

BRB No. 08-0487 BLA

D.M. )  
(Widow of C.M.) )  
 )  
Claimant-Petitioner )  
 ) DATE ISSUED: 02/25/2009  
v. )  
 )  
SEWELL COAL COMPANY )  
 )  
and )  
 )  
PITTSTON COMPANY )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

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

John Cline, Piney View, West Virginia, for claimant.

Jeffrey S. Goldberg (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank  
James, Acting 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:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5293) of Administrative Law Judge Richard A. Morgan rendered 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 miner died on September 29, 2004, and claimant filed her claim for survivor's benefits on February 8, 2005. Director's Exhibits 6, 12. Initially, the administrative law judge excluded Dr. Abraham's March 30, 2007 report, which commented on fourteen year-old, negative biopsy reports from one of the miner's four unsuccessful claims, ruling that the doctrine of collateral estoppel barred claimant from submitting it. Ruling and Order on Claimant's Request for Reconsideration of Evidentiary Ruling at 1-2; October 3, 2007 Transcript at 7-17. The administrative law judge credited the miner with at least forty-four years of coal mine employment, as stipulated.<sup>1</sup> Addressing the merits of the survivor's claim, the administrative law judge found that claimant did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that the miner died due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>2</sup> Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's exclusion of Dr. Abraham's report and the administrative law judge's weighing of the medical opinions pursuant to Sections 718.202(a)(4)<sup>3</sup> and 718.205(c). Employer did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), did not file a substantive response brief, but noted that any error in the administrative law judge's exclusion of Dr. Abraham's report is harmless.

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,

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<sup>1</sup> The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

<sup>2</sup> The administrative law judge found moot the issue of whether the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) after finding that claimant did not establish that the miner had pneumoconiosis. Decision and Order at 19-20.

<sup>3</sup> 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)(1)-(3) is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor’s 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* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993). For survivors’ claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner’s death, or was a substantially contributing cause or factor leading to the miner’s death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo*, 17 BLR at 1-87.

The miner’s death certificate, completed by Dr. Lynn Smith, the miner’s treating physician, listed the immediate cause of death as respiratory failure due to chronic lung disease with gastrointestinal bleed as another significant condition contributing to death. Director’s Exhibit 12. No autopsy was performed. Drs. Rosenberg and Spagnolo opined that the miner did not have legal pneumoconiosis,<sup>4</sup> but instead suffered from chronic obstructive pulmonary disease (COPD) due solely to smoking, and thus that the miner’s death from chronic lung disease was not caused or hastened by pneumoconiosis. Employer’s Exhibits 4 at 10; 5 at 19; 6 at 17, 24-25; 7 at 23-26. Dr. Koenig opined that the miner had legal pneumoconiosis, because his COPD was due to both his coal mine employment and smoking, and that the miner’s legal pneumoconiosis caused or hastened his death. Claimant’s Exhibit 3 at 7.

Pursuant to Section 718.202(a)(4), the administrative law judge discussed and weighed the opinions of Drs. Koenig, Rosenberg, and Spagnolo. The administrative law judge considered that while Dr. Koenig stated that the effects of legal pneumoconiosis

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<sup>4</sup> A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(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). The administrative law judge’s finding that clinical pneumoconiosis was not established is affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 19.

“due to heavy smoking and coal dust exposure are essentially indistinguishable,” Drs. Rosenberg and Spagnolo made “a convincing case to the contrary.” Decision and Order at 19. Additionally, the administrative law judge found that Dr. Rosenberg was the most qualified to interpret the conflicting medical studies because of his Public Health credentials. *Id.* The administrative law judge concluded that claimant did not establish that the miner had legal pneumoconiosis, based on the opinions of Drs. Rosenberg and Spagnolo. *Id.*

Claimant challenges the administrative law judge’s reliance on the opinions of Drs. Rosenberg and Spagnolo over that of Dr. Koenig, to find that the existence of legal pneumoconiosis was not established pursuant to Section 718.202(a)(4).<sup>5</sup> Claimant argues that the administrative law judge erred in discounting Dr. Koenig’s opinion in a single sentence without resolving the conflict in the medical opinions of Drs. Koenig and Rosenberg, and emphasized Dr. Rosenberg’s qualifications to the exclusion of the documentation and reasoning underlying the doctors’ opinions. We agree.

The United States Court of Appeals for the Fourth Circuit has held that administrative law judges must analyze all of the relevant evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439, 21 BLR 2-269, 2-272 (4th Cir. 1997). In this case, Dr. Rosenberg related the miner’s COPD solely to smoking based on the miner’s decreased FEV1 percent, marked bronchodilator response, low diffusing capacity, and marked air trapping, citing to medical literature for the proposition that these findings are unlikely to be related to coal dust exposure. Dr. Koenig disagreed that the prevailing medical literature concerning coal dust exposure and obstructive lung disease supported Dr. Rosenberg’s opinion. Employer’s Exhibits 4 at 9-10; 6 at 19-21; Claimant’s Exhibit 3 at 5. The administrative law judge noted Dr. Koenig’s disagreement with Dr. Rosenberg’s opinion when he summarized Dr. Koenig’s report. *See* Decision and Order at 9. However, when weighing the opinions, the administrative law judge disposed of Dr. Koenig’s opinion in one sentence, relying primarily on Dr. Rosenberg’s qualifications to interpret the medical literature. While qualifications are relevant, the administrative law judge also needed to consider the documentation and reasoning underlying the medical opinions in resolving the conflicting evidence. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Because the administrative law judge did not do so, we are unable to determine whether his finding is supported by substantial evidence. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

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<sup>5</sup> Claimant does not challenge the administrative law judge’s discounting of Dr. Rasmussen’s 1992 opinion and thus it is affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 19.

Consequently, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4), and remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge must reconsider Dr. Koenig's opinion, together with the opinions of Drs. Rosenberg and Spagnolo, to determine whether claimant established that the miner had legal pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge should address not only the comparative credentials of the respective physicians,<sup>6</sup> but also the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses, in conjunction with the other evidence of record. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997).

Pursuant to Section 718.205(c), the administrative law judge relied on the opinions of Drs. Rosenberg and Spagnolo, over that of Dr. Koenig, to find that claimant did not establish that the miner's death was due to pneumoconiosis. Because the administrative law judge must reweigh the medical opinion evidence at Section 718.202(a)(4), we

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<sup>6</sup> Drs. Koenig and Rosenberg are both Board-certified in Internal Medicine and Pulmonary Disease. Claimant's Exhibit 4 at 33; Employer's Exhibit 6 at 6. Additionally, Dr. Koenig is the Director of the Occupational Lung Disease Program at the University of Virginia Health System, Claimant's Exhibit 3 at 8, and Dr. Rosenberg is the Medical Director of the Occupational Health Services at Chagrin Highlands University Hospitals of Cleveland. Employer's Exhibit 4 at 10. Dr. Rosenberg testified that he has a Master's Degree in Public Health in areas including Epidemiology, the study of diseases in the population, and that his Master's Degree and background in Epidemiology are helpful to him in analyzing the medical research performed on coal miners. *See Decision and Order* at 11; Employer's Exhibit 6 at 6-7. Dr. Spagnolo is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 7 at 5.

vacate the administrative law judge's finding pursuant to Section 718.205(c), and remand this case to the administrative law judge for reconsideration of this issue, if reached.

We decline to address claimant's remaining argument that the administrative law judge erred in excluding Dr. Abraham's March 30, 2007 report. Claimant does not explain the relevance of Dr. Abraham's report discussing the 1993 and 1994 negative biopsy reports to establishing her entitlement to benefits. *See* 30 U.S.C. §923(b); *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 388, 21 BLR 2-639, 2-647 (4th Cir. 1999); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136, 1-139 (1989).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge