BRB No. 08-0488 BLA

S.S. (Widow of M.S.) Claimant-Petitioner v. CANNELTON INDUSTRIES, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/30/2009 DECISION and ORDER

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

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (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[1] appeals the Decision and Order Denying Benefits (06-BLA-5918) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on a survivor's claim filed on May 12, 2004, 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 thirty-one years of coal mine employment[2] based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the autopsy evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b),[3] but that the medical opinion evidence did not establish the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). The administrative law judge further determined that the evidence did not establish that pneumoconiosis hastened the miner's death pursuant 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that legal pneumoconiosis was not established. Claimant further challenges the administrative law judge's finding that neither clinical nor legal pneumoconiosis contributed to the miner's death pursuant to Section 718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, stating that a physician's credible opinion that pneumoconiosis made a tangible contribution to the miner's death, even if that contribution was minimal, is sufficient to establish that pneumoconiosis is a substantially contributing cause of the miner's death under Section 718.205(c)(2).[4]

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,

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[1] Claimant is the surviving spouse of the miner, M.S., who died on January 5, 2004. Director's Exhibits 6, 7.

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc)*.

[3] Although the administrative law judge did not make a specific finding under 20 C.F.R. §718.202(a)(1), the record reflects that no x-ray interpretations were submitted.

[4] We affirm the administrative law judge's finding that the miner worked for thirty-one years in qualifying coal mine employment, and that claimant established the existence of clinical pneumoconiosis under 20 C.F.R. §§718.202(a), 718.203(b) as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 20, 23.

and is in accordance with law. 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 to survivor's benefits pursuant to 20 C.F.R. Part 718, 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* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

There are four methods by which claimant may establish the existence of pneumoconiosis under the regulations: (1) a chest x-ray conducted and classified in accordance with 20 C.F.R. §718.102; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. §718.106; (3) by application of one of the presumptions described in 20 C.F.R. §§718.304, 718.305 or 718.306; or (4) by a physician's reasoned medical opinion, notwithstanding a negative x-ray, that the miner had pneumoconiosis. *See* 20 C.F.R. § 718.202(a)(1)-(4). The United States Court of Appeals for the Fourth Circuit has held that although Section 718.202(a) provides four distinct methods of establishing the existence of pneumoconiosis, all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000).

20 C.F.R. §718.202(a): Existence of Pneumoconiosis

Relevant to the existence of legal pneumoconiosis under Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Houser and Green, attributing the miner's emphysema in part to coal dust exposure,[5] in conjunction with the

[5] Specifically, upon review of the autopsy slides, Dr. Green reported that "the lungs show emphysema, predominantly of the centriacinar and panacinar types." Claimant's Exhibit 1. Dr. Green further explained that:

> The predominant type of emphysema associated with both smoking and coal dust exposure is centriacinar. However, panacinar emphysema is also

opinions of Drs. Crouch and Farney, stating that the predominantly panacinar distribution of the emphysema seen on autopsy argued against a coal dust-related etiology.[6] Employer's Exhibits 4, 6. Finding that the opinions of Drs. Houser and Green were not well reasoned, the administrative law judge determined that claimant failed to establish the existence of legal pneumoconiosis.

> associated with both smoking and coal dust exposure. In fact, pathologic studies show that there are absolutely no differences in types of emphysema produced by smoking and coal dust exposure with the exception of scar emphysema, which is exclusively associated with dust exposure. The majority of the emphysema should, in my opinion, be attributed to coal mine dust exposure in view of the 31 years of exposure to coal mine dust versus 17 pack years of cigarette smoking.

Id. Dr. Houser stated in his consultative opinion that a causal relationship between coal dust exposure and emphysema had been established; and, although he did not specify the type of emphysema that the miner had, Dr. Houser opined that it was caused by both the miner's thirty-year history of exposure to coal dust and seventeen-year history of smoking. Claimant's Exhibits 2, 3.

[6] Specifically, upon reviewing the autopsy slides, Dr. Crouch stated that:

> There is some deposition of dust within areas of fibrosis; however, the fibrotic changes can be attributed to complications of tumor and post-obstructive pneumonia. The predominantly panacinar distribution of the emphysema argues against a coal dust related etiology. Furthermore, there is no concordance between the amount and distribution of coal dust deposition and the amount or severity of emphysema. Thus, occupational coal dust exposure could not have caused any degree of respiratory impairment or disability . . . .

Employer's Exhibit 4. Dr. Farney stated in his consultative opinion that:

> [T]here was no evidence of dust related emphysema at post-mortem examination. Emphysema related to coal dust exposure invariably is associated with fibrotic lung disease. Furthermore, a panacinar process as described by Dr. Crouch would not be found as a consequence of coal dust exposure.

Employer's Exhibit 6 at 4-5. Dr. Farney therefore concluded that the miner did not have a chronic lung disease arising out of coal mine employment. *Id.*

The administrative law judge found that Dr. Houser's opinion was not well reasoned, because "Dr. Houser only cited to Dr. Green's statement that panacinar emphysema can be caused by coal dust exposure; he did not provide an independent opinion or independent evidence." Decision and Order at 20. Further, the administrative law judge found that Dr. Green's diagnosis of legal pneumoconiosis was not well reasoned, because Dr. Green failed to explain how it was possible to distinguish between centriacinar and panacinar emphysema by viewing the autopsy slides, and because Dr. Green failed to cite any references supporting his statement that studies show no difference in the types of emphysema caused by smoking and coal dust exposure. *Id*. at 20, 21 n.26. The administrative law judge did not indicate what weight he assigned to the contrary opinions of Drs. Crouch and Farney.

Claimant asserts that the administrative law judge erred in finding that Dr. Houser did not render an independent diagnosis of legal pneumoconiosis. Claimant's Brief at 6. We agree. As claimant contends, Dr. Houser attributed the miner's emphysema to both smoking and coal dust exposure based on the miner's smoking and coal mine employment histories. Claimant's Exhibits 2, 3. As claimant further contends, Dr. Houser stated that science has established a relationship between coal dust exposure and emphysema, and he supported this statement with a reference to the position statement of the American Thoracic Society and additional references contained in his supplemental report. Claimant's Brief at 6; Claimant's Exhibits 2, 3. Therefore, substantial evidence does not support the administrative law judge's finding that Dr. Houser failed to provide an independent opinion. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997).

We additionally find merit in claimant's assertion that the administrative law judge did not adequately explain his basis for discounting Dr. Green's opinion pursuant to Section 718.202(a)(4). Claimant's Brief at 5. As claimant contends, employer's experts do not dispute that occupational dust exposure causes emphysema, and Dr. Green, an expert in his own right, opined that coal dust exposure significantly contributed to the miner's emphysema. Claimant's Brief at 5; Claimant's Exhibit 1. It is therefore unclear how the probative value of Dr. Green's opinion was diminished by his failure to explain how he distinguished between centriacinar and panacinar emphysema, or by his failure to specify which medical studies establish that panacinar emphysema is caused by exposure to coal dust and cigarette smoke. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Lane Hollow Coal Co. v. OWCP* [*Lockhart*], 137 F.3d 799, 802-03, 21 BLR 2-302, 2-311(4th Cir. 1998); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

In light of the foregoing, we vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis under

Section 718.202(a)(4), and remand this case for further consideration. On remand, the administrative law judge must reconsider the relevant medical opinions under Section 718.202(a)(4) and explain his assignment of weight and credibility. In so doing, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

On remand, should the administrative law judge find that the evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence establishes the existence of legal pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174.

20 C.F.R. §718.205(c): Death Due to Pneumoconiosis

As a finding of legal pneumoconiosis may affect the administrative law judge's finding as to death causation, we additionally vacate the administrative law judge's findings under Section 718.205(c). Should the administrative law judge find that the preponderance of evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge must then consider whether legal pneumoconiosis caused or hastened the miner's death. 20 C.F.R. §718.205. Further, in the interest of judicial economy, we will address claimant's assertion that the administrative law judge erred in discounting the opinions of Drs. Green and Houser that clinical pneumoconiosis hastened the miner's death.

With respect to Dr. Green's opinion, the administrative law judge found that:

> Dr. Green defined pneumoconiosis to include "macules and nodules, interstitial fibrosis and pulmonary emphysema." As previously discussed, I have not found the miner to have established legal pneumoconiosis, and therefore, I cannot accept Dr. Green's inclusion of emphysema in his definition of pneumoconiosis. . . . Dr. Green did not state whether simple CWP alone, without considering emphysema, substantially contributed to the miner's death.

Decision and Order at 22. Further, with respect to Dr. Houser's opinion, the administrative law judge found that:

> Dr. Houser's opinion states in a conclusory manner that the miner died due to CWP with associated fibrosis and emphysema. Other than referencing the certificate of death, Dr. Houser has not explained how he concluded the miner died from pulmonary fibrosis. . . .

Decision and Order at 23.

Claimant asserts that the administrative law judge erred in discounting Dr. Green's opinion because Dr. Green failed to apportion the contributions that clinical and legal pneumoconiosis made in hastening the miner's death. Claimant's Brief at 8. We agree. Under Section 718.205(c)(2), a survivor is entitled to benefits if she establishes that pneumoconiosis was a "substantially contributing cause" of the miner's death. Therefore, as the Director contends, a physician's credible opinion that pneumoconiosis tangibly contributed to the miner's death, even if that contribution was minimal, satisfies the "substantially contributing cause" standard under Section 718.205(c)(2). Director's Response at 1-2. Thus, on remand, the administrative law judge must assess the probative value of Dr. Green's opinion that clinical pneumoconiosis tangibly contributed to the miner's respiratory death. *See Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93; Claimant's Exhibit 1 at 5-7.

We additionally find merit in claimant's assertion that the administrative law judge failed to state a valid reason for discounting Dr. Houser's opinion pursuant to Section 718.205(c). As claimant contends, Dr. Houser diagnosed pulmonary fibrosis based on the miner's treatment records and the autopsy findings of Drs. Estalilla and Green. Claimant's Brief at 8-9; Claimant's Exhibit 2. Further, contrary to the administrative law judge's finding that Dr. Houser's opinion was conclusory, the record reflects that Dr. Houser explained that the fibrosis could not have been a result of the other diseases that employer's physicians pointed to as causes of death, such as adult respiratory distress syndrome, pneumonia, or cancer. Claimant's Exhibit 2 at 3-4. While an administrative law judge need not credit a doctor's opinion, substantial evidence does not support the administrative law judge's finding that Dr. Houser failed to explain his conclusions.[7] *See Lane*, 105 F.2d at 174, 21 BLR at 2-48.

Consequently, on remand, the administrative law judge must reconsider whether the opinions of Drs. Green and Houser support a finding that clinical pneumoconiosis hastened the miner's death pursuant to Section 718.205(c). In so doing, the administrative law judge must explain the basis for his findings of fact and conclusions of law, as required by the Administrative Procedure Act (the APA). 5 U.S.C.

[7] We reject employer's assertion that the administrative law judge erred in receiving Dr. Houser's November 30, 2007, supplemental report into evidence after the hearing. Hearing Transcript at 17; Employer's Brief at 17 n.1. Although employer asserts that there was no justification for the post-hearing report from Dr. Houser, employer has not demonstrated any abuse of discretion. *See Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). Moreover, we note that employer concedes that Dr. Houser's supplemental report "adds nil to his prior report." Employer's Brief at 17.

§557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Lockhart*, 137 F.3d at 802-03, 21 BLR at 2-311; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings 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