

BRB Nos. 99-1229 BLA  
and 99-1229 BLA-A

GRACE E. POPICH )  
(Widow of STEVE J. POPICH) )

Claimant-Petitioner )  
Cross-Respondent )

v. )

CONSOLIDATION COAL COMPANY )

Employer- )  
Respondent )  
Cross-Petitioner )

DIRECTOR, OFFICE OF )  
WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )

DATE ISSUED:

DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order Denying Benefits of Richard A.  
Morgan, Administrative Law Judge, United States Department of Labor.

Charles E. Evans (Evans, Portnoy & Quinn), Pittsburgh, Pennsylvania,  
for claimant.

George Stipanovich (Strassburger McKenna Gutnick & Potter),  
Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY,  
Administrative Appeals Judge, and NELSON, Acting Administrative  
Appeals Judge.

HALL, Chief Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (99-BLA-0544) of Administrative Law Judge Richard A. Morgan 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). The administrative law judge credited the miner with at least twenty-five years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718, based on claimant's December 11, 1997 filing date. Addressing the merits, 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)(2) and 718.203(b). However, he found the evidence insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in this survivor's claim.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

In its cross-appeal, employer challenges the administrative law judge's finding that the evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). Claimant has not responded to employer's cross-appeal. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in employer's cross-appeal.

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<sup>1</sup> Claimant is the widow of the miner, Steve J. Popich, who died on March 20, 1997. Director's Exhibit 11. Claimant filed her survivor's claim on December 11, 1997. Director's Exhibit 1. The survivor's claim is the only claim currently before the Board.

<sup>2</sup> The parties do not challenge the administrative law judge's decision to credit the miner with at least twenty-five years of coal mine employment or his findings pursuant to 20 C.F.R. §§718.202(a)(1), (3), (4), 718.203(b) and 718.205(c)(1), (3). Therefore, these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a survivor's claim filed after January 1, 1982, claimant must establish that the miner had 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. 20 C.F.R. §§718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Death due to pneumoconiosis may be established by showing that the miner's death was hastened by pneumoconiosis. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); see also *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

In order to establish entitlement to survivor's benefits, claimant must first establish the existence of pneumoconiosis pursuant to Section 718.202(a). In weighing the evidence pursuant to Section 718.202(a), the administrative law judge recognized that the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has 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 miner suffers from the disease. Decision and Order at 16; *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The administrative law judge then considered the relevant evidence under each of the separate subsections and found that while the evidence was insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(1), (3) and (4), the autopsy evidence was sufficient to establish "legal" pneumoconiosis pursuant to Section 718.202(a)(2). Decision

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<sup>3</sup> In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the United States Court of Appeals for the Third Circuit held that the fact-finder must first consider each of the four regulatory methods of establishing the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), and then weigh all of the conflicting evidence together under Section 718.202(a)(1)-(4) prior to making a finding regarding that element of entitlement.

<sup>4</sup> The administrative law judge found that the medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3) and (4), which the parties do not challenge on appeal, see discussion, *supra* at n.2.

and Order at 16-19. In particular, the administrative law judge found that the autopsy prosector included “marked anthracosis” among his findings on gross examination of the miner, see Director’s Exhibit 13, and that this finding was supported by Dr. Perper’s microscopic findings and “somewhat by Dr. Kleinerman’s findings of black granular pigment.” Decision and Order at 16; Director’s Exhibit 24; Employer’s Exhibits 1, 2. The administrative law judge then stated that anthracosis is encompassed in the legal definition of pneumoconiosis pursuant to 20 C.F.R. §718.202, if it causes a respiratory or pulmonary impairment and is significantly related to or substantially aggravated by the miner’s coal dust exposure. Decision and Order at 16. The administrative law judge concluded that “[w]hile employer’s pathologists may not interpret these findings as ‘clinical’ CWP [coal workers’ pneumoconiosis], I find they establish CWP as defined by the Act and regulations.” *Id.*

While the administrative law judge has set forth the legal standards for considering the relevant evidence pursuant to Section 718.202(a), Decision and Order at 16, nonetheless, he has not fully explained his finding pursuant to Section 718.202(a)(2), inasmuch as he has not explicitly discussed the evidence supportive of a finding that the miner’s anthracosis was significantly related to or substantially aggravated by coal dust exposure in coal mine employment as well as that it resulted in a respiratory or pulmonary impairment. Decision and Order at 16; 20

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<sup>5</sup> We note that DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 104 (25th ed., 1974) defines anthracosis as

“a usually asymptomatic form of pneumoconiosis caused by deposition of coal dust in the lungs; it is present in most urban dwellers. When the coal dust accumulates in large amounts, it may result in pneumoconiosis of coal workers.”

<sup>6</sup> The administrative law judge cited to the unpublished holding of the United States Court of Appeals for the Fourth Circuit in *Brooks v. W.P. Coal Co.*, 110 F.3d 59, 1997 WL 158116 (4th Cir. 1997)(unpublished), wherein the court held “anthracosis”--mentioned by name in the regulation--is ‘pneumoconiosis’ if it results in respiratory or pulmonary impairment and is ‘significantly related to or substantially aggravated by’ coal dust exposure.” *Brooks, supra*, 1997 WL 158116 at 3; see also Decision and Order at 16.

<sup>7</sup> The Act defines the term “pneumoconiosis” to mean a chronic dust disease of the lung arising out of employment in a coal mine. 30 U.S.C. §902(b). The implementing regulation at 20 C.F.R. §718.201, provides:

For the purposes of the Act, *pneumoconiosis* means a dust disease

C.F.R. §§718.201, 718.202(a); see *Brooks, supra*; see generally *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995). Moreover, the administrative law judge does not specifically discuss the contrary evidence of record, specifically, the reports of Drs. Kleinerman and Mendelow, wherein the physicians stated that the autopsy reports do not show the existence of coal workers' pneumoconiosis. See Employer's Exhibits 1, 2, 4. While the administrative law judge noted that Dr. Mendelow opined that the autopsy slides showed anthracotic pigment and micro-crystals of silica, he further opined that these findings were insignificant. However, the administrative law judge did not discuss the weight, if any, he accorded this opinion. Decision and Order at 16; Employer's Exhibit 4. Similarly, the administrative law judge stated that Dr. Kleinerman's finding of black granular pigment was supportive of the autopsy prosector's finding of marked anthracosis. The administrative law judge, however, did not discuss the remainder of Dr. Kleinerman's opinion wherein he states that the autopsy evidence was not supportive of a finding of coal workers' pneumoconiosis. Decision and Order at 16; Employer's Exhibits 1, 2; 20 C.F.R.

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of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthracosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §718.201.

<sup>8</sup> Dr. Mendelow reviewed the autopsy slides and found, *inter alia*, severe pan-lobular emphysema and irregular emphysema in all sections, with the fusion of some of these emphysematous areas into larger blebs or bullae. Dr. Mendelow also noted that granular black pigment characteristic of anthracotic pigment was surprisingly scant in amount and was non-specific in distribution, and that there was no recognizable formation of the macule or micro-nodules of even the most minimal degree of simple coal workers' pneumoconiosis present. Employer's Exhibit 4.

<sup>9</sup> Dr. Kleinerman reviewed the autopsy slides and opined that several sections showed small amounts of black granular pigment, along with his other findings of intra alveolar hemorrhage, fibrosis, honeycomb lung with interstitial

§718.201; see *Bueno v. Director, OWCP*, 7 BLR 1-337 (1984); see generally *Barber, supra*. Inasmuch as the administrative law judge has not discussed all of the relevant evidence, we vacate the administrative law judge's Section 718.202(a)(2) finding and remand the case for the administrative law judge to weigh all of the relevant evidence and provide specific bases for his conclusions regarding this evidence. See generally *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

Furthermore, while stating the correct standard applicable pursuant to Section 718.202(a) in this Third Circuit case, and weighing the evidence under each subsection, the administrative law judge nevertheless failed to weigh all of the contrary evidence together, as required under *Williams*. Consequently, if on remand, the administrative law judge again finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), he must then weigh this evidence against the contrary evidence of record to determine whether the record, as a whole, establishes the existence of pneumoconiosis pursuant to Section 718.202(a). *Williams, supra*; see generally *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000).

In light of the administrative law judge's reliance on his findings under Section 718.202(a) in finding that the medical evidence was insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death, we vacate the administrative law judge's Section 718.205(c)(2) finding and remand the case to the administrative law judge for further consideration of the evidence. If, on remand, the administrative law judge again finds the evidence sufficient to establish the existence of pneumoconiosis, he then must consider the medical evidence of record pursuant to Section 718.205(c)(2), in light of his finding that the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a). In particular, the administrative law judge must determine initially whether the opinions of Drs. Mendelow and Kleinerman, that pneumoconiosis, even if it is assumed to exist, did not cause, contribute to or hasten the miner's death, is negatively impacted by the physicians' actual findings that the miner did not have pneumoconiosis, which would be contrary to the administrative law judge's findings on this issue. See generally *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-474 (1986). Consequently, the administrative law judge should consider whether these

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fibrosis, panacinar emphysema and localized areas of organizing pneumonia. However, he further stated that none of the sections showed any lesions of coal workers' pneumoconiosis, either simple or complicated pneumoconiosis. Employer's Exhibits 1, 2.

opinions are responsive to the issue of whether the miner's pneumoconiosis, as found by the administrative law judge, contributed to, or hastened, the miner's ultimate demise. 20 C.F.R. §718.205(c)(2); see *Lukosevicz, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

I concur.

REGINA C. McGRANERY  
Administrative Appeals Judge

NELSON, Acting Administrative Appeals Judge, concurring in part, and dissenting in part:

Inasmuch as the administrative law judge did not address all of the evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), and did not properly weigh all of the relevant evidence as required by *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), I agree with my colleagues that the administrative law judge's findings must be vacated and this case remanded for further findings.

However, the autopsy prosector found, among other afflictions, "marked anthracosis." This diagnosis is sufficient to establish pneumoconiosis. See *Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536, 18 BLR 2-203 (11th Cir. 1993); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990)(a diagnosis of anthracosis is pneumoconiosis for purposes of the Act); *Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989)(the administrative law judge seems to recognize and the employer does not seriously dispute that a diagnosis of anthracosis can be the equivalent of a diagnosis of pneumoconiosis); *Bueno v. Director, OWCP*, 7 BLR 1-337 (1984). See generally *Consolidation Coal Co. v. Smith*, 837 F.2d 321, 11 BLR 2-37 (8th Cir. 1988). Thus, on remand, if credited, this diagnosis is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202.

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge