

BRB No. 01-0607 BLA

HARRIET J. ANDERSON	)	
(Widow of GORDON R. ANDERSON)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED:
	)	
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 Thomas F. Phalen, Jr.,  
Administrative Law Judge, United States Department of Labor.

Ronald B. Johnson (McDermott & Bonenberger, PLLC), Wheeling, West  
Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (01-BLA-0607) of  
Administrative Law Judge Thomas F. Phalen, Jr. awarding benefits on a 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).<sup>1</sup> The instant case involves a survivor's claim

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<sup>1</sup>The Department of Labor has amended the regulations implementing the Federal  
Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective  
on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All  
citations to the regulations, unless otherwise noted, refer to the amended regulations.

filed on March 14, 1997.<sup>2</sup> In the initial Decision and Order, Administrative Law Judge

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<sup>2</sup>The miner filed a claim on May 9, 1980. Director's Exhibit 19. After the district director denied the claim, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* However, by Order dated December 15, 1987, Administrative Law Judge Robert L. Hillyard dismissed the claim pursuant to the miner's request. *Id.*

The miner filed a second claim on July 25, 1989. Director's Exhibit 20. In a Decision and Order dated May 31, 1991, Administrative Law Judge Nahum Litt found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Judge Litt, therefore, considered the miner's 1989 claim on the merits. After crediting the miner with twenty-two and one-half years of coal mine employment, he found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000), that the miner was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000) and that the evidence was sufficient to establish total disability pursuant

Thomas F. Phalen, Jr. (the administrative law judge), after crediting the miner with twenty-two and one-half years of coal mine employment, found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). The administrative law judge also found that claimant was entitled to a presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). The administrative law judge further found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated April 5, 2000, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) (2000) and 718.203(b) (2000) as unchallenged on appeal. *Anderson v. Valley Camp Coal Co.*, BRB No. 99-0688 BLA (Apr. 5, 2000) (unpublished). The Board, however, vacated the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000) and remanded the case for further consideration. *Id.*

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to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(4) (2000). *Id.* Judge Litt also found that the evidence was sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, Judge Litt awarded benefits. *Id.* By Decision and Order dated April 30, 1992, the Board affirmed Judge Litt's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1) and (a)(4) (2000), 718.203(b) (2000), 718.204(c)(2) (2000) and 725.309 (2000) as unchallenged on appeal. *Anderson v. Valley Camp Coal Co.*, BRB No. 91-1511 BLA (Apr. 30, 1992) (unpublished). The Board also affirmed Judge Litt's findings pursuant to 20 C.F.R. §§718.204(c)(1) and (c)(4) (2000) and 718.204(b) (2000). *Id.* The Board, therefore, affirmed Judge Litt's award of benefits. *Id.* The miner's claim was in payment status at the time of his death.

On remand, the administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Neither claimant<sup>3</sup> nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R.

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<sup>3</sup>Claimant is the surviving spouse of the deceased miner who died on February 6, 1997. Director's Exhibit 5.

§718.205(c).<sup>4</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). 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 *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), cert. denied, 113 S.Ct. 969 (1993).

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<sup>4</sup>Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner’s death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner’s death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) 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).

In his consideration of whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge found that Dr. Aguilar's opinion, by itself, was not supportive of claimant's claim.<sup>5</sup> Decision and Order on Remand at 6. The administrative law judge noted that Dr. Aguilar did not list pneumoconiosis as either a final diagnosis or as a cause of death. *Id.* The administrative law judge further noted that although Dr. Aguilar "opined that silicosis certainly played a part in the miner's multi-system disease, he did not specify that the multi-system disease led to [the miner's] death." *Id.*

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<sup>5</sup>Dr. Aguilar completed the miner's death certificate on February 7, 1997. Director's Exhibit 5. Dr. Aguilar attributed the miner's death to cardiopulmonary arrest due to cirrhosis. *Id.*

In a letter dated May 30, 1997, Dr. Aguilar stated:

[The miner] was diagnosed as having miner silicosis. Apparently he had [been] retired as a coal miner, since 1985. Other diagnosis used is "black lung." Certainly this disease played a part of his multisystem disease.

Director's Exhibit 11; *see also* Claimant's Exhibit 4.

The administrative law judge accorded Dr. Mapel's opinion "great weight" because he found that his opinion was "well reasoned and based on a review of all the medical evidence of record."<sup>6</sup> Decision and Order on Remand at 6. The administrative law judge found that:

[Dr. Mapel] provided a cogent analysis linking the miner's death to pneumoconiosis. Dr. Mapel explained that the miner's severe pneumoconiosis led to cor pulmonale which in turn led to passive liver congestion and chronic liver failure. Furthermore, he pointed out that the severe coal workers' pneumoconiosis with secondary cor pulmonale made it much more difficult for the miner to withstand the effects of his multi-system failure, thus hastening his death. While the x-ray evidence does not indicate severe pneumoconiosis, the finding by Judge Litt (as affirmed by the Benefits Review Board) that [the miner] was totally disabled by pneumoconiosis evinces that the disease was severe. Dr. Mapel also logically opined that failure to mention pneumoconiosis in the hospital records just preceding the miner's death was not unexpected because the attending physicians were concerned with treating [the miner's] immediate problems: blood loss, ascites, and congestive heart failure. With this in mind, I find that Dr. Aguilar's determinations bolster Dr. Mapel's opinion. Both believed that coal workers' pneumoconiosis contributed to the miner's multi-system failure. Dr. Mapel explained that the multi-system failure, culminating in cardiopulmonary arrest and cirrhosis of the liver, was worsened by pneumoconiosis. Furthermore, Dr. Mapel's

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<sup>6</sup>Dr. Mapel's opinion, if credited, could support a finding that the miner's death was due to pneumoconiosis since Dr. Mapel opined that the miner's pneumoconiosis caused cor pulmonale with right heart failure, which in turn, caused "cardiac cirrhosis," one of the causes of the miner's death. *See* 20 C.F.R. §718.205(c)(2); Claimant's Exhibit 6. Dr. Mapel's opinion that the miner's respiratory impairment (attributable to his pneumoconiosis) made it more difficult for him to withstand the effects of his multisystem failure, if credited, could support a finding that pneumoconiosis hastened the miner's death. *See* 20 C.F.R. §718.205(c)(5); Claimant's Exhibit 6.

reliance on the diagnosis of cor pulmonale is supported by the findings of Dr. Henry Cunningham, who examined [the miner] on October 27, 1989. (Dir. Ex. 20).

Decision and Order on Remand at 6.

In regard to Dr. Altmeyer's opinion that the miner's death was not due to pneumoconiosis, the administrative law judge stated that:

I place considerable weight on Dr. Altmeyer's opinion because it is based on a review of most of the medical evidence of record. Noticeably missing from his reviews, however, were any of the positive x-ray reports. Still, I find this omission harmless because Dr. Altmeyer assumed the existence of pneumoconiosis. Dr. Altmeyer's superior credentials also lend greater credibility to his opinion. *Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990).

Decision and Order on Remand at 7.

The administrative law judge, after noting that the opinions of Drs. Mapel and Altmeyer were "diametrically opposed," found that Dr. Mapel's opinion was "more persuasive because of his cogent reasoning." Decision and Order on Remand at 7. The administrative law judge found that Dr. Mapel's opinion was "supported by the x-ray evidence, the previously adjudged severity of the pneumoconiosis, the miner's lengthy coal mine employment and absence of a smoking history, Dr. Aguilar's notes and letter, and Dr. Cunningham's opinion." *Id.* The administrative law judge, therefore, found that the evidence was sufficient to establish that pneumoconiosis hastened the miner's death. *Id.*

Employer argues that the administrative law judge committed numerous errors in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer initially contends that the administrative law judge erred in his consideration of Dr. Mapel's opinion.

Employer argues that the administrative law judge erred in not addressing evidence calling into question Dr. Mapel's assessment of "severe" pneumoconiosis. Dr. Mapel's assessment of "severe" pneumoconiosis was based upon the miner's chest x-rays and the results of the miner's February 22, 1990 pulmonary function study. Claimant's Exhibit 6. After the administrative law judge acknowledged that the x-ray evidence did not indicate severe pneumoconiosis, *see* Decision and Order on Remand at 6, he failed to address the significance of Dr. Mapel's reliance upon the x-ray evidence to support his finding of "severe" pneumoconiosis.

Employer argues that the administrative law judge erred in failing to address evidence refuting Dr. Mapel's claim that the results of the miner's February 22, 1990 pulmonary function study demonstrated "severe" pneumoconiosis. Employer's Brief at 7. We agree. During his December 23, 1998 deposition, Dr. Altmeyer indicated that he disagreed with Dr. Mapel's conclusion that the miner's February 22, 1990 pulmonary function study revealed "combined severe restrictive and obstructive ventilatory defects."<sup>7</sup> Employer's Exhibit 2 at 28. The administrative law judge erred in not addressing this evidence.

Moreover, employer accurately notes that a finding of severe pneumoconiosis is neither a legal nor a factual requirement in a finding of total disability due to pneumoconiosis. Employer's Brief at 6. Consequently, the administrative law judge made an improper medical conclusion in finding that the miner's pneumoconiosis was severe because Judge Litt previously found that the miner was totally disabled by pneumoconiosis. *See generally Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

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<sup>7</sup>Dr. Altmeyer opined that there was not any measurement in the miner's February 22, 1990 pulmonary function study which would allow a physician to determine whether there was a restrictive defect. Employer's Exhibit 2 at 28. Dr. Altmeyer explained that while a reduced FVC value could indicate a restrictive impairment of lung function, its presence had to be confirmed by lung volume testing. *Id.* at 29. Dr. Altmeyer noted that the miner's February 22, 1990 pulmonary function study did not contain any measurement of the miner's total lung capacity. *Id.* Dr. Altmeyer opined that the miner's FEV1/FVC ratio of 67 percent revealed a very mild air flow obstruction which would not translate into any symptoms. *Id.* at 30-31.

Employer further contends that the administrative law judge erred in failing to address evidence contradicting Dr. Mapel's conclusion that the miner suffered from cor pulmonale that caused right-sided congestive heart failure.<sup>8</sup> On remand, the administrative law judge noted that "Dr. Mapel explained that the miner's severe pneumoconiosis led to cor pulmonale which in turn led to passive liver congestion and chronic liver failure." Decision and Order on Remand at 6. The administrative law judge further noted that "Dr. Mapel's reliance on the diagnosis of cor pulmonale is supported by the findings of Dr. Henry Cunningham, who examined [the miner] on October 27, 1989." *Id.*

Although the administrative law judge acknowledged that Dr. Altmeyer found no medical evidence pointing to a diagnosis of cor pulmonale, he failed to resolve the conflict in the opinions of Drs. Mapel and Altmeyer.<sup>9</sup> Employer also contends that the administrative law judge failed to adequately scrutinize Dr. Cunningham's finding of cor pulmonale.<sup>10</sup>

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<sup>8</sup>In his initial decision, the administrative law judge found that the record was "absent of any evidence which contradicts cor pulmonale and right sided congestive heart failure." Decision and Order at 14. In its Decision and Order, the Board held that, contrary to the administrative law judge's finding, there was evidence contradicting such a finding, namely Dr. Altmeyer's opinion. *Anderson v. Valley Camp Coal Co.*, BRB No. 99-0688 BLA (Apr. 5, 2000) (unpublished).

<sup>9</sup>During a December 23, 1998 deposition, Dr. Altmeyer testified that he did not find any evidence of cor pulmonale. Employer's Exhibit 2 at 43. Dr. Altmeyer noted that the evidence was consistent with left ventricular failure causing right ventricular failure but not isolated right-sided failure. *Id.* Dr. Altmeyer, therefore, opined that the findings were not consistent with cor pulmonale. *Id.* Dr. Altmeyer further explained that:

[The miner] was treated in the standard fashion for left-sided heart failure. He received diuretics and he has received digitalis, and these are treatments for left-sided failure and not right-sided failure. In fact, treating individuals with digitalis and heavy doses of diuretics may, in fact, make some people with cor pulmonale worse, and he got better when he was treated. His physicians were treating him for left ventricular failure. There is no doubt about that by multiple records that I reviewed.

Employer's Exhibit 2 at 44.

<sup>10</sup>In a report dated October 27, 1989, Dr. Cunningham opined that the miner had a "physical exam and clinical evidence of cor pulmonale." Director's Exhibit 20. Dr. Cunningham noted that the miner had been recently hospitalized with an episode of cor pulmonale, bronchitis, and congestive heart failure. *Id.* In a second report related to his

We agree. The administrative law judge failed to adequately address whether Dr. Cunningham's opinion is sufficiently reasoned. See *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Additionally, employer contends that the administrative law judge failed to consider other evidence in the record refuting a diagnoses of cor pulmonale. Although the administrative law judge considered Dr. Cunningham's diagnosis of cor pulmonale, the administrative law judge failed to address the significance of hospital records that contain no such finding. See Claimant's Exhibit 5.

Because the administrative law judge failed to adequately address evidence calling into question Dr. Mapel's finding of "severe" pneumoconiosis and his finding of cor pulmonale, we remand the case to the administrative law judge to reconsider whether Dr. Mapel's opinion is sufficient to support a finding that the miner's death was due to pneumoconiosis

Employer further contends that the administrative law judge mischaracterized Dr. Mapel's opinion. Although employer concedes that Dr. Mapel opined that pneumoconiosis was a major contributing factor in the miner's death and that the miner's severe respiratory impairment would have made it much more difficult for him to withstand the effects of his multi-system failure, employer accurately notes that Dr. Mapel failed to explicitly link these two opinions together. However, in rendering his opinions, Dr. Mapel did not diagnose any lung diseases other than pneumoconiosis. See Claimant's Exhibit 6. Moreover, Dr. Mapel opined that claimant's pneumoconiosis was severe enough to have prevented him from working. See Claimant's Exhibit 6. Consequently, the administrative law judge reasonably inferred that when Dr. Mapel opined that the miner's "severe respiratory impairment would have made it more difficult for him to withstand the effects of his multisystem failure," the doctor was referring to a respiratory impairment attributable to the miner's coal workers' pneumoconiosis.

Employer next contends that "nowhere in his report did Dr. Mapel find or opine that pneumoconiosis hastened the miner's death." Employer's Brief at 26. The administrative law judge found that Dr. Mapel's opinion supported a finding that the miner's death was hastened by pneumoconiosis because Dr. Mapel opined that the miner's "severe coal workers' pneumoconiosis with secondary cor pulmonale made it much more difficult for the

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October 27, 1989 examination of the miner (dated December 26, 1989), Dr. Cunningham diagnosed cor pulmonale based on "increased P2." *Id.*

miner to withstand the effects of his multi-system failure.” Decision and Order on Remand at 6. The administrative law judge’s finding was based upon a reasonable inference that the miner’s pneumoconiosis caused a respiratory impairment which made it more difficult for the miner to withstand the effects of his multisystem failure.

Employer next argues that the administrative law judge mischaracterized Dr. Aguilar’s opinion. We agree. The administrative law judge stated that Dr. Aguilar opined that the miner’s pneumoconiosis “contributed to [his] multisystem *failure*.” Decision and Order on Remand at 6 (emphasis added). Dr. Aguilar, however, opined that the miner’s pneumoconiosis “played a part of his multisystem *disease*.” Director’s Exhibit 11 (emphasis added).

Likewise, we agree with employer’s contention that the administrative law judge erred in finding that Dr. Mapel’s opinion was supported by Dr. Aguilar’s opinion. After finding that Dr. Aguilar’s opinion, by itself, was not supportive of claimant’s claim, the administrative law judge subsequently found that Dr. Aguilar’s determinations bolstered Dr. Mapel’s opinion because both doctors “believed that coal workers’ pneumoconiosis contributed to the miner’s multi-system failure.” Decision and Order on Remand at 6. As discussed, *supra*, Dr. Aguilar opined that the silicosis played a part in the miner’s *multi-system disease*, not his *multi-system failure*.

Employer next contends that the administrative law judge provided improper bases for crediting Dr. Mapel’s opinion over that of Dr. Altmeyer. We agree. The administrative law judge found that Dr. Mapel’s opinion was supported by the x-ray evidence. Decision and Order on Remand at 7. However, because Dr. Altmeyer also assumed the existence of pneumoconiosis, the administrative law judge erred in crediting Dr. Mapel’s opinion based upon the x-ray evidence.

The administrative law judge credited Dr. Mapel’s opinion based upon “the previously adjudged severity of the pneumoconiosis.” Decision and Order on Remand at 7. However, as discussed, *supra*, the administrative law judge failed to address evidence calling into question Dr. Mapel’s assessment of “severe” pneumoconiosis.

Next, the administrative law judge found that Dr. Mapel’s opinion was supported by the miner’s lengthy coal mine employment history and absence of a smoking history. Decision and Order on Remand at 7. The administrative law judge, however, failed to explain how either of these factors provided support for Dr. Mapel’s opinion that the miner’s death was due to pneumoconiosis.

The administrative law judge further found that Dr. Mapel’s opinion was supported by “Dr. Aguilar’s notes and letter” and Dr. Cunningham’s opinion. Decision and Order on

Remand at 7. As discussed, *supra*, the administrative law judge erred in finding that Dr. Aguilar's opinion supported Dr. Mapel's opinion and the administrative law judge erred in failing to address whether Dr. Cunningham's diagnosis of cor pulmonale was sufficiently reasoned.

Finally, employer argues that the administrative law judge failed to provide a basis for according less weight to Dr. Altmeyer's opinion that the miner's death was not due to pneumoconiosis. We agree. The administrative law judge, in noting that Dr. Altmeyer based his opinion on "most of the medical evidence," implies that Dr. Altmeyer did not review all of the medical evidence of record. *See* Decision and Order on Remand at 7. Dr. Altmeyer, however, based his opinions on an extensive review of the medical evidence. Moreover, the administrative law judge erred in finding that Dr. Altmeyer did not consider any positive x-ray interpretations of record. Although he questioned its legitimacy, Dr. Altmeyer reviewed Dr. James' positive interpretation of the miner's January 7, 1997 x-ray. *See* Employer's Exhibit 1. The administrative law judge failed to identify any relevant evidence not considered by Dr. Altmeyer in rendering his opinions.

In light of the above-referenced errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration.

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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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

