

BRB No. 07-0902 BLA

F.P.)	
(Widow of S.P.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
FREEMAN UNITED COAL MINING)	DATE ISSUED: 07/16/2008
COMPANY)	
)	
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 on Remand Denying Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

R. Henry Sarpy, Jr. (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for claimant.

Theodore F. Kommers (Gould & Ratner), Chicago, Illinois, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand Denying Benefits (04-BLA-0098) of Administrative Law Judge Lee J. Romero, Jr. on both a miner's claim and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine

¹ Claimant is the surviving spouse of the deceased miner who died on November 15, 2000. The death certificate lists the cause of the miner's death as "unspecified natural causes." Director's Exhibit 35.

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 third time.² When this case was most recently before the Board, the Board affirmed the administrative law judge's finding that clinical pneumoconiosis was not established by x-ray, autopsy, or medical opinion evidence at 20 C.F.R. §718.202(a)(1), (2), and (4) and that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(3), as claimant was not entitled to the presumptions set forth therein. The Board, however, vacated the administrative law judge's denial of benefits on both the miner's claim and the survivor's claim because the administrative law judge failed to fully address whether the evidence was sufficient to establish that the miner's emphysema/chronic obstructive pulmonary disease (copd) was due, in part, to coal dust exposure and thereby sufficient to establish legal pneumoconiosis at Section 718.202(a)(4).³ Accordingly, the Board instructed the administrative law judge to consider, on remand, whether the medical opinion evidence was sufficient to establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The Board further noted that because the administrative law judge's analysis of the medical opinion evidence on the issue of legal pneumoconiosis could affect his finding on whether the miner's disability was due to pneumoconiosis, *i.e.*, disability causation, his finding at Section 718.204(c) was likewise vacated.⁴ The Board also vacated the administrative law judge's denial of benefits on the survivor's claim as his analysis on the issue of legal pneumoconiosis at Section 718.202(a)(4) could affect his weighing of the evidence on that issue pursuant to 20 C.F.R. §718.205(c). [*F.P.*] *v. Freeman United Coal Mining Co.*, BRB No. 05-0904 BLA (Aug. 30, 2006) (unpub.).

On remand, the administrative law judge initially found that the evidence established a coal mine employment history of fourteen years and a smoking history of more than fifty years. Decision and Order on Remand at 4. The administrative law judge next found that the medical opinion evidence failed to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 4-10. The administrative law judge further found that, in the absence of a finding of either clinical

² A complete history of this case is set forth in the administrative law judge's Decision and Order on Remand Denying Benefits of July 10, 2007 and the Board's most recent decision, [*F.P.*] *v. Freeman United Coal Mining Co.*, BRB No. 05-0904 BLA (Aug. 30, 2006) (unpub.).

³ Legal pneumoconiosis is any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic, restrictive or obstructive lung disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

⁴ It was stipulated that the miner was totally disabled. 20 C.F.R. §718.204(b).

or legal pneumoconiosis, the issues of disability causation at Section 718.204(c) and the cause of the miner's death at Section 718.205(c) were moot. Decision and Order at 10. Accordingly, the administrative law judge denied benefits on both the miner's claim and the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). Claimant also contends that the medical opinion evidence is sufficient to establish that the miner's disability and death were due to pneumoconiosis pursuant to Sections 718.204(c) and 718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁵

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.⁶ 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 order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner suffered from pneumoconiosis at 20 C.F.R. §718.202(a); that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203; that he was totally disabled at 20 C.F.R. §718.204(b); and that his pneumoconiosis was a substantially contributing cause of his total disability at 20 C.F.R. §718.204(c). *See* 20 C.F.R. §725.202(d).

To establish entitlement to survivor's benefits, in addition to establishing that the miner had pneumoconiosis that arose out of coal mine employment, claimant must establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death,

⁵ We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination as well as his determination regarding the length of the miner's smoking history. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁶ We will apply the law of the United States Court of Appeals for the Seventh Circuit as claimant was last employed in the coal mine industry in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *see Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992).

In finding that "legal" pneumoconiosis was not established at Section 718.202(a)(4), claimant argues that the administrative law judge improperly relied on employer's medical opinion evidence,⁷ which primarily relied on a negative x-ray evidence and a negative autopsy report, evidence relevant to clinical pneumoconiosis, to find that legal pneumoconiosis was not established. Instead, claimant contends that the administrative law judge should have credited the well-reasoned medical opinions of Drs. Rose, Hebert and Winkler, which properly addressed and found legal pneumoconiosis.⁸

Claimant first asserts that the opinion of Dr. Rose, finding legal pneumoconiosis, should have been credited because, contrary to the administrative law judge's determination, Dr. Rose reviewed all of the miner's medical records and based her opinion on the totality of the miner's autopsy report, which showed that, in addition to

⁷ This evidence consists of the opinions of Dr. Emory, who opined that the miner did not suffer from clinical pneumoconiosis and that the miner's emphysema was caused solely by cigarette smoking, Director's Exhibits 42, 52; Employer's Exhibit 2; Dr Kress, who opined that the miner did not suffer from coal workers' pneumoconiosis and suffered from severe emphysema due to cigarette smoking, Director's Exhibit 52; Employer's Exhibit 5; and Dr. Fino, who opined that the miner did not have coal workers' pneumoconiosis and that the miner's emphysema was due to smoking alone, Director's Exhibit 52; Employer's Exhibits 3, 4; Claimant's Exhibit 8.

⁸ Dr. Rose opined that the miner's smoking history was sufficient to cause the miner's emphysema, but that coal mine dust exposure was also a contributing factor to the disease. Claimant's Exhibits 1, 4, 51.

Dr. Hebert opined that the miner suffered from pneumoconiosis and chronic obstructive pulmonary disease due to both smoking and coal mine dust exposure. Director's Exhibit 11; Claimant's Exhibits 11, 13, 15.

Dr. Winkler, the miner's treating physician, opined that that the miner suffered from emphysema and chronic obstructive pulmonary disease caused by both coal mine employment and smoking. Director's Exhibits 42, 52; Claimant's Exhibits 16, 18; Employer's Exhibit 31.

anthracosilicosis, there was evidence of emphysema due, in part, to coal dust exposure, *i.e.*, legal pneumoconiosis. Claimant also asserts that, contrary to the administrative law judge's finding, Dr. Rose relied on objective evidence to find legal pneumoconiosis.

In considering the opinion of Dr. Rose on the issue of legal pneumoconiosis, the administrative law judge accorded it little weight because Dr. Rose's finding was based, in part, on her finding of clinical pneumoconiosis, which conflicted with the finding of the autopsy prosector that the miner did not have clinical pneumoconiosis. In addition, the administrative law judge noted that Dr. Rose relied on her finding of a fifteen year coal mine employment history without sufficiently explaining how it contributed to the miner's emphysema/copd, when she attributed the miner's emphysema/copd to both smoking and coal mine employment. The administrative law judge concluded, therefore, that Dr. Rose's opinion, that the autopsy showed "a coal dust related lung disease," was entitled to little weight because it was not sufficiently supported.

As claimant contends, Dr. Rose looked at all of the miner's medical records and relied on the totality of the autopsy findings, *i.e.*, findings of emphysema/copd due to coal mine employment and smoking, and not just findings regarding clinical pneumoconiosis. The administrative law judge, nonetheless, permissibly found that Dr. Rose's finding of legal pneumoconiosis was not sufficiently reasoned because she did not explain how the miner's fifteen years of coal mine employment contributed to his lung disease. The administrative law judge also permissibly found that her use of the word "probable" in discussing the cause of the miner's lung disease rendered her opinion "faulty". *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *see generally Stark v. Director, OWCP*, 9 BLR 1-36 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

Regarding the opinion of Dr. Hebert, claimant argues that, contrary to the administrative law judge's determination, Dr. Hebert did not just make a finding of clinical pneumoconiosis based on x-ray evidence, but instead diagnosed legal pneumoconiosis, *i.e.*, chronic obstructive pulmonary disease due to coal mine employment, based on the miner's work and medical history, physical examination findings and pulmonary function study results. Claimant further contends that, contrary to the administrative law judge's determination, Dr. Hebert did not "presume" that the miner's coal mine employment automatically resulted in legal pneumoconiosis, but rather, considered that the miner's "medical and work histories" supported such a diagnosis.

In considering the opinion of Dr. Hebert, the administrative law judge found that it was entitled to little weight on the issue of legal pneumoconiosis because, despite the fact that Dr. Hebert examined the miner, he relied on an inaccurate smoking history and appeared to rely on his diagnosis of clinical pneumoconiosis, based on x-ray and coal mine employment history, which was contrary to the administrative law judge's finding. The administrative law judge further concluded that, although Dr. Hebert noted that the miner's respiratory condition was "complicated by the fact that he did have a smoking history" the doctor did not explain how the smoking history attributed to the miner's lung condition and the doctor found a thirty year smoking history, when the record revealed a fifty year smoking history. In light of his inaccurate smoking history and his reliance on positive x-ray evidence, the administrative law judge permissibly concluded that Dr. Hebert's diagnosis of legal pneumoconiosis was unreasoned because it "rest[ed] solely on the fact that the miner worked as an underground coal miner." Decision and Order at 8; *see Clark*, 12 BLR at 1-155; *Maypray*, 7 BLR at 1-688 (1985); *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Turning to the opinion of Dr. Winkler, claimant argues that, contrary to the administrative law judge's finding, Dr. Winkler's opinion of legal pneumoconiosis should have been given deference as he was the miner's treating physician for two years, and therefore "had more contact with [the miner] than any other physician," Claimant's Brief at 22, 25.⁹ In addition, claimant argues that, contrary to the administrative law judge's finding, Dr. Winkler's opinion is supported by objective evidence.

In considering the opinion of Dr. Winkler, the administrative law judge found that, notwithstanding the doctor's status as the miner's treating physician, the doctor's opinion was not entitled to "special priority" on that basis because the physician had been a treating physician for only two years and her opinion did not contain sufficient reasoning.

⁹ 20 C.F.R. §718.104(d) provides, in pertinent part, that the administrative law judge must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record and shall consider the following factors in weighing the opinion of the treating physician:

- 1) Nature of relationship.
- 2) Duration of relationship.
- 3) Frequency of treatment.
- 4) Extent of treatment.

The regulation also requires the administrative law judge to consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Further, the administrative law judge accorded little weight to Dr. Winkler's opinion because, although she found that the miner had anthracosilicosis and severe end-stage emphysema and chronic obstructive pulmonary disease, she did not refer to any objective evidence to support her finding of legal pneumoconiosis and her finding of anthracosilicosis on autopsy was in opposition to the autopsy prosector's conclusion. These reasons constitute a permissible basis for according Dr. Winkler's opinion little weight on the issue of legal pneumoconiosis. See 20 C.F.R. §718.104(d)(1)-(5); *Clark*, 12 BLR at 1-155; *Peskie*, 8 BLR at 1-129; *Lucostic*, 8 BLR at 1-47 (1985). Accordingly, we conclude that the administrative law judge rationally determined that the opinions of Drs. Rose, Hebert and Winkler failed to carry claimant's burden of establishing legal pneumoconiosis pursuant to Section 718.202(a)(4). 20 C.F.R. §§718.201, 718.202(a)(4); see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

The Board's prior remand instructions were very narrow, specifically requiring the administrative law judge to determine whether the medical opinion evidence of record supported a finding of legal pneumoconiosis. As discussed above, the administrative law judge considered the evidence which could, if credible, establish legal pneumoconiosis, but properly found that it was incredible. We, therefore, affirm the administrative law judge's finding that the evidence failed to establish legal pneumoconiosis pursuant to Section 718.202(a)(4).¹⁰ See *Gee v. W.G. Moore & Sons*, 9 BLR 1-4, 1-6 (1986) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Kozele*, 6 BLR at 1-382 n.4.

As claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to Part 718, see *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we must affirm the denial of benefits on both the miner's claim and the survivor's claim, and we need not consider claimant's arguments at Section 718.204(c) and Section 718.205(c).

¹⁰ Because we affirm the administrative law judge's finding that the opinions of Drs. Rose, Winkler and Hebert were insufficient to carry claimant's burden of establishing legal pneumoconiosis, we need not address claimant's argument that the administrative law judge erred in his analysis of the opinions of Drs. Fino, Emory and Kress, attributing claimant's lung condition solely to smoking. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits on both the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge