

BRB No. 11-0563 BLA

REBECCA MORGAN)	
(Widow of GEORGE MORGAN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LUCKY STAR COAL COMPANY)	
)	DATE ISSUED: 04/27/2012
Employer-Respondent)	
)	
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 Denying Benefits of Administrative Law Judge Joseph E. Kane, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand Denying Benefits (2007-BLA-05445) of Administrative Law Judge Joseph E. Kane rendered on a 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

¹ Claimant is the surviving spouse of the miner, who died on February 18, 2006. Director's Exhibits 1, 12.

U.S.C. §§921(c)(4) and 932(l)). This case involves a survivor's claim filed on March 31, 2006, and is before the Board for the second time.

In his initial decision, after crediting the miner with seven years of coal mine employment,² the administrative law judge found that claimant failed to establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's findings of seven years of coal mine employment, and that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *R.M. [Morgan] v. Lucky Star Coal Co.*, BRB No. 09-0200 BLA, slip op. at 2-3 (Oct. 29, 2009) (McGranery, J., dissenting) (unpub.). The Board vacated, however, the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Specifically, the Board held that the administrative law judge's determination to discredit the opinion of Dr. Koura, that the miner suffered from pneumoconiosis, did not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), because the administrative law judge provided no explanation for his finding that Dr. Koura's opinion was not well-reasoned or well-documented. *Morgan*, BRB No. 09-0200 BLA, slip op. at 4-5. In addition, the Board held that if the administrative law judge determined, on remand, that Dr. Koura's opinion was documented and reasoned, he must also reconsider whether Dr. Koura's opinion was entitled to additional weight as that of the miner's treating physician, pursuant to 20 C.F.R. §718.104(d). Therefore, the Board remanded the case to the administrative law judge to reconsider Dr. Koura's opinion, together with those of Drs. Rosenberg and Repsher, who opined that the miner did not have pneumoconiosis, and to explain his findings. *Id.* at 6.

On remand, the administrative law judge reconsidered the medical opinions of Drs. Koura, Rosenberg, and Repsher, and again found that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).³ Accordingly, the administrative law judge denied benefits.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

³ On remand, the administrative law judge accepted additional briefing from the parties, and correctly determined that recent amendments to the Act do not affect this case, because claimant did not establish that the miner had at least fifteen years of coal

On appeal, claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish that the miner had pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), asserting that the administrative law judge improperly discounted Dr. Koura's opinion. Claimant's Brief at 2-5. Claimant's argument is without merit.

In considering, on remand, whether claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge evaluated the opinions of Drs. Koura, Rosenberg, and Repsher, as instructed by the Board. Dr. Koura, the miner's treating physician, recorded a diagnosis of chronic obstructive pulmonary disease in his treatment notes. Director's Exhibit 14. In responses to a questionnaire submitted to him by claimant's attorney, Dr. Koura indicated that the miner suffered from a pulmonary disease related to coal dust inhalation, or legal pneumoconiosis,⁴ and stated that he based his conclusion on the miner's history of coal

mine employment, and because the miner's claims for benefits were denied. See Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)).

⁴ 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment

dust exposure, symptoms of dyspnea, and on the scarring visible on x-rays. Director's Exhibit 13. In contrast, Drs. Rosenberg and Repsher opined that the miner did not suffer from pneumoconiosis or any coal dust-related disease or impairment. Employer's Exhibits 5-8.

The administrative law judge found that Dr. Koura's medical opinion did not meet claimant's burden to establish the existence of pneumoconiosis, because it was unreasoned and undocumented. The administrative law judge acknowledged that Dr. Koura was the miner's treating physician, but permissibly accorded his opinion "no weight," because the physician provided insufficient explanation for his " cursory" opinion that the miner's pulmonary disease was causally related to coal mine dust exposure.⁵ See 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order on Remand at 2-3. Regarding Dr. Koura's stated bases for his opinion, the administrative law judge correctly found that, without further explanation, a history of coal mine dust exposure is not sufficient to justify a diagnosis of pneumoconiosis, see *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994), and that neither symptoms of dyspnea, nor "scarring on chest x-ray" are conditions solely attributable to pneumoconiosis.⁶ Decision and Order on Remand at 2-3. Contrary to claimant's argument, because the administrative law judge found that Dr. Koura's opinion was unreasoned and undocumented, it was unnecessary for him to consider Dr. Koura's opinion in light of the factors set forth at 20 C.F.R. §718.104(d)(1)-(4), relevant to the nature and duration of the miner's relationship

"significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁵ To the extent that Dr. Koura's treatment notes were submitted as documentation for his conclusions, the administrative law judge found the notes to be largely illegible. Decision and Order on Remand at 2.

⁶ The administrative law judge noted Dr. Repsher's statement that the miner's dyspnea was most likely caused by his heart condition. Decision and Order on Remand at 2, *citing* Employer's Exhibit 5. The administrative law judge further found, as was within his discretion, that without further explanation, Dr. Koura's reliance on "scarring on chest x-ray" was merely "an x-ray restatement," and did not constitute a reasoned and documented medical opinion. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); Decision and Order on Remand at 3.

with the treating physician, and the frequency and extent of the treatment. *See* 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d at 513, 22 BLR at 2-647 (holding that an administrative law judge must evaluate the opinions of treating physicians just as they consider those of other experts).

The task of determining the credibility of a physician's opinion is committed to the discretion of the administrative law judge. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002). Because the administrative law judge explained his findings, as we instructed him to do, and substantial evidence supports the administrative law judge's determination to discredit the opinion of Dr. Koura, the only medical opinion supportive of a finding that the miner had pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Therefore, we affirm the administrative law judge's finding that claimant did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge