

BRB No. 02-0473 BLA

RITA A. OUSLEY)
(Widow of HERMAL OUSLEY))
)
 Claimant-Petitioner)
)
 v.)
)
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent)
)

DATE
ISSUED: _____

DECISION and ORDER

Appeal of the Decision and Order on Remand of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

Rita S. Fuchsman, Chillicothe, Ohio, for claimant.

Before: McGRANERY, HALL, and GABAUER, Administrative Appeals
Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (98-BLA-0470) of
Administrative Law Judge Joseph E. Kane denying 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).² This case is before the

¹Claimant is Rita A. Ousley, widow of the miner, who filed her claim for benefits on
December 27, 1996. Director's Exhibit 1. Pursuant to an application for benefits filed by
the miner on February 5, 1991, Administrative Law Judge Rudolf L. Jansen awarded
benefits on the miner's claim in a Decision and Order issued August 25, 1993. No appeal
was taken of Judge Jansen's Decision and Order.

²The 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.

Board for the second time. Initially, the administrative law judge credited the miner with six years of coal mine employment. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant has established the existence of pneumoconiosis arising out of coal mine employment. However, the administrative law judge found the medical evidence of record to be insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(1)-(c)(3) (2000). Accordingly, benefits were denied.

In response to claimant's appeal, the Board upheld the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2) (2000), and, therefore, affirmed his denial of benefits. See *Ousley v. Director, OWCP*, BRB No. 98-1534 BLA (Feb. 28, 2000)(unpub.)(*Ousley I*). Additionally, the Board affirmed, as unchallenged on appeal, the administrative law judge's decision to credit the miner with six years of coal mine employment, his acceptance of the Director's concession of the existence of pneumoconiosis arising out of coal mine employment, and the administrative law judge's findings at Section 718.205(c)(1) and (c)(3) (2000). See *Ousley I, supra*.

Claimant appealed to the United States Court of Appeals for the Sixth Circuit, which vacated the Board's decision affirming the administrative law judge's finding that claimant failed to prove that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2) (2000). See *Ousley v. Director, OWCP*, No. 00-3352 (6th Cir. Apr. 30, 2001)(*Ousley II*). The Sixth Circuit court stated that the Board had erred in affirming the administrative law judge's determination that Dr. Lance's report was unreasoned. The court stated that the administrative law judge's finding was premised upon his determination that the report was undocumented when, in fact, the report was documented. See *Ousley II, slip op.* at 5.

Subsequently, the Board issued an order remanding this case to the Office of Administrative Law Judges for further consideration consistent with the Sixth Circuit court's decision. On second remand, the administrative law judge again found that claimant failed to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). Decision and Order on Remand at 5. Accordingly, benefits were denied.

Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

In her current appeal to the Board, claimant asserts that the administrative law judge erred in again discrediting the opinion of Dr. Lance, the miner's treating physician, pursuant to Section 718.205(c)(2). Claimant's Brief at 3-5. Claimant also contends that the administrative law judge on remand did not follow the mandate of the Sixth Circuit court's opinion. Claimant's Brief at 6-8. The Director has not responded to claimant's appeal.

In his Decision and Order on Remand, the administrative law judge stated that his review of the case was limited to the Sixth Circuit court's holding that it did not agree with the Board that the administrative law judge offered an adequate alternative reason for rejecting Dr. Lance's opinion as unreasoned. Decision and Order on Remand at 4. The administrative law judge further stated that he declined to "readdress his evaluation of other medical evidence or rehash the findings of the various doctors and reports relevant to this issue" that were detailed in his previous decision and that he would "cabin the discussion to [his] analysis of Dr. Lance's opinion and the medical evidence of record supportive of Dr. Lance's opinion...." *Id.*

In reconsidering Dr. Lance's opinion, the administrative law judge again found the report of Dr. Lance to be "inadequately reasoned" regarding the cause of the miner's death. *Id.* Dr. Lance had stated that pneumoconiosis had "markedly decreased [the miner's] respiratory reserve which was further decreased by his cancer and even further impaired due to the radiation therapy he received, which further decreased his respiratory reserve. It is with certainty that I state that his black lung condition hastened his death." Director's Exhibit 8. The administrative law judge stated that "Dr. Lance fails to provide explicit, logical steps that lead from his premise of pneumoconiosis to the miner's death." *Id.* The administrative law judge further stated:

It is not enough, as the Sixth Circuit Court of Appeals appears to intimate, that the record supports Dr. Lance's conclusion that the miner had a restricted respiratory capacity. The fault of Dr. Lance's opinion is the lack of any connection between the miner's death and his restricted respiratory capacity.

Id. at 5. Therefore, the administrative law judge concluded that "[b]ecause Dr. Lance does not explain how underlying documentation supports his diagnosis," his opinion is entitled to less weight. *Id.*

³In his first Decision and Order, the administrative law judge also found Dr. Lance's opinion to be entitled to little weight because it was "inadequately documented." Decision and Order at 6.

Claimant argues that the administrative law judge did not follow the Sixth Circuit's instruction to consider Dr. Lance's opinion in light of all the evidence of record. In its opinion in the case at bar, the court held that "the ALJ's finding that Dr. Lance's opinion was undocumented is not supported by substantial evidence." See *Ousley II, slip op.* at 5. In support of its holding, the Sixth Circuit court stated the following:

The record as a whole documents the Miner's compromised respiratory reserve; in fact, the Miner was awarded benefits on the basis that he was totally disabled from a respiratory or pulmonary impairment arising out of his coal mine employment. This conclusion is supported by the Miner's continued treatment, while hospitalized for lung cancer, of the chronic obstructive pulmonary disease/black lung which was stated to be secondary to his coal mine employment. Moreover, Dr. Gutterman's statement that the Miner's "previous lung condition did not cause me to withhold chemotherapy" is called into question by his contemporaneous report of July 15, 1996, in which he stated: "I am concerned *because of his other medical problems* that he will not do well with chemotherapy and his quality of life would not benefit as much" (emphasis added). Those "other medical problems," as listed in the final diagnoses of July 12, 1996, consisted of "hemoptysis, resolving" and "black lung."

Id. The Sixth Circuit court concluded:

Finally, a reading of the ALJ's decision and order does not support the Board's conclusion that the ALJ offered an adequate alternative reason for rejecting Dr. Lance's opinion in that it was "unreasoned." Instead, the ALJ noted that where a medical opinion is not supported by the underlying documentation, it is unreasoned. Thus, any conclusion that Dr. Lance's opinion was unreasoned is tied directly to the ALJ's erroneous finding that it was undocumented.

Id. We agree with claimant that the administrative law judge did not follow the court's instruction to consider Dr. Lance's opinion in light of all the evidence of record. A lower court must not only comply with the court's mandate, it must "implement both the letter and spirit of the ...mandate." *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993). Instead, the administrative law judge parsed the sentences of Dr. Lance's letter in such a way as to rob them of their meaning. The administrative law judge's analysis thereby violated the established rule that a determination of whether a medical opinion is reasoned should be based on the totality of the report. *E.g., Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94, 13 BLR 2-348, 2-355 (7th Cir. 1990).

A review of Dr. Lance's opinion shows that during the miner's last hospitalization he was given treatment around the clock for his increasing dyspnea. The case at bar arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which held in *Peabody Coal Co., v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), that a treating physician's opinion, that pneumoconiosis had hastened the death of a miner who had died from a heart attack, was adequately supported because the miner's treatment notes indicated pulmonary problems. The evidence of record is replete with references to the miner's dyspnea and black lung disease which the administrative law judge ignored in his opinion.

The plain reading of Dr. Lance's opinion is that because pneumoconiosis significantly decreased the miner's respiratory reserve it hastened death. The administrative law judge asserts that the doctor failed to explain how the significantly decreased respiratory capacity hastened death. What is at issue is the extent to which a doctor is required to detail his analysis in explaining his opinion or, put another way, the extent to which one is expected to read a medical opinion in light of common knowledge of the human body. In that regard, the Sixth Circuit's observation in *Groves* is instructive:

[T]he fact that Groves suffered from heart disease and other medical problems does not affect the import of [the treating physician's] conclusion that pneumoconiosis compromised the function of Groves's lungs and *thereby* hastened his death. (emphasis added).

277 F.3d at 836 n.9, 22 BLR at 2-331 n.9. It seems intuitively obvious that a significantly decreased lung capacity would necessarily interfere with normal bodily function and thereby hasten death. Moreover, courts have recognized that a medical opinion should be read with the understanding that it reflects the doctor's professional judgment:

Like other judgments, a medical judgment is sometimes based upon instinct, the unarticulated and unarticulable opinion that is nonetheless grounded in years of experience. Apparently out of respect for this medical intuition, the regulations permit an ALJ to find total disability on the basis of a medical judgments [sic] even if the medical tests are inconclusive.

Director, OWCP v. Mangifest, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-235 (3d Cir. 1987). Considering Dr. Lance's opinion as a whole, reflecting the miner's increasing dyspnea requiring twenty-four hour a day attention prior to his death and his severely reduced respiratory capacity due to pneumoconiosis and further reduced by both cancer and radiation, the doctor's conclusion appears inevitable: "It is with certainty that I state that his black lung condition hastened his death." Director's Exhibit 8.

To counter Dr. Lance's opinion, employer offered the opinion of Dr. Gutterman, an oncologist. In its opinion in this case, the Sixth Circuit observed that Dr. Gutterman's statement, that the miner's lung condition did not cause the doctor to withhold chemotherapy, was "called into question by his contemporaneous report of July 15, 1996...." See *Ousley II*, *slip op.* at 5. Since the court has made clear that the doctor's credibility has been undermined, his opinion could not constitute substantial evidence showing that pneumoconiosis did not hasten the miner's death.

Employer also offered the report of Dr. Long, which was provided at DOL's request. In her initial report she found no medical basis to diagnose pneumoconiosis. When told that it had previously been established that the miner had been totally disabled due to pneumoconiosis, she opined that pneumoconiosis did not in any way contribute to or hasten death. In view of Dr. Long's failure to diagnose pneumoconiosis, the administrative law judge could not reasonably rely upon her opinion to prove that pneumoconiosis did not hasten the miner's death. See *Skukan v. Consolidation Coal Co.*, 99 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1231 (1994); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-63 (6th Cir. 1989); *accord Scott v. Mason Coal Co.*, 289 F.3d 263, 269, --- BLR --- (4th Cir. 2002).

The Third Circuit's statement in *Mancia v. Director, OWCP*, 130 F.3d 579, 593, 21 BLR 2-215, 2-244 (3d Cir. 1997) applies with equal force to the case at bar:

In sum, we do not believe that this record contains that quantum of evidence that a reasonable mind would find necessary to support [the administrative law judge's] rejection of [the treating physician's opinion] that [the miner's] black lung disease hastened his death. (citation omitted).

The court reversed the denial of benefits and directed an award of benefits which it explained was appropriate where the “result is foreordained.” *Id.*, citing *Caprini v. Director, OWCP*, 824 F.2d 283, 285, 10 BLR 2-180, 2-184 (3d Cir. 1987); accord *Scott, supra* (holding that reversal of the denial of benefits is appropriate where the only possible factual conclusion establishes claimant’s entitlement to benefits because there is no substantial evidence to support a finding that he is not totally disabled and there is no substantial evidence to dispute a causative contribution of pneumoconiosis to his disability). In the case at bar, remand for further proceedings would serve no useful purpose because the only credible medical opinion of record establishes that pneumoconiosis hastened the miner’s death. In avoiding unnecessary delay we are mindful of DOL’s regulation at 20 C.F.R. §718.205(d), providing that survivor’s claims “be adjudicated on an expedited basis....” Accordingly, we reverse the decision of the administrative law judge and remand the case for the limited purpose of awarding survivor’s benefits in accordance with 20 C.F.R. §725.503(c).

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

GABAUER, Administrative Appeals Judge, dissenting:

⁴The *Mancia* court considered this regulation in support of its decision to reverse the denial of benefits in a claim which had been in litigation more than seven years. Similarly, we note that the instant case has been in litigation more than six years, and that it has been twice considered by the administrative law judge.

I respectfully dissent from the decision of my colleagues to reverse the administrative law judge's Decision and Order on Remand denying benefits. Rather than reverse the administrative law judge's decision denying benefits, I would remand this case for the administrative law judge to reconsider the relevant medical opinion evidence pursuant to 20 C.F.R. §718.205(c)(2), (c)(5).

After considering claimant's appeal, the Sixth Circuit court discussed in considerable detail why the administrative law judge's original findings respecting Dr. Lance's opinion were not supported by substantial evidence. See *Ousley v. Director, OWCP*, No. 00-3352 (6th Cir. Apr. 30, 2001)(*Ousley II*). In his Decision and Order on Remand, the administrative law judge considered the Sixth Circuit court's statements respecting Dr. Lance's opinion. The administrative law judge again accorded Dr. Lance's opinion less weight because he found that this physician failed to "explain how underlying documentation supports his diagnosis." Decision and Order on Remand at 5. Based on the Sixth Circuit court's statements, quoted at length in the majority's opinion, I would hold that the administrative law judge erred in his finding the opinion of Dr. Lance to be unreasoned on remand. Accordingly, I would vacate the administrative law judge's finding that claimant failed to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2).

Because the record contains two other medical opinions which are relevant to determining whether pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2), (c)(5), rather than reverse the award of benefits, I would remand this case to the administrative law judge.

The Sixth Circuit court has held that "[w]hen the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case. . . ." *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); see *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). Further, the regulations state that the Board "is not empowered to engage in a de novo proceeding or unrestricted review of a case" and is only authorized to review the administrative law judge's findings of fact and conclusions of law. 20 C.F.R. §802.301; see *Rowe, supra*; see also *Lemar, supra*. In reversing the administrative law judge's denial of benefits on remand, it appears that the majority goes beyond our scope of review in its discussion regarding the opinions of Drs. Gutterman and Long.

Therefore, I would remand this case to the administrative law judge to weigh all of the medical opinions together. See *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); see also *Jericol Mining, Inc. v. Napier*, 301 F.3d

703, --- BLR --- (6th Cir. 2002)(Court discusses factors contained in 20 C.F.R. §718.104(d)(5) which are relevant for determining the appropriate weight that should be assigned to treating physicians' opinions). I would further instruct the administrative law judge to take into consideration the impact that the Sixth Circuit court's statements respecting Dr. Gutterman's reports have on the credibility of his opinion as it relates to Section 718.205(c)(2). See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). In its decision, the Sixth Circuit court stated that:

Dr. Gutterman's statement that the Miner's "previous lung condition did not cause me to withhold chemotherapy" is called into question by his contemporaneous report of July 15, 1996, in which he stated: "I am concerned *because of his other medical problems* that he will not do well with chemotherapy and his quality of life would not benefit as much" (emphasis added). Those "other medical problems," as listed in the final diagnoses of July 12, 1996, consisted of "hemoptysis, resolving" and "black lung."

See *Ousley II*, slip op. at 5.

Moreover, in reviewing Dr. Long's opinions regarding the cause of the miner's death, I would instruct the administrative law judge to consider that Dr. Long submitted two reports and that, in her original opinion, Dr. Long did not find the existence of pneumoconiosis.

PETER A. GABAUER, JR.
Administrative Appeals Judge

In her initial record review dated July 29, 1997, Dr. Long stated that she did not find a medical basis for the diagnosis of pneumoconiosis. Director's Exhibit 9. Therefore, Dr. Long opined that coal workers' pneumoconiosis did not cause, contribute to or hasten the miner's death. *Id.* However, the Department of Labor requested Dr. Long to re-examine the medical evidence of record with the knowledge that pneumoconiosis has been previously established. Subsequently, Dr. Long, in a report dated October 21, 1997, stated that "[e]ven if we assume that pneumoconiosis had decreased the miner's respiratory reserve, I do not believe that it in any way contributed to, caused or hastened his death. The extensive involvement of the carcinoma was the cause of death." Director's Exhibit 14.