and hospitalization records, it was reasonable for the administrative law judge to conclude that Dr. Jones fails to "point to any specific objective medical findings" that support his diagnosis of pneumoconiosis and that he "does not adequately explain how [he] concludes that the respiratory symptoms found in the Miner are due to coal mine dust exposure as opposed to other potential factors." 2004 Decision and Order on Remand at 5; see *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

Additionally, claimant asserts that the administrative law judge erred in finding Dr. Long's opinion insufficient to establish the existence of pneumoconiosis. On a November 9, 1993 form, Dr. Long stated that the miner suffered from "arteriosclerotic heart disease as well as [chronic obstructive lung disease] which was due, at least in part, to pneumoconiosis caused by his coal mine employment." Director's Exhibit 23. The administrative law judge found that Dr. Long's opinion was insufficient to establish the existence of pneumoconiosis because she failed "to provide the specific medical findings upon which she relie[d] to conclude that pneumoconiosis was present." 2004 Decision and Order on Remand at 5. In this case, the administrative law judge properly discredited Dr. Long's diagnosis of pneumoconiosis because she found that it was not sufficiently reasoned. *Freeman United Coal Co. v. Cooper*, 965 F.2d 443, 16 BLR 2-74 (7th Cir. 1992); see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields*, 10 BLR at 1-21-22; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

We also reject claimant's contention that the administrative law judge was required to provide an explanation for changing her findings regarding whether the opinions of Drs. Jones and Long were sufficient to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). When the Board vacates an administrative law judge's decision, it annuls or sets aside that decision, rendering it of no force or effect. *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985).

We next address claimant's request that the Board reconsider its holding that Dr. Sloan's opinion does not qualify as a reasoned opinion in light of the Seventh Circuit's decision in *McCandless*. Claimant's Brief at 6-8. Claimant's argument has merit. As *McCandless* was issued after the administrative law judge's 2001 Decision and Order on Remand, it would have been more appropriate for the administrative law judge to have reconsidered Dr. Sloan's opinion in light of *McCandless*. See *U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); see also *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 (2000)(*en banc*)(Hall, C.J., and Nelson, J., concurring and

dissenting); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). We, therefore, modify our holding regarding this issue, enunciated in our 2002 Decision and Order, and instruct the administrative law judge on remand to reconsider Dr. Sloan's opinion in light of *McCandless* and, more recently, *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2-584 (7<sup>th</sup> Cir. 2002). Because the administrative law judge's findings pursuant to Section 718.202(a)(4), in her most recent Decision and Order, are affected by our reconsideration of the administrative law judge's earlier treatment of Dr. Sloan's opinion, we vacate her findings pursuant to this subsection. We instruct the administrative law judge on remand to reconsider Dr. Sloan's opinion in conjunction with the other relevant evidence in the record pursuant to Section 718.202(a)(4).

Because the administrative law judge's Section 718.205(c)(2) finding, that claimant failed to establish that the miner's pneumoconiosis substantially contributed to his death, is dependent upon her finding that claimant failed to establish the existence of pneumoconiosis, we vacate the administrative law judge's Section 718.205(c)(2) finding as well. We instruct the administrative law judge that if, on remand, she finds the evidence sufficient to establish the existence of pneumoconiosis, she must then determine whether pneumoconiosis was a substantially contributing cause of the miner's death. *See Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7<sup>th</sup> Cir. 1992).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is vacated, 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

I concur.

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BETTY JEAN HALL  
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's decision to vacate the administrative law judge's decision denying benefits and to remand the case for reconsideration. Because the administrative law judge to whom this case has been assigned is now retired, a new administrative law judge will make his or her own credibility determinations of the medical evidence. I note that the Board thus far has affirmed both crediting and discrediting Dr. Jones's opinion.

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REGINA C. McGRANERY  
Administrative Appeals Judge