

BRB No. 00-0152 BLA

JUDY M. RICHARD )  
(o/b/o BARBARA A. RAY, )  
surviving child of RALPH E. RAY, SR.) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
KEYSTONE COAL MINING ) DATE ISSUED:  
CORPORATION )  
 )  
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 On Remand of Richard A. Morgan,  
Administrative Law Judge, United States Department of Labor.

David A. Colecchia (Law Care), Greensburg, Pennsylvania, for claimant.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh,  
Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order On Remand (97-BLA-0952) of  
Administrative Law Judge Richard A. Morgan 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). This case is before the Board for the

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<sup>1</sup> This survivor's claim was filed on May 17, 1996, Director's Exhibit 1, by Judy M.

second time. In his Decision and Order On Remand, the administrative law judge found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a) and death due to pneumoconiosis established pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a) and death due to pneumoconiosis established pursuant to Section 718.205(c). Claimant responds, urging that the administrative law judge's Decision and Order On Remand awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal.

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Richard on behalf of Barbara A. Ray, as a surviving disabled child of the miner, Ralph E. Ray, Sr., who died on April 18, 1996, Director's Exhibit 12. The miner had filed a claim on April 1, 1987, which was ultimately denied in a Decision and Order issued on June 2, 1989, by Administrative Law Judge Michael C. Colligan, who found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4). No further action was taken by the miner on his claim and it is not at issue herein.

<sup>2</sup> Originally, in a Decision and Order issued on April 21, 1998, the administrative law judge found at least thirteen years of coal mine employment established, as stipulated by the parties, and adjudicated this survivor's claim under 20 C.F.R. Part 718. The administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), and found death due to pneumoconiosis established pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

Employer appealed and the Board initially affirmed the administrative law judge's findings that the existence of pneumoconiosis was not demonstrated pursuant to 20 C.F.R. §718.202(a)(1)-(3) as unchallenged. *Richard v. Keystone Coal Mining Corp.*, BRB No. 98-1146 BLA (May 21, 1999)(unpub.). However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), because the administrative law judge did not weigh together all of the evidence relevant to the existence of pneumoconiosis under Section 718.202(a) in accordance with the holding of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). Thus, the Board remanded the case for further consideration. Finally, because the administrative law judge's finding at Section 718.202(a)(4) was determinative of his finding at Section 20 C.F.R. §718.205(c) that pneumoconiosis caused the miner's death, the Board vacated the administrative law judge's finding at Section 718.205(c) and instructed him to reconsider this issue if he found the existence of pneumoconiosis established on remand.

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 on the basis of this survivor's claim, which was filed after January 1, 1982, and in which the miner had not been awarded benefits prior to his death on a claim filed prior to January 1, 1982, *see* 30 U.S.C. §§901, 932(1); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989), claimant must establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988), and that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.1; 718.205(c); *Neeley, supra*; *cf. Smith, supra*, which arose out of coal mine employment, *see* 20 C.F.R. §718.203; *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Moreover, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that, pursuant to Section 718.205(c)(2), pneumoconiosis substantially contributes to death if it hastens the miner's death, *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Initially, the Third Circuit has held that "all types of relevant evidence must be weighed together" in determining whether claimant has met her burden of establishing the existence of pneumoconiosis pursuant to Section 718.202, *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). The administrative law judge considered all of the relevant evidence of record pursuant to Section 718.202(a) and found that while the medical opinion evidence submitted with the miner's claim and the x-ray and CT scan evidence of record did not establish "clinical" pneumoconiosis or coal workers' pneumoconiosis, it did establish chronic obstructive pulmonary disease (COPD) and emphysema, Decision and Order On Remand at 2-4. The administrative law judge also considered the medical opinion evidence submitted with the survivor's claim, which included the opinion of Dr. Wald. Dr. Wald, who is board-certified in internal medicine, reviewed the evidence of record and concluded that, while the evidence did not reveal clinical pneumoconiosis and indicated that smoking was a major cause of the miner's COPD, coal

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<sup>3</sup> The presumptions at Section 411(c)(2) of the Act, 30 U.S.C. §921(c)(2), as implemented by 20 C.F.R. §718.303, at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, and at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306, are inapplicable to this survivor's claim filed after January 1, 1982, *see* 20 C.F.R. §§718.303(c), 718.305(a), (e), 20 C.F.R. §718.306(a); Director's Exhibit 1.

mine dust exposure was also “a substantial contributing factor” in the progression of the miner’s COPD and emphysema, which shortened his life and caused his death, Claimant’s Exhibits 1, 2. On the other hand, Dr. Sinnenberg, board-certified in anatomical and clinical pathology, reviewed the evidence and found that the miner probably had mild coal workers’ pneumoconiosis, but that the miner’s COPD and emphysema were due to smoking which caused the miner’s death, Employer’s Exhibits 3-4, 7. Finally, a CT scan was reviewed by Dr. Sagel, a board-certified-radiologist, who found no evidence of pneumoconiosis or coal workers’ pneumoconiosis, but emphysema undoubtedly related to smoking, Director’s Exhibit 19.

The administrative law judge found the evidence established that the miner’s COPD was caused in part by his coal dust exposure, *i.e.*, the definition of pneumoconiosis as more broadly defined by the Act and the regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201. The administrative law judge found Dr. Wald’s opinion convincing and corroborated by the x-ray evidence, to the extent that it also confirmed the diagnosis of COPD and/or emphysema. The administrative law judge also noted that the CT scan also confirmed the diagnosis of emphysema, while further noting that it had been related to smoking. The administrative law judge stated that he was not persuaded that the negative x-ray evidence precluded finding coal workers’ pneumoconiosis established because Dr. Wald stated, without contradiction in the record, that emphysema may mask findings of coal workers’ pneumoconiosis on x-ray. In addition, the administrative law judge noted that claimant’s treating physician, Dr. Patel, Director’s Exhibit 14, as well as Dr. Rao, Director’s Exhibit 15, had diagnosed “cor pulmonale,” which the administrative law judge stated has been held to be an indicator of coal workers’ pneumoconiosis. The administrative law judge found that Dr. Sinnenberg’s opinion that the miner’s COPD was due to smoking is not disputed. Nevertheless, the administrative law judge noted that Dr. Sinnenberg also conceded that the miner probably had mild coal workers’ pneumoconiosis, which the administrative law judge found was supported by the opinions from the miner’s claim from Drs. Eligator and Connelly, Director’s Exhibit 38, who both diagnosed coal workers’ pneumoconiosis and emphysema and/or obstruction due to the miner’s coal dust exposure. Thus, the administrative law judge ultimately credited Dr. Wald’s opinion that coal mine dust exposure was also “a substantial contributing factor” in the miner’s COPD.

Initially, employer contends that the administrative law judge erred in finding the

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4 The administrative law judge again, as previously affirmed by the Board, discounted Dr. Scott’s opinion, Director’s Exhibit 34, that claimant did not have coal workers’ pneumoconiosis or occupational lung disease and that his COPD and emphysema were due solely to smoking as he did not account for the miner’s exposure to coal dust, *see Richard*, BRB No. 98-1146 BLA at 5.

existence of pneumoconiosis established pursuant to Section 718.202(a) based on what employer characterizes as the “equivocal” opinion of Dr. Wald. Specifically, employer contends that the administrative law judge erred in relying on Dr. Wald’s statement that emphysema “may” mask findings of coal workers’ pneumoconiosis on x-ray in support of the administrative law judge’s finding that the existence of pneumoconiosis was established, because Dr. Wald did not testify with a reasonable degree of medical certainty that “clinical” pneumoconiosis was present.

Contrary to employer’s contention, the administrative law judge did not rely on Dr. Wald’s statement that emphysema “may” mask findings of coal workers’ pneumoconiosis on x-ray as affirmative evidence of the existence of pneumoconiosis. Rather, in weighing together all of the evidence relevant to the existence of pneumoconiosis under Section 718.202(a) on remand as required by the Third Circuit in *Williams, supra*, and in accordance with the Board’s previous remand instructions, the administrative law judge held that in light of Dr. Wald’s uncontradicted statement, he was not persuaded by the majority of negative x-ray readings. This is a rational and proper weighing of the evidence consistent with the standard enunciated in *Williams*. Moreover, as opposed to being inconsistent with a finding that pneumoconiosis was not established by the x-ray or medical evidence, Dr. Wald’s statement offers an explanation for his conclusion taking into consideration the x-ray evidence which is overwhelmingly negative for the existence of pneumoconiosis.

Nevertheless, the administrative law judge did not follow the Board’s previous remand instructions and indicate how much weight he accorded the negative CT scan readings, *see Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988). Dr. Sagel found no evidence of coal workers’ pneumoconiosis or clinical pneumoconiosis on the miner’s CT scan, but emphysema undoubtedly related to smoking, Director’s Exhibit 19. Such a discussion is critical in this case since a majority of the x-ray evidence, as well as some of the medical reports, are also negative for the existence of pneumoconiosis, *see Hall, supra*.

In addition, as employer contends, the administrative law judge erred in finding that the diagnosis of “cor pulmonale” by Drs. Patel and Rao is an indicator of coal workers’ pneumoconiosis. In support of the administrative law judge’s holding that cor pulmonale is an established indicator of the presence of clinical coal workers’ pneumoconiosis, the administrative law judge cites to the Board’s holding in *Christian v. Monsanto Corp.*, 12 BLR 1-56, 1-58 (1988). A review of the holding in *Christian*, however, does not provide a statutory or regulatory basis for the administrative law judge’s conclusion. Consequently, in

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5 In *Christian v. Monsanto Corp.*, 12 BLR 1-56, 1-58 (1988), the Board merely noted that cor pulmonale “may be” indicative of the existence of pneumoconiosis, citing to *Gilson v. Price River Coal Co.*, 6 BLR 1-96 (1983), which in turn cites to the definition of pneumoconiosis at 20 C.F.R. §727.202 and to *Makowski v. Director, OWCP*, 10 BRBS 456, 459, 2 BLR 1-363, 1-366 (1979). Neither the regulations nor *Makowski*, however, support

considering the diagnosis of “cor pulmonale” by Drs. Patel and Rao on remand, the administrative law judge should provide an evidentiary basis for a finding that cor pulmonale is an indicator of the presence of pneumoconiosis.

The administrative law judge also provides no basis or reason for crediting the opinions from the miner’s claim of Drs. Eligator and Connelly as supporting Dr. Sinnenberg’s opinion from the survivor’s claim that the miner probably had mild “clinical” coal workers’ pneumoconiosis. As employer contends, an explanation of the weight given to the opinions from the miner’s claim of Drs. Eligator and Connelly is especially necessary in light of the administrative law judge’s inconsistent finding that the medical opinion evidence from the miner’s claim was insufficient to demonstrate pneumoconiosis, *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Wike v. Bethlehem Mines Corp.*, 7 BLR 1-593 (1984).

Finally, employer contends that the administrative law judge erred in relying on a medical treatise that was not a part of the record under Section 718.202 and in order to credit Dr. Wald’s opinion in finding death due to pneumoconiosis established pursuant to 718.205(c) and, thereby, substituted his own opinion over Dr. Sinnenberg’s opinion. In

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the proposition that cor pulmonale is an indicator of the existence of pneumoconiosis absent a finding that the cor pulmonale is significantly related to, or substantially aggravated by, dust exposure in coal mine employment, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201.

6 Contrary to employer’s contention, however, cor pulmonale must be associated with right-sided congestive heart failure in order to demonstrate total disability, as opposed to the existence of pneumoconiosis, *see* 20 C.F.R. §718.204(c)(3).

7 Pursuant to Section 718.205(c), the administrative law judge initially gave great weight to the opinion of Dr. Patel as the miner’s treating physician, who attributed the miner’s death to “end-stage” chronic obstructive lung disease, Director’s Exhibit 12. Decision and Order On Remand at 4-5. The administrative law judge noted that Dr. Wald found that coal mine dust exposure was “a substantial contributing factor” in the progression of the miner’s COPD to the point of death and shortened his life, Claimant’s Exhibits 1, 2, whereas Dr. Sinnenberg, a pathologist, found that the miner’s death was caused by his COPD which he attributed solely to smoking, Employer’s Exhibits 3-4, 7. The administrative law judge found Dr. Wald’s opinion more credible than Dr. Sinnenberg’s opinion because of his prior experience with patients with coal workers’ pneumoconiosis, because there was no anatomical evidence for Dr. Sinnenberg to review to add credence to his opinion, because Dr. Wald rationally accounted for the impact of the miner’s many years of coal mine employment. Inasmuch as all of the relevant medical opinions attributed the cause of the miner’s death to his COPD, which the administrative law judge found was caused “in part” by his coal dust exposure, the

weighing the medical opinion evidence under Section 718.202, the administrative law judge cited a treatise stating that the symptoms of industrial bronchitis are no different than those of chronic bronchitis due to smoking and that the effects of smoking obscure those due to dust exposure, *see* 4A *Gordy-Gray, Attorney's Textbook of Medicine* (3rd Ed., 1987) §205B.80; Decision and Order On Remand at 3 n. 3, 4 n. 4. Moreover, the administrative law judge found Dr. Wald's opinion more credible than Dr. Sinnenberg's contrary opinion under Section 718.205(c), in part, because Dr. Wald's opinion was in accord with the medical treatise cited by the administrative law judge, Decision and Order On Remand at 5.

An administrative law judge may take judicial notice of a fact if substantial prejudice will not result and the parties are given an adequate opportunity to show the contrary, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). Thus, the administrative law judge did not take proper judicial notice of the treatise he relied on under Sections 718.202 and 718.205(c), inasmuch as the administrative law judge did not give employer adequate notice and/or an opportunity to respond, *see Maddaleni, supra*. Moreover, as employer contends, the administrative law judge's according of great weight to Dr. Patel's opinion under Section 718.205(c) as the miner's treating physician is inconsistent with the administrative law judge's original Decision and Order in which he gave lesser weight to Dr. Patel's opinion as his qualifications were unknown, *see Revnack, supra; see also Wike, supra*.

Consequently, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a) and remand the case for reconsideration of all relevant evidence, *see Williams, supra*. Moreover, inasmuch as the administrative law judge erred in his weighing of the relevant medical opinion evidence under Section 718.205(c) and inasmuch as the administrative law judge's finding at Section 718.202(a) is determinative of his finding at Section 718.205(c), *see Trumbo, supra; Neeley, supra*, the administrative law judge's finding at Section 718.205(c) is also vacated. If the

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administrative law judge found death due to pneumoconiosis established.

8 Employer also contends that the administrative law judge's finding that the miner's COPD was caused, in part, by his coal dust exposure under Section 718.202(a) is insufficient to support a finding that the miner's coal dust exposure "substantially contributed" to the miner's death pursuant to Section 718.205(c). Contrary to employer's contention, pneumoconiosis substantially contributes to death if it hastens the miner's death under Section 718.205(c)(2), *see Lukosevicz, supra*. The administrative law judge relied on Dr. Wald's opinion that the miner's coal dust exposure was a substantial contributing factor in the his COPD and "shortened his life," Claimant's Exhibit 2 at 57. Although employer contends that the administrative law judge did not account for the role of the miner's smoking in his death, the administrative law judge credited Dr. Wald's opinion, who found

administrative law judge finds the existence of pneumoconiosis established pursuant to Section 718.202(a) on remand, he should then reconsider whether death due to pneumoconiosis is established pursuant to Section 718.205(c).

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that the miner's death was due to his COPD and emphysema which he attributed predominantly to the miner's smoking, as well as his coal dust exposure, *see* Claimant's Exhibit 2 at 19. Thus, inasmuch as Dr. Wald believed that the miner's coal dust exposure "shortened his life," Dr. Wald's opinion is sufficient, if credited on remand, to establish death due to pneumoconiosis under Section 718.205(c) in accord with the standard enunciated in *Lukosevicz*.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge