

BRB Nos. 09-0432 BLA
and 09-0433 BLA

MILDRED MAYNARD)	
(o/b/o and Widow of BERNIE MAYNARD))	
)	
Claimant-Respondent)	
)	
v.)	
)	
OMAR MINING COMPANY)	DATE ISSUED: 04/16/2010
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits on Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

James M. Haviland (Pyles, Haviland, Turner & Mick, LLP), Charleston, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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:

Employer appeals the Decision and Order – Awarding Benefits on Remand (04-BLA-6645 and 04-BLA-6646) of Administrative Law Judge Linda S. Chapman rendered on a subsequent miner’s claim and a survivor’s claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ This case is before the Board for the second time. In her original Decision and Order, in which benefits were awarded in both the miner’s subsequent claim and the survivor’s claim,² the administrative law judge adjudicated the claims pursuant to 20 C.F.R. Part 718 and credited the miner with at least forty years of coal mine employment. With respect to the miner’s claim, the administrative law judge found that the new evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, thus, she found that it established a “material change” in the miner’s condition pursuant to 20 C.F.R. §725.309. Turning to the merits of the miner’s claim, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and that the miner’s total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). With respect to the survivor’s claim, the administrative law judge found that the evidence established that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both the miner’s claim and the survivor’s claim.

Pursuant to employer’s appeal, the Board vacated the administrative law judge’s award of benefits in both the miner’s and survivor’s claims, and remanded the case for further consideration of the relevant evidence in both claims. *M.M. [Maynard] v. Omar Mining Co.*, BRB Nos. 07-0595 BLA and 07-0773 BLA (Apr. 30, 2008)(unpub.). With respect to the miner’s claim, the Board affirmed the administrative law judge’s finding that the medical evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a) and that the miner was totally disabled

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not affect the instant case, as the claims were filed prior to January 1, 2005.

² Claimant is the surviving spouse of the miner, who died on January 14, 2003. Director’s Exhibits 8, 33. In addition to her claim for survivor’s benefits, which she filed on July 7, 2003, Director’s Exhibit 31, claimant is also pursuing the subsequent miner’s claim, which was filed on November 4, 2002.

pursuant to Section 718.204(b).³ *Id.* at 3 n.5. However, the Board vacated the administrative law judge's finding that the evidence was sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c) and remanded the case for the administrative law judge to more fully explain her credibility determinations in light of the totality of the medical reports. *Id.* at 9-10. In addition, the Board held that, in light of the administrative law judge's finding that disability causation was due to legal pneumoconiosis, the administrative law judge must first render a specific finding regarding the presence or absence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *Id.* at 10. With respect to the survivor's claim, the Board vacated the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), holding that the administrative law judge committed the same errors in weighing the medical opinion evidence that she made in finding disability causation established at Section 718.204(c). Therefore, in light of the holding to vacate the administrative law judge's finding at Section 718.204(c) and remand for further consideration therein, the Board also vacated the administrative law judge's finding at Section 718.205(c) and remanded the survivor's claim for further consideration of the relevant evidence. *Id.* at 12.

On remand, the administrative law judge initially found the medical evidence sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4), in both the miner's and the survivor's claims. With respect to the miner's claim, the administrative law judge found the evidence sufficient to establish that the miner's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c). With respect to the survivor's claim, the administrative law judge found that the miner's death was due to his pneumoconiosis pursuant to Section 718.205(c). Accordingly, the administrative law judge again awarded benefits in both the miner's claim and the survivor's claim.

On appeal, employer challenges the administrative law judge's award of benefits in both the miner's and survivor's claims, arguing that the administrative law judge erred in failing to follow the Board's instructions on remand, as she merely reiterated her findings from her prior decision. Employer contends that the administrative law judge again erred in crediting the medical opinion of Dr. Green over the contrary opinions of Drs. Oesterling, Zaldivar and Castle, arguing that the administrative law judge did not provide valid bases for her conclusions. Employer further argues that the administrative

³ The Board affirmed, as unchallenged by the parties, the administrative law judge's findings that the new evidence established the existence of clinical pneumoconiosis and, thus, that it established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.202(a), 725.309(d). *M.M. [Maynard] v. Omar Mining Co.*, BRB Nos. 07-0595 BLA and 07-0773 BLA, slip op. at 3 n.5 (Apr. 30, 2008) (unpub.).

law judge erred in relying on the preamble to the amended regulations in weighing the conflicting medical opinion evidence. In response, claimant urges affirmance of the administrative law judge's award of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a substantive brief on the merits of either claim for benefits. However, in a footnote, the Director urges the Board to reject employer's contention that the administrative law judge erred in considering the preamble to the amended regulations in weighing the medical opinion evidence, arguing that it is within the administrative law judge's discretion to consider the preamble to the amended regulations in evaluating the credibility of the medical evidence.

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in the miner's claim, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In the survivor's claim, in order to establish entitlement to 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). Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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 *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mining employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3, 4.

Employer, in challenging the administrative law judge's award of benefits in both the miner's and survivor's claims, contends that the administrative law judge erred in failing to follow the mandate of the Board on remand and, thus, again erred in her weighing of the conflicting medical evidence of record. Employer's Brief at 12-14. Employer specifically argues that the administrative law judge committed numerous errors in crediting Dr. Green's opinion, that the miner's disabling emphysema was due in part to his coal dust exposure, over the contrary opinions of Drs. Oesterling, Zaldivar and Castle, that the miner's disabling emphysema was in the form of bullous emphysema due to the miner's smoking history. *Id.* at 25-28. In particular, employer contends that the administrative law judge mischaracterized the opinions of Drs. Oesterling, Zaldivar and Castle, in discussing the cause of the focal emphysema diagnosed by the physicians and whether this focal emphysema contributed to the miner's total disability and, subsequently, to his death. *Id.* at 16-23. Employer also contends that the administrative law judge again mischaracterized the opinions of Drs. Oesterling, Zaldivar and Castle, in finding that they failed to address the findings of Dr. Jelic, the autopsy prosecutor. *Id.* at 23-24. In addition, employer contends that the administrative law judge erred in according greater weight to the opinion of Dr. Green, based on her finding that Dr. Green's professional credentials are superior to those of the other physicians. *Id.* at 27. Lastly, employer contends that the administrative law judge erred in using the preamble to the amended regulations in weighing the medical opinion evidence of record. *Id.* at 29-33.

Pursuant to Section 718.202(a)(4), after noting the Board's remand instructions, the administrative law judge stated that, in her prior decision, she found that pneumoconiosis was established based on the autopsy evidence, as well as the opinions of Drs. Zaldivar and Castle, who relied on the autopsy evidence in diagnosing the presence of simple pneumoconiosis. Decision and Order on Remand at 4. In addition, the administrative law judge noted that she previously found that Dr. Green discussed the contribution of the miner's coal mine employment history in the development of his emphysema and, therefore, that Dr. Green diagnosed legal pneumoconiosis.⁵ *Id.* Consequently, the administrative law judge found that, based on the opinion of Dr. Green, claimant established the presence of "not only clinical pneumoconiosis, based on the autopsy findings, but legal coal workers' pneumoconiosis." *Id.* As employer contends, however, the administrative law judge did not provide an adequate discussion of her weighing of the conflicting medical opinions of record in resolving the issue of the existence of legal pneumoconiosis, as instructed by the Board in its prior decision. *Maynard*, slip op. at 10. Rather, the administrative law judge merely reiterated her prior

⁵ "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).

finding that Dr. Green related the miner's disabling emphysema to his coal mine employment history, but she did not discuss the contrary evidence of record. Decision and Order on Remand at 4. Specifically, the administrative law judge did not discuss the opinions of Drs. Oesterling, Zaldivar and Castle, that the miner's disabling emphysema was not his focal emphysema, but was rather his bullous emphysema, which was related to his smoking history, and not related to his coal mine employment. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established legal pneumoconiosis at Section 718.202(a)(4) and remand the case for the administrative law judge to provide a more detailed discussion and weighing of the specific evidence of record. 20 C.F.R. §§718.201, 718.202(a)(4); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *compare* Claimant's Exhibit 1 *with* Employer's Exhibits 1-3, 6, 7, 9.

The administrative law judge then considered the issue of the cause of the miner's total respiratory disability, again finding that, based on Dr. Green's opinion, claimant has established that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c). The administrative law judge credited Dr. Green's opinion because she found that it was more consistent with the autopsy findings of Dr. Jelic, diagnosing focal emphysema.⁶ Decision and Order on Remand at 5-6. Specifically, the

⁶ Based on the results of his macroscopic examination of the miner's lungs, Dr. Jelic diagnosed the following conditions: (1) simple coal workers' pneumoconiosis; (2) marked emphysema with focal formation of bullae (bullous emphysema); (3) acute exacerbation of chronic bronchitis; (4) acute bronchopneumonia involving right upper and right lower lobes; (5) organizing pneumonia involving right middle and lower lobes, and left upper lobe; (6) adhesions between the left lung, chest wall and diaphragm; and (7) liver congestion. Director's Exhibit 35. Dr. Jelic, however, did not address the etiology of the miner's emphysema and chronic bronchitis. Specifically, these diagnoses were based on Dr. Jelic's microscopic examination findings, which included:

Simple coal workers' pneumoconiosis presents with multiple macules throughout the all [sic] lung lobes and occasional dust nodules. Anthracotic and polarizable silica/silicate particles are numerous and associated refractile collagen fibrosis is conspicuous. Local emphysema surrounding macules is marked. Acute exacerbation of chronic bronchitis is present. The latter presents with focal squamous metaplasia of the respiratory epithelium. Emphysema is marked. The large anthracosilicotic nodule in the right lower lobe for the most part of it's [sic] part exhibits ossification with presence of hematopoietic elements.

Director's Exhibit 35.

administrative law judge noted the concerns expressed in the Board's prior decision with regard to her consideration of the opinions of Drs. Oesterling, Zaldivar and Castle. Nevertheless, the administrative law judge found that, contrary to the Board's description of the medical opinion evidence, the opinions of Drs. Oesterling, Zaldivar and Castle did not address the specific findings of Dr. Green or Dr. Jelic, regarding the etiology of the miner's focal and panacinar emphysema. The administrative law judge therefore found that the opinions of Drs. Oesterling, Zaldivar and Castle are not credible. *Id.* at 4-5. In addition, the administrative law judge accorded greater weight to Dr. Green's opinion, finding that it is consistent with the studies cited by the Department of Labor (DOL) in the preamble to the amended regulations, showing that all types of emphysema can be related to coal dust exposure. *Id.* at 7, 8, 9. The administrative law judge further stated that, in addition to considering the explanations of the respective physicians, the documentation underlying their opinions and the sophistication of those opinions, she also considered their respective qualifications. The administrative law judge found that, while all the physicians have impressive credentials, Dr. Green possesses superior qualifications, based on the depth of Dr. Green's experience in research and subsequent publication in the relevant areas of respiratory disease. *Id.* at 10. Consequently, based on all of these factors, the administrative law judge found that claimant established, by a preponderance of the evidence, that the miner's total disability was due to pneumoconiosis. *Id.*

As employer contends, the administrative law judge did not follow the Board's instructions in reweighing the medical opinion evidence on remand. Rather, the administrative law judge again accorded less weight to the opinions of Drs. Oesterling, Zaldivar and Castle because they did not address the significance of the pathologic findings of focal emphysema, in excluding coal dust exposure as a cause of the miner's totally disabling pulmonary impairment. Decision and Order on Remand at 4-5. However, despite the Board's instruction in its prior decision, *Maynard*, slip op. at 7-9, the administrative law judge again failed to address the significance of the fact that Drs. Oesterling, Zaldivar and Castle indicated that their respective diagnoses of clinical coal workers' pneumoconiosis encompassed a finding of focal emphysema, and that they specifically discussed why focal emphysema did not contribute to the miner's total disability. Drs. Oesterling, Zaldivar and Castle opined that the miner's total disability was not due to his focal emphysema, which is associated with clinical pneumoconiosis, but rather, is the consequence of bullous emphysema which, in this case, is not related to the miner's coal dust exposure. See Employer's Exhibits 1-3, 6, 7, 9. Therefore, contrary to the administrative law judge's characterization of these opinions, Drs. Oesterling, Zaldivar and Castle, in opining that the miner's clinical pneumoconiosis did not contribute to his pulmonary impairment, addressed the miner's focal emphysema as a

cause of his disabling pulmonary impairment.⁷ Consequently, because the administrative law judge did not address the opinions of Drs. Oesterling, Zaldivar and Castle, in their entirety, and did not accurately characterize all aspects of these opinions, we vacate the administrative law judge's decision to discredit their opinions under Section 718.204(c). *See Schoenecker v. Allegheny River Mining Co.*, 8 BLR 1-501 (1986); *Hunley v. Director, OWCP*, 8 BLR 1-323 (1985).

In addition, the administrative law judge again erred in finding that Dr. Green is the only physician to discuss the significance of the miner's history of coal mine employment, as well as his history of cigarette smoking. The administrative law judge stated that, contrary to the Board's holding, she took into account the findings by Drs. Oesterling, Zaldivar and Castle, including their consideration of the miner's smoking and coal dust exposure histories, but again found Dr. Green's opinions to be entitled to greater weight. Decision and Order on Remand at 6-8. However, in discussing the opinions of Drs. Zaldivar and Castle, and most specifically Dr. Oesterling's opinion, the administrative law judge did not consider the doctors' respective opinions in their entirety. In particular, the administrative law judge did not adequately discuss why the physicians opined that the miner's bullous emphysema, as distinct from the miner's focal emphysema, is due to his smoking history, and not his coal dust exposure. Consequently, on remand, the administrative law judge must address whether Drs. Oesterling, Zaldivar and Castle properly took into account the miner's coal mine employment and smoking histories with regard to both his focal emphysema and his bullous emphysema. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Employer's Exhibits 3, 6, 9.

In light of the administrative law judge's failure to follow the Board's instructions on remand and, thus, her failure to provide a complete and adequate discussion of all of the relevant evidence, we vacate her finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c), and remand the case for further consideration of the evidence thereunder. On remand, when reconsidering whether the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and whether the evidence establishes

⁷ Dr. Oesterling opined that the level of the miner's clinical pneumoconiosis appeared "insufficient to have significantly altered structure." Employer's Exhibit 1. Dr. Oesterling, therefore, opined that the miner's clinical pneumoconiosis "would have produced little or no disability or respiratory impairment." *Id.* Dr. Zaldivar indicated that the miner's level of pneumoconiosis would only have been expected to cause a "minuscule amount of damage to the lungs." Employer's Exhibit 6 at 29. Dr. Castle opined that the miner's clinical pneumoconiosis did not play any role in his respiratory impairment. Employer's Exhibit 7 at 15.

that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c), the administrative law judge must address the entirety of the explanations by the physicians for their respective conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Schoenecker*, 8 BLR at 1-503; *Hunley*, 8 BLR at 1-326.

Moreover, on remand, contrary to employer's contention, the administrative law judge may reasonably consider the findings contained in the preamble to the amended regulations, in determining whether a medical opinion is supported by accepted scientific evidence, as determined by the DOL when it revised the definition of pneumoconiosis. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O. [Obush] v. Helen Mining Co.*, BLR , BRB No. 08-0671 BLA (June 24, 2009). However, in so doing, the administrative law judge must be mindful that, while the DOL's findings regarding the scientific studies supporting a view that obstructive lung conditions may be due to coal dust exposure, it still remains claimant's burden to prove that the miner had a lung disease that falls within the definition of pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(4), 718.204(c); *see* 65 Fed. Reg. 79938-44.

With respect to the survivor's claim, the administrative law judge again found that the evidence established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), crediting Dr. Green's opinion, that the miner's medical and legal pneumoconiosis contributed to his death,⁸ over the contrary opinions of Drs. Oesterling, Zaldivar and Castle.⁹ Decision and Order on Remand at 10-12. In crediting Dr. Green's opinion regarding the cause of the miner's death, the administrative law judge again accorded less weight to the opinions of Drs. Oesterling, Zaldivar and Castle, because they failed to address the significance of the miner's focal emphysema as a factor in his death, and she again accorded greater weight to Dr. Green's opinion because he discussed the available medical evidence in depth and took into account the miner's smoking and coal mine employment histories. *Id.* at 11. However, in light of our decision to vacate the

⁸ Dr. Green opined that the miner died of respiratory failure due to pneumoconiosis and chronic obstructive pulmonary disease, and that the miner's coal dust exposure was the major underlying factor that caused his death. Claimant's Exhibit 1.

⁹ Dr. Oesterling opined that the miner's coal mine dust exposure "in no way hastened, contributed to, or caused [his] death." Employer's Exhibits 1, 9. Drs. Zaldivar and Castle specifically stated that neither coal workers' pneumoconiosis nor coal dust exposure played any role in the miner's death. Employer's Exhibits 2, 3, 6, 7.

administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and because her findings on disability causation under Section 718.204(c) are based on the same reasons, we also vacate the administrative law judge's findings pursuant to Section 718.205(c), and remand the case to the administrative law judge for further consideration of the survivor's claim.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits on Remand is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion and the Board's previous opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge