

BRB No. 99-0425 BLA

BEULAH BOWERS)	
(Widow of JAMES P. BOWERS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	DATE ISSUED:
COMPANY)	
)	
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 After Remand of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

William D. Turner (Crandall, Pyles, Haviland & Turner, LLP), Lewisburg, West Virginia, for claimant.

Richard A. Dean (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order After Remand (95-BLA-2257) of Administrative Law Judge Frederick D. Neusner awarding benefits on 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 This case has been before the Board

¹ The miner, James P. Bowers, died on July 10, 1990. Director's Exhibit 9. Claimant, the miner's widow, filed her survivor's claim on April 22, 1994, which was denied by the district director on October 6, 1994 and October 14, 1994. Director's Exhibits 1, 12, 22. Claimant subsequently requested a hearing before an administrative law judge.

previously. In the original Decision and Order, the administrative law judge found thirty-seven years of coal mine employment. Decision and Order dated January 27, 1997. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was insufficient to establish either the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205(c). Decision and Order dated January 27, 1997. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (3), but vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (4) and 718.205(c) and remanded the case for the administrative law judge to reconsider the medical opinion evidence thereunder. *Bowers v. Eastern Associated Coal Co.*, BRB No. 97-0804 BLA (February 6, 1998)(unpublished).

On remand, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) and 718.205(c). Decision and Order After Remand at 7-8. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in failing to consider all of the evidence of record in concluding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(4) and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer also contends that its due process rights were violated as it received no notice that the case was returned to the administrative law judge. Claimant responds that the administrative law judge's Decision and Order is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Fourth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of

death when it actually hastens the miner's death.² *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

²This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3.

Employer initially contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), asserting that the administrative law judge failed to weigh all the relevant evidence of record or adequately explain his weighing of the evidence. Employer's Brief at 12. Specifically, employer contends that the administrative law judge failed to consider the opinions of Drs. Rasmussen, Fino and Tuteur and offered no rationale for not accepting or rejecting these opinions in his analysis and further erred in failing to weigh all the evidence pursuant to 20 C.F.R. §718.202(a) in determining if claimant established the existence of pneumoconiosis. Employer's Brief at 13-20. Employer's contentions have merit. In the prior decision, the administrative law judge concluded that the opinions of Drs. Fino and Tuteur were reasoned and supported by the record, but did not discuss these opinions or their probative value on remand. Decision and Order dated January 27, 1997; Decision and Order After Remand at 7. Consequently, as the administrative law judge failed to specifically address the relevant evidence pursuant to Section 718.202(a)(4) or sufficiently explain his rationale for crediting or discrediting the evidence, a remand is required. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge, in the instant case, found the existence of pneumoconiosis established based on the evidence of the length of the miner's coal mine employment, the presence of anthracotic pigmentation in the miner's lungs, the award of state compensation benefits for total disability due to pneumoconiosis, the findings of the attending physicians and medical evidence that established the miner's disabling pulmonary condition from 1986 to the time he died in 1990.³ Decision and Order After Remand at 7. Although these factors may be relevant in determining the weight to be assigned a particular medical opinion, the administrative law judge must first determine if the medical opinions of record are reasoned and documented and therefore credible. *See Trumbo, supra*. As the administrative law judge failed to address the conflicting medical opinion evidence at Section 718.202(a)(4), we vacate the administrative law judge's finding that the existence of pneumoconiosis is established and remand the case for the administrative law judge to determine the credibility of the physicians' opinions of record and to specifically address the conflicting medical opinion evidence. *See Director's Exhibits 4, 9; Claimant's Exhibits 1, 2, 5; Employer's Exhibits 5-8; Trumbo, supra; Fields v. Island*

³ Employer correctly contends that the finding of the West Virginia State Pneumoconiosis Board is not binding on the administrative law judge, but it is relevant evidence that the administrative law judge must discuss and give reasons for accepting or rejecting. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744 (1985); *Dalton v. Eastern Associated Coal Corp.*, 4 BLR 1-1 (1982). Finally, a diagnosis of anthracotic pigmentation is not a diagnosis of pneumoconiosis as defined by the Act. *See Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *Dobrosky v. Director, OWCP*, 4 BLR 1-680 (1982).

Creek Coal Co., 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111 (1979). Furthermore, the administrative law judge must specifically address the biopsy evidence and determine its credibility pursuant to 20 C.F.R. §718.202(a)(2). Additionally, we note that subsequent to the issuance of the administrative law judge's Decision and Order After Remand, the United States Court of Appeals for the Fourth Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000). Consequently, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), then the administrative law judge, on remand, must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis.⁴ *Compton, supra*.

With respect to Section 718.205(c), employer argues that the administrative law judge violated 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), in finding that the evidence established that the miner's death was due to pneumoconiosis in that he failed to specifically determine if Dr. Salon's opinion is reliable or to discuss and weigh the remaining medical opinions of record. Employer's Brief at 21-25. We agree. In finding that claimant established that the miner's death was due to pneumoconiosis, the administrative law judge relied upon the opinion of Dr. Salon, the miner's attending physician, that pneumoconiosis contributed to the miner's death by aggravating his overall condition. Decision and Order After Remand at 8. The administrative law judge failed, however, to specifically determine if the opinion of Dr. Salon was reasoned and documented or to specifically discuss and consider the opinions of Drs. Fino, Tuteur and Rasmussen or the findings of the West Virginia State Pneumoconiosis Board as they relate to claimant's burden of proof to establish that the miner's death was due to pneumoconiosis. Claimant's Exhibit 5; Employer's Exhibits 5-8; Director's Exhibit 25; *Hicks, supra*; *Akers, supra*;

⁴ If the administrative law judge determines that the evidence is sufficient to establish the existence of pneumoconiosis, the administrative law judge must further determine if the evidence of record is sufficient to establish if the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. See *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

Trumbo, supra. Additionally, the administrative law judge found that the miner's hypoxemia was due to pneumoconiosis and that it hastened the miner's death based upon Dr. Salon's opinion, but failed to discuss Dr. Fino's opinion, which was found to be reasoned in the prior decision, that the miner's hypoxia was due to emphysema. Decision and Order dated January 27, 1997; Decision and Order After Remand at 8; *Hicks, supra*. Under the APA, the administrative law judge is required to address all relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. 5 U.S.C. §557; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Although the administrative law judge is empowered to weigh the evidence, as he failed to specifically address the reliability of the medical opinions of record and the respective weight to be accorded each opinion, the basis for the administrative law judge's credibility determinations in this particular case can not be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). We therefore vacate the administrative law judge's findings under Section 718.205 and remand this case to the administrative law judge to specifically discuss all the relevant evidence of record and to set forth the basis for his credibility determinations.

Finally, employer contends that its due process rights were violated as the administrative law judge failed to notify employer that the case had been returned for further consideration pursuant to the Board's remand order. Employer's Brief at 25-26. Employer's contention is without merit. The United States Court of Appeals for the Fourth Circuit has held that due process is violated when a party is deprived of a fair opportunity to mount a meaningful defense. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). In the instant case, employer was timely notified of its potential liability for benefits in the instant survivor's claim and was given the opportunity to fully present its case and introduce documentary evidence in support thereof at the hearing before the administrative law judge. Further, the administrative law judge, on remand, did not reopen the record for submission of additional evidence by claimant nor was there any change in the law which required additional briefing by the parties. Rather, the administrative law judge reconsidered the submitted evidence of record pursuant to the Board's remand instructions. Inasmuch as employer has demonstrated no core violation of due process, we reject employer's contention based on the circumstances of the instant case. *Lockhart, supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge