

BRB No. 02-0519 BLA

MARGARET R. EARL, o/b/o and as (Widow of WILLARD L. EARL))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
CONSOLIDATION COAL COMPANY)	
)	
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 Modification Request--Awarding Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Dannette Constantino, lay representative, Morgantown, West Virginia, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Modification Request--Awarding Benefits (2001-BLA-0279, 2001-BLA-0280) of Administrative Law Judge Robert J. Lesnick rendered on 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).

¹ The miner's claim filed on April 8, 1994 was awarded by an administrative law

judge who gave greater weight to medical opinions by Drs. Devabhaktuni and Rasmussen attributing the miner's totally disabling emphysema and chronic obstructive pulmonary disease (COPD), in part to coal mine dust exposure. Director's Exhibits 20, 56. That administrative law judge discounted contrary opinions by Drs. Renn, Morgan, and Hippensteel because he found that they understated the extent of the miner's coal dust exposure, and because Dr. Renn claimed that coal mine dust was inert and thus could not have aggravated the miner's chronic lung disease. Upon consideration of employer's appeal, the Board affirmed the award of benefits. *Earl v. Consolidation Coal Co.*, BRB No. 97-1297 BLA (May 22, 1998)(unpub.).

The miner died of respiratory failure on May 13, 1998 and claimant filed her survivor's claim on July 28, 1998. Director's Exhibits 2, 12. The miner had been diagnosed with lung cancer in early 1998 and had undergone surgery in which the lower lobe of his left lung was removed and biopsied. Director's Exhibit 20. On May 7, 1999, employer requested modification of the miner's claim award, arguing that the biopsy results demonstrated that the miner did not have pneumoconiosis. Director's Exhibit 69; see 33 U.S.C. §922, implemented by 20 C.F.R. §725.310(2000)(providing for modification within one year of an award, based on a mistake of fact or change in conditions). After further evidentiary development by the parties, the District Director of the Office of Worker's Compensation Programs denied employer's request for modification of the miner's claim award and awarded benefits on the survivor's claim. Director's Exhibits 82-85. Employer requested a hearing, which was held by Judge Lesnick on July 12, 2001. Director's Exhibit 87-B.

In the ensuing Decision and Order on Modification Request--Awarding Benefits, the administrative law judge credited the miner with thirty-seven years of coal mine employment pursuant to the parties' stipulation and accepted employer's stipulation that the miner was totally disabled by a respiratory or pulmonary impairment. Transcript (Tr.) at 20. The administrative law judge found that the chest x-ray and biopsy evidence was inconclusive for the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(2), but found that the medical opinion evidence established that the miner's chronic lung disease was due in part to coal mine dust exposure and thus constituted legal pneumoconiosis. See 20 C.F.R. §§718.202(a)(4); 718.201. Weighing the chest x-rays, biopsy, and medical opinions together, the administrative law judge found that the evidence established the existence of legal pneumoconiosis. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge further found that pneumoconiosis arising out of coal mine employment was a substantially contributing cause of the miner's totally disabling respiratory impairment and a substantially contributing cause or factor leading to the miner's death pursuant to 20 C.F.R. §§718.204(c) 718.205(c)(2).

Accordingly, the administrative law judge denied employer's request for modification and awarded benefits on both the miner's claim and survivor's claim.

On appeal, employer contends that the administrative law judge erred in his analysis of the biopsy and medical opinion evidence pursuant to Sections 718.202(a)(2), (a)(4), 718.204(c), and 718.205(c)(2). Claimant responds, urging affirmance of the award of benefits, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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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, 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).

To be entitled to benefits on the miner's claim under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(2), employer contends that the administrative law judge erred in finding the biopsy evidence to be inconclusive as to the existence of pneumoconiosis. Employer's contention lacks merit. The administrative law judge considered multiple pathology reports based on the lung biopsy of the left, lower lobe. Review of the record reflects that all the pathologists diagnosed squamous cell carcinoma, severe emphysema, and COPD. Dr. Chang additionally noted "anthracotic pigmentation." Director's Exhibit 20. Drs. Kleinerman, Garcia, and Perper concluded that "coal workers' pneumoconiosis" was absent from the

biopsy tissue. Director's Exhibits 50, 69, 81. The administrative law judge noted, however, that both Drs. Garcia and Perper also diagnosed "anthracosis." Director's Exhibits 50, 81. Dr. Rizkalla concluded that the biopsy tissue revealed macular pneumoconiosis. Claimant's Exhibit 3. Additionally, as highlighted by the administrative law judge, Drs. Perper and Rizkalla cautioned that the biopsy limited to the left, lower lobe was not necessarily representative of the miner's lungs as a whole, because coal workers' pneumoconiosis is typically more prevalent in the upper lung lobes. Director's Exhibit 81; Claimant's Exhibit 3.

The administrative law judge considered these opinions in light of the physicians' qualifications and reasonably found Dr. Perper's and Dr. Rizkalla's comments to be "instructive regarding the limited nature of the biopsy evidence in this case" Decision and Order at 11. Additionally, the administrative law judge did not err in considering that Drs. Garcia and Perper diagnosed anthracosis, "which meets the definition of pneumoconiosis" Decision and Order at 11, 22; see *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661-62 (4th Cir. 1999); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104, 1-114-15 (2001)(*en banc*)(Dolder and Smith, JJ, dissenting in part and concurring in part). Based on the foregoing findings, the administrative law judge was within his discretion to find that the biopsy evidence was "conflicting and inconclusive" as to the existence of pneumoconiosis. Decision and Order at 11, 22.

Moreover, the administrative law judge found that even were the biopsy "clearly found to be negative for pneumoconiosis, it would not be dispositive," because the tissue sample was limited to the left, lower lobe, and because a biopsy finding of no "medical pneumoconiosis. . . does not preclude a finding of legal pneumoconiosis" Decision and Order at 22. The administrative law judge's finding is supported by the physicians' statements in the record and is in accordance with law. See 20 C.F.R. §718.106(c); *Compton*, 211 F.3d at 210 and n.8, 22 BLR at 2-173 and n.8 (Recognizing that "[e]vidence that does not establish medical pneumoconiosis . . . should not necessarily be treated as evidence weighing *against* a finding of legal pneumoconiosis," and "encourag[ing] ALJ's to be mindful of this distinction and of the different diagnostic purposes attending various pieces of evidence.") Therefore, we reject employer's allegation of error and affirm the administrative law judge's finding pursuant to Section 718.202(a)(2).

Pursuant to Section 718.202(a)(4), employer argues that the administrative law judge erred in finding the existence of legal pneumoconiosis established because he erred in discrediting the opinions of Drs. Morgan, Hippensteel, Renn, and Kleinerman and in crediting the opinion of Dr. Rasmussen. Employer's Brief at 7-18. We conclude that substantial evidence supports the administrative law judge's determination to discount the opinions of Drs. Morgan, Hippensteel, and Renn, but that a remand is required for further consideration of the opinions of Drs. Kleinerman and Rasmussen.

The administrative law judge discounted the opinions of Drs. Morgan, Hippensteel, Renn, and Kleinerman attributing the miner's COPD and emphysema to smoking because they had an inaccurate understanding of the degree of the miner's coal dust exposure. Dr. Morgan stated that as a mechanic, the miner was exposed to a "strictly limited amount of coal dust." Employer's Exhibit 4 at 5, 16. Dr. Hippensteel believed that the miner spent only eleven months underground during his entire coal mine employment history. Director's Exhibits 20, 50. In contrast, the administrative law judge found that the miner's testimony established that he "was exposed to considerable coal dust."⁴ Decision and Order at 7; see *Compton*, 211 F.3d at 213, 22 BLR at 2-178 (opinion of physician who misunderstood degree of miner's coal dust exposure properly discounted); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Dr. Renn initially stated the same history given by Dr. Hippensteel of only eleven months underground. Director's Exhibit 53; Employer's Exhibit 1. Employer however, contends that Dr. Renn correctly understood the miner's exposure history because he later testified that the miner's coal mine employment history was sufficient to put him at risk for a coal mine dust disease. Employer's Exhibit 3 at 15. We conclude that substantial evidence nevertheless supports the administrative law judge's decision to discount Dr. Renn's opinion. At his deposition, Dr. Renn still indicated his belief that pneumoconiosis would occur "with less frequency" in "aboveground workers" such as the miner. *Id.* Thus, there is substantial evidence to support the administrative law judge's determination that Dr. Renn did not understand the extent of the miner's coal dust exposure. See *Compton, supra*. Additionally, the administrative law judge provided a second valid reason for discounting Dr. Renn's opinion, when he found that Dr. Renn did not "explain his previous comments regarding the 'inert' nature of the coal mine dust which the miner breathed." Decision and Order at 19; Director's Exhibit 53 at 47; see 20 C.F.R. §718.201; *Eagle v. Armco Inc.*, 943 F.2d 509, 511 n.2, 15 BLR 2-201, 2-203 n.2 (4th Cir. 1991)(physician's view that breathing coal mine dust does not cause COPD is contrary to the Act). Consequently, we reject employer's allegation of error in the administrative law judge's weighing of the opinions of Drs. Morgan, Hippensteel, and Renn.

However, we agree with employer that substantial evidence does not support the administrative law judge's determination to discount Dr. Kleinerman's opinion. In summarizing Dr. Kleinerman's opinion, the administrative law judge characterized Dr. Kleinerman's understanding of the miner's employment history as "fairly accurate." Decision and Order at 20. But later in the decision, the administrative law judge found Dr. Rasmussen's opinion to be more consistent with "the actual extent and duration of the miner's exposure to coal mine dust," implying that Dr. Kleinerman misunderstood the extent of the miner's coal dust exposure. Decision and Order at 24. Because this finding is inconsistent with the administrative law judge's prior characterization of Dr. Kleinerman's opinion and is not supported by substantial evidence, we must vacate the administrative law judge's finding and

remand the case for further consideration of Dr. Kleinerman's opinion.⁵ See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998)(administrative law judge must give valid reasons both for crediting certain evidence and discrediting other evidence).

Employer further contends that the administrative law judge did not adequately explain his rationale for crediting Dr. Rasmussen's opinion that the miner's COPD and emphysema were related to coal mine dust exposure. Employer's Brief at 9, 13. The administrative law judge stated that Dr. Rasmussen's opinion was "most consistent with the miner's complaints of worsening breathing problems, the miner's extensive smoking and coal mine employment histories, the actual extent and duration of the miner's exposure to coal mine dust, the abnormal blood gas test results, and qualifying pulmonary function studies before and after bronchodilator." Decision and Order at 24. Review of the record reflects that Dr. Kleinerman considered the same factors in addressing whether the miner's COPD and emphysema arose out of coal mine employment. Director's Exhibits 49, 69. Upon review, we are unable to discern why the administrative law judge found Dr. Rasmussen's opinion to be "most consistent" with the factors listed by the administrative law judge. Consequently, we must vacate the administrative law judge's finding and instruct him to provide an adequate rationale if he again credits Dr. Rasmussen's opinion. See *Hicks*, 138 F.3d at 533, 535, 21 BLR 2-336-37, 2-340 (administrative law judge's finding that physician's opinion was "most consistent with" miner's complaints, coal mine employment history, and test results not a sufficient rationale for crediting the opinion).

Employer challenges the administrative law judge's findings that legal pneumoconiosis was a substantially contributing cause of the miner's total disability pursuant to Section 718.204(c) and a substantially contributing cause or factor leading to the miner's death pursuant to Section 718.205(c). Employer's Brief at 13. Review of the administrative law judge's Decision and Order reflects that he relied on the findings and credibility determinations he made at Section 718.202(a)(4) to also find that disability causation was established. Decision and Order at 25. Additionally, at Section 718.205(c), the administrative law judge discounted the death causation opinions of all physicians who did not diagnose pneumoconiosis. Decision and Order at 27, citing *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70, --- BLR --- (4th Cir. 2002). Consequently, we must vacate the administrative law judge's findings at Sections 718.204(c) and 718.205(c) and instruct him to reconsider these issues after he has reassessed the "legal pneumoconiosis" opinions of Drs. Kleinerman and Rasmussen.

Accordingly, the administrative law judge's Decision and Order on Modification Request--Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge