BRB Nos. 99-0262 BLA
and 03-0697 BLA

JEAN SHUMAKER (Widow of GEORGE SHUMAKER) Claimant-Respondent v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/23/2004 DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits and Decision and Order – Awarding Living Miner Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld & Schiller), Pittsburgh, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits and Decision and Order – Awarding Living Miner Benefits (1996-BLA-1552) of Administrative Law Judge Thomas F. Phalen, Jr., with respect to a miner's claim and 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 relevant procedural history of this case is as follows. The miner filed a claim for benefits on May 3, 1994, but died on June 8, 1995. Director's Exhibit 1. The miner's widow filed a survivor's claim on July 6, 1995. Director's Exhibit 33. The claims were consolidated and on February 24, 1997, Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) issued a Decision and Order in which he awarded benefits in both claims. Employer appealed to the Board, which vacated the award of benefits with respect to both claims and remanded the case to the administrative law judge for reconsideration. *Shumaker v. Peabody Coal Co.*, BRB No. 97-0896 BLA (Mar. 27, 1998)(unpub.). In a Decision and Order on Remand issued on April 1, 1998, the administrative law judge granted benefits in the survivor's claim, but denied benefits in the miner's claim.

Employer appealed to the Board and claimant filed a cross-appeal. On August 16, 2000, the Board issued a Decision and Order affirming the award of benefits in the survivor's claim, but vacating the administrative law judge's finding of total disability due to pneumoconiosis in the miner's claim. *Shumaker v. Peabody Coal Co.*, BRB Nos. 99-0262 BLA and 99-0262 BLA-A (Aug. 16, 2000)(unpub.). The case was remanded to the administrative law judge for reconsideration of the miner's claim.

Employer appealed the Board's affirmance of the award in the survivor's claim to the United States Court of Appeal for the Sixth Circuit, within whose jurisdiction this case arises.[1] Subsequent to the issuance of the Sixth Circuit's decision in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), employer filed a motion to remand the survivor's claim to the Board. While the survivor's claim was still before the Sixth Circuit, the administrative law judge issued a Decision and Order in which he awarded benefits in the miner's claim. Employer appealed this decision to the Board and asked the Board to suspend briefing until the circuit court ruled on its motion to remand the survivor's claim. Before the Board could respond, the court granted employer's motion and remanded the survivor's claim to the Board for further consideration. Employer then requested that the Board consolidate the two cases and

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's last year of coal mine employment took place in the Commonwealth of Kentucky. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

establish a briefing schedule. The Board subsequently issued an Order in which the parties were informed the that cases were being consolidated for briefing purposes only and were instructed to submit briefs which addressed both claims. *Shumaker v. Peabody Coal Co.*, BRB Nos. 99-0262 BLA and 03-0697 BLA (Mar. 12, 2004)(unpub. Order).

With respect to the miner's claim, employer requests that the Board revisit its affirmance of the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1). Employer also argues that the administrative law judge erred in finding that total disability due to pneumoconiosis was established under 20 C.F.R. §718.204(c). In the survivor's claim, employer maintains that the administrative law judge must reconsider his weighing of Dr. Haggenjos's opinion in light of the holdings in *Williams*. Employer further contends that the administrative law judge erred in discrediting Dr. Rosenberg's opinion. Claimant urges affirmance of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in either appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In its appeal of the award of benefits in the miner's claim, employer argues that the administrative law judge's prior finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1) can no longer be affirmed, as the Sixth Circuit is currently considering whether to adopt the holdings of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) and the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In *Williams* and *Compton*, the courts ruled that in determining whether claimant has met his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence, all evidence relevant to the existence of pneumoconiosis must be considered together, rather than merely within the discrete subsections of Section 718.202(a)(1)-(4). Employer also contends that the administrative law judge erred in relying upon a presumption that pneumoconiosis is a latent and progressive disease when weighing the x-ray evidence of record.

These contentions are without merit. As employer has acknowledged, the Sixth Circuit has not adopted the analysis set forth by the Third and Fourth Circuits, which requires an administrative law judge to weigh all of the evidence relevant to the existence of pneumoconiosis together. With respect to employer's allegation concerning the presumption of progressivity, the Board held that in according greatest weight to Dr.

Gaziano's positive x-ray interpretation based upon his qualifications as a B reader, the administrative law judge provided a valid rationale separate from his reference to the date of the x-ray which Dr. Gaziano read. *Shumaker*, BRB Nos. 99-0262 BLA and 99-0262 BLA-A, slip op. at 4. Employer has not advanced any compelling argument in support of changing this holding. It is, therefore, the law of the case and will not be disturbed. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Regarding the administrative law judge's findings under Section 718.204(c), employer alleges that the administrative law judge erred in crediting Dr. Knight's diagnosis, attributing the miner's totally disabling chronic obstructive pulmonary disease (COPD) primarily to coal dust exposure, as Dr. Knight relied on an inaccurate smoking history and an invalid pulmonary function study and did not adequately explain how he arrived at his conclusion. These contentions have merit.[2]

Dr. Knight examined claimant at the request of the Department of Labor and indicated that the miner reported to him that he smoked one-half of a package of cigarettes per day for thirty years. Director's Exhibit 11. Dr. Knight was later informed that the miner may actually have smoked one package of cigarettes per day for more than thirty years. Dr. Knight indicated that "I would certainly consider smoking of this level to be a minor aggravating factor" in causing the miner's COPD. Director's Exhibit 13. In addressing Dr. Knight's opinion on remand, the administrative law judge reaffirmed his previous finding that the miner smoked two packages of cigarettes per day for thirty years, but acknowledged that "there is also a substantial amount of evidence that the miner smoked one pack per day for thirty years." Decision and Order – Awarding Living Miner's Benefits at 8. The administrative law judge found that physicians, like Dr. Knight, who relied upon a thirty pack year history "relied upon a sufficiently accurate length of smoking history for their opinions to be probative." *Id*.

As employer asserts, however, the administrative law judge did not set forth the evidentiary basis for his apparent finding that the knowledge that the miner smoked for an additional thirty pack years would be of no significance in accurately identifying the source of the miner's disabling COPD. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). We must vacate, therefore, the administrative law judge's decision to give greatest weight to Dr. Knight's opinion under Section 718.204(c). On remand, the administrative law judge must reconsider the

[2] Employer has not identified error in the administrative law judge's finding that total disability was established under 20 C.F.R. §718.204(b)(2)(i) and (iv). We affirm this finding, as it has not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

relevant evidence and make a definitive finding regarding the length of the miner's smoking history. The administrative law judge must then reconsider his weighing of the relevant medical opinions in light of this determination. When reconsidering the medical opinions regarding the issue of causation, the administrative law judge must render findings as to whether the physicians' diagnoses, including those of Dr. Knight, are supported by the underlying documentation and adequately explained and the administrative law judge must set forth the bases for these findings. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Employer also maintains that the administrative law judge erred in discrediting Dr. Rosenberg's opinion, that the miner's disabling COPD was caused solely by cigarette smoking, on the ground that Dr. Rosenberg did not diagnose pneumoconiosis. Decision and Order – Awarding Living Miner Benefits at 9; Employer's Exhibit 1. This contention has merit. The administrative law judge determined, pursuant to Section 718.202(a)(1), that the x-ray evidence of record established the existence of clinical pneumoconiosis. Decision and Order – Award of Benefits at 15. The administrative law judge did not, however, make a separate finding as to whether the miner suffered from legal pneumoconiosis, *e.g.*, a respiratory or pulmonary impairment caused by dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2); *see also* 20 C.F.R. §718.201 (2000). Because the administrative law judge relied upon the opinion in which Dr. Knight attributed the miner's totally disabling obstructive impairment to legal pneumoconiosis, the administrative law judge did not act properly in discrediting Dr. Rosenberg's opinion based upon the fact that Dr. Rosenberg did not diagnose clinical pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995). Thus, we vacate the administrative law judge's finding regarding Dr. Rosenberg's opinion. On remand, the administrative law judge must reconsider Dr. Rosenberg's opinion under Section 718.204(c) and make a finding regarding the probative value of the doctor's conclusion that the miner's respiratory problems were attributable to smoking rather than coal dust exposure.

We now turn to a consideration of employer's appeal of the award of benefits in the survivor's claim. Employer argues that because the administrative law judge's decision to give greatest weight to the opinion of Dr. Haggenjos based upon his status as the miner's treating physician is at odds with the subsequent decision of the United States Court of Appeals for the Sixth Circuit in *Williams*, the award must be vacated. The court stated in *Williams* that "the opinions of treating physicians get the deference they deserve based on their power to persuade." 338 F.3d at 513, 22 BLR at 2-647. The court also

indicated that in order for a medical opinion to support a finding that pneumoconiosis hastened a miner's death, it must be more than conclusory and must describe a "specifically defined process that reduces the miner's life by an estimable time." 338 F.3d at 516, 22 BLR at 2-655.

Upon review of the administrative law judge's Decision and Order awarding benefits in the survivor's claim, we hold that the administrative law judge's analysis of Dr. Haggenjos's opinion does not clearly comport with the court's language in *Williams* as it pertains to the issues of the weighing of a treating physician's opinion and the proper standard for proving that pneumoconiosis hastened a miner's death. Accordingly, we vacate the award of benefits in the survivor's claim and remand this case to the administrative law judge for reconsideration of whether the evidence of record is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). On remand, the administrative law judge must assess Dr. Haggenjos's opinion in accordance with the standards set forth by the Sixth Circuit in *Williams*.

Accordingly, the Decision and Order – Award of Benefits and Decision and Order – Awarding Living Miner Benefits are affirmed in part and vacated in part and both claims are remanded to the administrative law judge 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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REGINA C. McGRANERY
Administrative Appeals Judge