



BRB No. 18-0138 BLA

RUTH LEE NEAL	)	
(Widow of THOMAS N. NEAL)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNION CARBIDE CORPORATION	)	
	)	DATE ISSUED: 02/28/2019
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (2013-BLA-05503) of Administrative Law Judge Richard A. Morgan, denying benefits on a claim filed pursuant to the provisions

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on November 10, 2012.

of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on December 6, 2012.<sup>2</sup>

The administrative law judge found the evidence did not establish the existence of complicated pneumoconiosis and claimant therefore could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 413(c)(3) of the Act. 30 U.S.C. §921(c)(3). Because the administrative law judge credited the miner with 13.93 years of coal mine employment,<sup>3</sup> he also found claimant did not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.<sup>4</sup> 30 U.S.C. §921(c)(4) (2012). Turning to whether claimant could establish her entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found the evidence did not establish the existence of either clinical or legal pneumoconiosis<sup>5</sup> pursuant to 20 C.F.R. §718.202(a).

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Director's Exhibit 10.

<sup>2</sup> Section 422(l) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012). On September 11, 2015, the administrative law judge granted claimant's request to hold her survivor's claim in abeyance pending the outcome of the miner's pending claim. In a Decision and Order on Remand dated November 29, 2017, the administrative law judge denied benefits in the miner's claim. That decision became effective when it was filed in the office of the district director. 20 C.F.R. §725.479(a). There is no indication that claimant requested reconsideration or modification, or filed an appeal with the Board. Because the miner's claim was denied, claimant cannot benefit from the Section 422(l) provision.

<sup>3</sup> The miner's coal mine employment was in West Virginia. Director's Exhibit 2. 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>4</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis where the evidence establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

<sup>5</sup> Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R.

He also found the evidence did not establish the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and denied benefits.

On appeal, claimant contends the administrative law judge erred in finding the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.<sup>6</sup>

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a survivor's claim, where the Section 411(c)(3) and Section 411(c)(4) presumptions are not invoked, claimant must establish by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

### **Clinical Pneumoconiosis**

Claimant contends the administrative law judge erred in finding the x-ray and CT scan evidence does not establish the existence of clinical pneumoconiosis. The record contains four interpretations of two x-rays taken on October 20, 2011 and August 22, 2012. Dr. Smith, a dually-qualified Board-certified radiologist and B reader, interpreted the x-rays as positive for pneumoconiosis; Dr. Meyer, also a dually-qualified radiologist, interpreted them as negative. Claimant's Exhibits 1, 2; Employer's Exhibits 1, 2.

Drs. Smith and Meyer also interpreted two CT scans taken on June 9, 2010 and November 22, 2011. Dr. Smith interpreted the CT scans as positive for pneumoconiosis; Dr. Meyer interpreted them as negative.<sup>7</sup> Claimant's Exhibits 4, 6; Employer's Exhibit 3.

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§718.201(a)(1). 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).

<sup>6</sup> We affirm the administrative law judge's determinations that claimant is not entitled to the presumptions set forth at Sections 411(c)(3) and 411(c)(4) of the Act as unchallenged.. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>7</sup> The miner's treatment records contain CT scan readings by Drs. Leef and Schlarb. Dr. Leef read the June 9, 2010 CT scan as revealing advanced pulmonary fibrosis, and Dr.

## Weighing of the X-ray and CT Scan Evidence in the Miner's Claim

The administrative law judge rendered two decisions in the miner's claim.<sup>8</sup> Resolving the conflicting x-ray interpretations in his first decision, the administrative law judge identified the additional radiological qualifications of Drs. Smith and Meyer,<sup>9</sup> and found that "Dr. Meyer is the best qualified radiologist . . ." Decision and Order (miner's claim) at 31. Based on Dr. Meyer's superior credentials, the administrative law judge found the October 20, 2011 and August 22, 2012 x-rays negative for pneumoconiosis. *Id.* at 32. Resolving the conflict in the CT scan evidence, he again deferred to Dr. Meyer's superior credentials, finding the June 9, 2010 and November 22, 2011 CT scans negative for pneumoconiosis. *Id.* at 37. On appeal, claimant and the Director argued that the administrative law judge failed to consider claimant's argument that recent medical literature undermined Dr. Meyer's rationale for excluding clinical pneumoconiosis on the x-ray and CT scan testing.<sup>10</sup>

The Board agreed, holding that the administrative law judge did not adequately explain the weight he accorded the relevant evidence because he did not address the study

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Schlarb read the November 22, 2011 CT scan as revealing end-stage pulmonary fibrosis. Claimant's Exhibits 3, 5.

<sup>8</sup> Because the administrative law judge considered the same evidence, it is useful to first summarize his weighing of the x-rays and CT scans in the miner's claims before addressing claimant's arguments in the survivor's claim.

<sup>9</sup> The administrative law judge noted that Dr. Smith "is licensed in four states and currently operates his own radiology practice in the towns of New Cumberland and Millersburg, Pennsylvania." Decision and Order (miner's claim) at 9. The administrative law judge noted that Dr. Meyer "has practiced in the subspecialty of thoracic radiology since 1992 and is a past section head of cardiothoracic imaging at the University of Cincinnati." *Id.* He noted that Dr. Meyer is also "an associate professor of diagnostic radiology at University Hospital in Cincinnati, Ohio" and is "very well published on radiology topics and lectures nationally on radiographic interpretation, interstitial lung disease and pneumoconiosis." *Id.*

<sup>10</sup> In claimant's closing brief to the administrative law judge, claimant argued that Dr. Meyer's negative readings should not be credited because his opinion that the shape and location of the miner's opacities were not consistent with pneumoconiosis was called into question by findings of a recent study authored by Laney and Petsonk. Claimant's Post-Hearing Brief (miner's claim) at 5 (citing and discussing Laney and Petsonk, *Small Pneumoconiotic Opacities on U.S. Coal Workers' Surveillance Chest Radiographs are not Predominantly in the Upper Lung Zones*, Am. J. Indus. Med., 55: 793-98 (2012)).

before assigning the most weight to Dr. Meyer's x-ray and CT scan readings. *Neal v. Union Carbide Corp.*, BRB Nos. 16-0317 BLA and 16-0317 BLA-A, slip op. at 4 (Apr. 13, 2017) (unpub.).

The Board therefore vacated his finding that claimant failed to establish the existence of clinical pneumoconiosis based on medical opinions and his finding that the overall weight of the evidence did not establish clinical pneumoconiosis. *Id.* The Board instructed the administrative law judge to address claimant's argument that the Laney and Petsonk study undermined Dr. Meyer's rationale for finding no clinical pneumoconiosis based on the miner's x-rays and CT scans. *Id.*

On remand, the administrative law judge found the Laney and Petsonk study did not undermine Dr. Meyer's x-ray and CT scan interpretations:

The Laney and Petsonk article which was published in 2012 has not been incorporated into the black lung regulations, nor was it part of the scientific research which the Department specifically addressed in the Preamble to the 2001 Amendments to the regulations. Although Dr. Sood referenced this study, it has not been established in the record that this study provides definitive information regarding the presentation of clinical pneumoconiosis on x-rays. Further, even to the extent that the study may be considered valid or reliable, it is providing only a general conclusion based on the x-rays reviewed. There is no information in the record as to the methodology used in the study, the type of controls utilized, whether the results have been reproduced in other studies, or any other information which would allow the undersigned to reach a conclusion regarding the validity of the general conclusions reached in the study. Further, there has been no assertion by any medical expert that the study supports that all irregular or linear findings on chest x-ray equate to a finding of clinical pneumoconiosis, or that clinical pneumoconiosis is the only explanation for irregular or linear findings on x-rays or chest CT scan, or that all lower zone opacities equate to clinical pneumoconiosis. As noted, Dr. Meyer agreed that there are cases where coal worker's pneumoconiosis presents as linear and in the lower zones.

Dr. Meyer's readings of the claimant's x-ray and CT scans provide specific information as to why he concluded that the changes did not represent clinical pneumoconiosis in this case. I find that his conclusion that clinical pneumoconiosis was not present is based on his understanding of the totality of the information he noted on the chest x-rays and CTs, and not on one particular finding, for example whether the changes shown were linear as opposed to rounded, or primarily in the lower zones, as opposed to the upper zones.

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Therefore, after considering the claimant's argument regarding issues raised by the Laney and Petsonk article as summarized in Dr. Sood's report, I conclude that it does not undermine Dr. Meyer's x-ray or CT readings. In addition, after reconsidering all information contained in the record, I continue to give Dr. Meyer's readings the greatest weight based upon his superior qualifications.

Decision and Order on Remand (Miner's Claim) at 19-20.

Considering the evidence as a whole, the administrative law judge found that the claimant did not establish that the miner had clinical pneumoconiosis. 20 C.F.R. §718.202(a); *Id.* at 26. Because the Board previously affirmed his determination that the medical evidence did not establish the miner had legal pneumoconiosis, the administrative law judge denied benefits. As previously noted, there is no indication that claimant took any further action on the miner's claim.

### **Weighing of the X-ray and CT Scan Evidence in the Survivor's Claim**

In the survivor's claim,<sup>11</sup> the administrative law judge again found Dr. Meyer's radiological qualifications superior to those of Dr. Smith. Decision and Order at 25. Based on Dr. Meyer's superior credentials, the administrative law judge credited his critique of the Laney and Petsonk article and found the October 20, 2011 and August 22, 2012 x-rays negative for pneumoconiosis. *Id.* at 28. In resolving the conflict in the CT scan evidence, he again deferred to Dr. Meyer's superior credentials, and found the June 9, 2010 and November 22, 2011 CT scans negative for pneumoconiosis.<sup>12</sup> *Id.* at 29-30. The administrative law judge therefore found the x-ray and CT scan evidence did not establish the existence of clinical pneumoconiosis. *Id.* at 28-30.

Claimant contends that Dr. Meyer's negative interpretations of the x-ray and CT scans of record are inconsistent with the Laney and Petsonk study. Claimant's Brief at 5.

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<sup>11</sup> The administrative law judge issued his Decision and Order denying benefits in the survivor's claim on December 20, 2017, twenty-one days after he issued his Decision and Order on Remand denying benefits in the miner's claim.

<sup>12</sup> The administrative law judge found neither Dr. Leef, in his interpretation of the June 9, 2010 CT scan, or Dr. Schlarb, in his interpretation of the November 22, 2011 CT scan, specifically addressed the presence of pneumoconiosis. Decision and Order at 29; Claimant's Exhibits 3, 5. We affirm these findings as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

Claimant therefore asserts “Dr. Meyer’s readings should not have been accepted so as to find that clinical pneumoconiosis has not been established.” *Id.* We disagree.

Unlike the initial consideration of the miner’s claim, the administrative law judge directly addressed the Laney and Petsonk study in the survivor’s claim. Decision and Order at 14, 32-33. Moreover, the administrative law judge considered new evidence not admitted in the miner’s claim: Dr. Meyer’s June 30, 2017 deposition testimony. Employer’s Exhibit 7. The administrative law judge noted that during this deposition, Dr. Meyer criticized the Laney and Petsonk study:

Dr. Meyer discussed the Laney and Petsonk article that was published in 2012. He stated that there were “some real problems with the conclusions of that article based on the actual design of the study.” Some concerns raised by Dr. Meyers include that the study did not control for smoking which he stated causes interstitial changes in up to 11 to 12 percent of patients caused just by smoking, especially with smoking histories in excess of twenty pack years. He found another major problem with the design of the study is that it only looked at the most recent x-ray of miners which would necessarily be the most severely affected reports. In this regard he discussed the ILO form which requires the reader to check all zones that have any involvement. He stated, “So typically, with coal workers’ pneumoconiosis, we’ll see a gradient of disease from apex to base, where the apical component, the upper lobe component of the disease, is far more severe than the basilar component.” A study which just looks at which zones show opacities does not reflect where the opacities are most prevalent, nor would it necessarily reflect where the opacities first appeared. The other major problem with the study Dr. Meyer noted, is that there was no correlation of the x-ray findings with pathology or CT scans. Dr. Meyer stated “there was [neither] cross-sectional imaging or pathology to help us sort out what the cause of those opacities was in that study.” He also confirmed that the study did not correct for the possibility of other lung disease, other occupational exposure, or even body habitus.

Decision and Order at 14 (Exhibit citations omitted).

Thus, the administrative law judge addressed the Laney and Petsonk study, finding that Dr. Meyer, the best qualified radiologist of record,<sup>13</sup> found “real problems” with it.

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<sup>13</sup> Claimant does not challenge the administrative law judge’s determination that Dr. Meyer is the “best qualified radiologist” of record. Decision and Order at 22. This finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

Decision and Order at 14. The administrative law judge is empowered to weigh the evidence and make credibility determinations. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Claimant has not made any specific allegation of error regarding the administrative law judge's consideration of the Laney and Petsonk study.<sup>14</sup> *See Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We therefore affirm the administrative law judge's determination that the x-ray and CT scan evidence did not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202)(a)(1), (4).

Because claimant does not raise any additional error regarding the administrative law judge's finding that the evidence did not establish the existence of clinical pneumoconiosis, we further affirm his finding on the record as a whole. 20 C.F.R. §718.202(a); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

### **Legal Pneumoconiosis**

To prove that the miner had legal pneumoconiosis, claimant must establish that he had a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Claimant argues the administrative law judge erred in finding the medical opinion evidence did not establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge noted that Dr. Rasmussen "diagnosed legal [coal workers' pneumoconiosis] as interstitial fibrosis caused in part by coal mine dust exposure." Decision and Order at 33; Claimant's Exhibit 7. The administrative law judge also noted that Dr. Sood "diagnosed the 'chronic bronchitis phenotype of [chronic obstructive pulmonary disease]' which he stated constituted a diagnosis of legal pneumoconiosis." *Id.* at 34; Claimant's Exhibit 8.

The administrative law judge found Dr. Rasmussen's opinion unpersuasive because it was based on "general statistics," and because he did "not point to factors other than the higher rate of interstitial fibrosis [in miners,] and the miner's occupational exposure to support his conclusion." Decision and Order at 33. The administrative law judge found Dr. Sood's diagnosis of legal pneumoconiosis poorly reasoned "based on his failure to explain why he diagnosed legal pneumoconiosis in this case and because of his reliance on general statistics which he fail[ed] to apply to the particular facts . . . in this case." *Id.* at 34.

Claimant argues the opinions of Drs. Rasmussen and Sood "should have been found to outweigh the opinion of Dr. Spagnolo concerning whether legal pneumoconiosis was

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<sup>14</sup> Claimant does not point to any evidence calling into question Dr. Meyer's assessment of the Laney and Petsonk study.

present.” Claimant’s Brief at 9. Claimant, however, alleges no specific error in regard to the administrative law judge’s consideration of the medical opinion evidence. Because claimant provides no basis to review the administrative law judge’s findings, we affirm his determination the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §802.211(b); *Sarf*, 10 BLR at 1-120. Claimant thus failed to establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718. *See Trumbo*, 17 BLR at 1-87-88.

Accordingly, we affirm the administrative law judge’s Decision and Order denying benefits.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge