BRB No. 03-0458 BLA

MARTHA C. WILLIAMS (Widow of ALEXANDER WILLIAMS)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 03/19/2004
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

SMITH, Administrative Appeals Judge:

Claimant, the miner's widow, appeals the Decision and Order Awarding Benefits (01-BLA-1003) of Administrative Law Judge Michael P. Lesniak rendered 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).[1] The administrative law

[1] 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

judge found, and the parties stipulated to, twenty-five years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis and death due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, 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 Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see*

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The miner filed a claim for benefits on March 30, 1989. Benefits were awarded on the miner's claim on February 5, 1992. The Board affirmed that award on July 29, 1993. Director's Exhibits 27-1, 27-19, 27-25, 27-30, 27-31, 27-54, 27-55. The miner died on May 5, 2000. Director's Exhibit 2. Claimant filed the instant survivor's claim on May 25, 2000. Director's Exhibit 1.

Shuff v. Cedar Coal Co., 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert denied*, 506 U.S. 1050 (1993).

Employer first contends that the administrative law judge failed to provide sufficient reasoning for his crediting of four positive readings of a 1990 x-ray over the preponderantly negative series of x-rays and a negative CT scan dating between 1969 and 2000.[3] Employer contends that the administrative law judge did not explain how these four readings were more probative than other readings other than they were readings of a more recent x-ray. Employer contends, however, that none of the readers who interpreted the 1990 x-ray had the opportunity to review other x-rays while several highly qualified doctors who read earlier x-rays as negative had the opportunity to read a series of x-rays which provided them with a better understanding of the miner's condition.

Noting that he was not required to defer to the numerical superiority of the negative x-ray evidence, the administrative law judge accorded greatest weight to the four credible readings of the December 26, 1990 x-ray because he found them most "probative of the miner's respiratory condition at the time of death." Decision and Order at 33.[4] In considering the readings of the December 26, 1990 x-ray, the administrative law judge noted that the four positive readings of the x-ray were by B-readers while the two negative readings were by dually qualified, Board-certified, B-readers. The administrative law judge, nonetheless, after considering the qualifications of the readers, accorded determinative weight to the four positive readings of B-readers.

The administrative law judge, however, appears to have accorded greater weight to the four positive readings based on their numerical superiority, which he may not do.

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[3] In the miner's claim, the administrative law judge found that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1). In the instant case, the administrative law judge found that since there has been a change in the law, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the issue is no longer whether claimant can establish the existence of pneumoconiosis with evidence relevant to any one of the subparts of Section 718.202, hence, is not identical to the one previously litigated and therefore, the doctrine of collateral estoppel was not applicable. That finding is affirmed as it has not been challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The administrative law judge accorded less weight to the readings of 1998 x-rays because the 1998 x-rays were taken while claimant was hospitalized for the purpose of diagnosing cancer and monitoring a right pneumothorax, not for diagnosing the presence of pneumoconiosis. The administrative law judge, therefore, determined that he could not view these x-rays as negative for the existence of pneumoconiosis. *See Sacolick v. Rushton Mining Co.*, 6 BLR 1-930, 1-932 (1984). Because employer has not specifically challenged this finding, it is affirmed. *Skrack*, 6 BLR 1-710.

Adkins v. Director, OWCP, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see* 20 C.F.R. §718.202(a)(1). Further, the administrative law judge stated that he accorded greater weight to the December 26, 1990 x-ray because it was more probative of the miner's respiratory condition at the time of his death based on its recency. There were prior x-rays which were read negative, however, which were taken October 12, 1988, April 26, 1989, and January 24, 1990. Moreover, the miner did not die until May 5, 2000, almost ten years after the x-ray which the administrative law judge found to be probative of the miner's respiratory condition at the time of his death. The administrative law judge's consideration of the x-ray evidence does not, therefore, appear to be rational, in accord with law, or supported by the record. Accordingly, we vacate the administrative law judge's weighing of the x-ray evidence and his finding that clinical pneumoconiosis was established at Section 718.202(a)(1). On remand, the administrative law judge must reconsider all the x-ray evidence in keeping with 20 C.F.R. §718.202(a)(1) and *Adkins*, 958 F.2d 49, 16 BLR 2-61.

Additionally, employer contends that the administrative law judge erred in discrediting negative interpretations of the 1998 CT scan since that CT scan was taken eight years after the December 26, 1990 x-ray on which the administrative law judge relied based on its recency. Employer contends that even though the administrative law judge considered the negative scan readings of Drs. Wiot, Meyer, and Perme, he failed to discuss the scan interpretation of Dr. Patel, the first radiologist to interpret the scan. Additionally, employer contends that the administrative law judge mischaracterized Dr. Zaldivar's opinion regarding the scan and erred in applying the holding of the United States Court of Appeals for the Seventh Circuit in *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002) to his consideration of the scan in this case which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.

In considering the interpretations of the March 18, 1998 CT scan, the administrative law judge noted that Board-certified radiologists and B-readers found no evidence of pneumoconiosis, and acknowledged that several consulting physicians submitted reports stating that CT scans are more sensitive and more accurate for determining parenchymal changes than standard x-rays. Decision and Order at 33; Employer's Exhibit 8. Citing *Stein*, however, the administrative law judge noted that the Seventh Circuit has accepted the Department's view that a CT scan, by itself, cannot effectively rule out the existence of pneumoconiosis. Additionally, the administrative law judge noted that the CT scan in this case was conventional as opposed to the more reliable high resolution scan and that it was taken for the purpose of diagnosing cancer, not pneumoconiosis. The administrative law judge also noted that Dr. Zaldivar had testified that the benefit of a chest x-ray was that it showed the entire lung at one time rather the small slices through 10mm cuts throughout the lung seen on a CT scan.

Although, pursuant to *Stein*, CT scans may not be given determinative weight, they must nonetheless be considered. *Stein*, 294 F.3d 885, 22 BLR 2-409. In this case, however, it appears that the administrative law judge gave no weight to the CT scan and did not consider all the evidence interpreting the CT scan, *i.e.*, Dr. Patel's interpretation or the totality of Dr. Zaldivar's deposition testimony who went on to state that CT scans, even conventional ones, can show more sensitive and accurate pictures of the lung than an x-ray. Accordingly, we vacate the administrative law judge's discrediting of the negative CT scan and remand the case for further consideration of all the evidence interpreting the CT scan.

Turning to the medical opinion evidence, employer contends that the administrative law judge failed to explain adequately why the opinion of Dr. Rasmussen, finding the existence of pneumoconiosis, was entitled to greater weight solely because he was the miner's treating physician, than were the contrary opinions of Drs. Bush, Naeye, Caffrey, Daniel, Zaldivar, Rosenberg, Morgan and Castle, who were not treating physicians. Employer contends that, although the administrative law judge noted that Dr. Rasmussen had treated the miner for approximately ten years, seeing him every two or three months, he failed to analyze how Dr. Rasmussen's status as a treating physician accorded him any superior understanding of or information on the miner's condition than was available to consulting and other examining physicians. Additionally, employer contends that the administrative law judge provided irrational, insufficient reasoning for discrediting the opinions of Drs. Bush, Naeye, Caffrey, Daniel, Morgan, Rosenberg, Castle, and Zaldivar on the existence of pneumoconiosis.

Citing the factors to be considered in weighing the opinion of a treating physician at Section 718.104(d), the administrative law judge found that Dr. Rasmussen, as the miner's treating physician, was in a unique position to render an opinion on the miner's condition and that his opinion was entitled to greater weight if it was found to be well-reasoned and documented. In considering the medical opinions, the administrative law judge found the opinions of Dr. Rasmussen, the miner's treating physician, entitled to greater weight because they clearly set forth the clinical findings and observations upon which they based their diagnoses of coal workers' pneumoconiosis and considered the miner's twenty-four year history of coal mine employment as well as his heavy, significant smoking history when they concluded that coal mine employment was at least one factor causing the miner's severe chronic obstructive pulmonary disease. Decision and Order at 36-37. This was rational. 20 C.F.R. §718.104(d); *Milburn Colliery Co. v. Hicks*, 138 F.2d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-129 (4th Cir. 1993)(court rejected any requirement that opinions of treating physicians automatically be given greater weight, but acknowledged that they can be "deserving of special consideration"); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Anderson v. Valley Camp of*

Utah, Inc., 12 BLR 1-111, 1-113 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985).

Further, contrary to employer's contention, the administrative law judge properly accorded less weight to the opinions of Drs. Bush, Naeye, Caffrey and Castle because he found them to be equivocal. The administrative law judge noted that although these doctors did not definitively diagnose the existence of pneumoconiosis, statements made by them were equivocal regarding the existence of pneumoconiosis. Decision and Order at 37-38. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Likewise, the administrative law judge permissibly accorded little weight to Dr. Daniel's opinion because Dr. Daniel failed to explain how he was able to completely eliminate the miner's significant coal mine dust exposure as a possible contributing factor in the miner's chronic obstructive pulmonary disease. *See Compton*, 211 F.3d at 213, 22 BLR at 2-177; *Hicks*, 138 F.2d at 532 n.9, 21 BLR at 2-335 n.9; *Crosson v. Director, OWCP*, 6 BLR 1-809, 1-812 (1984). Additionally, the administrative law judge rationally found the fundamental foundation of Dr. Morgan's opinion to be flawed inasmuch as his opinion stated that it was unlikely that the miner was exposed to harmful coal dust or silica in his twenty-four years of underground coal mine employment had no basis in fact and was at odds with the opinion of every other physician who directly or impliedly agreed that the miner had sufficient exposure to coal mine dust to be a potential susceptible host of pneumoconiosis. *Hicks*, 138 F.2d at 532 n.9, 21 BLR at 2-335 n.9; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400 (1984). The administrative law judge also rationally accorded little weight to Dr. Rosenberg's opinion because he used the absence of complicated pneumoconiosis as the sole criterion to exclude coal mine dust as a possible factor in causing the miner's severe chronic obstructive pulmonary disease. *See* 20 C.F.R. §718.201. Further, the administrative law judge permissibly accorded little weight to Dr. Zaldivar's opinion because he failed to explain how he was able to rule out coal dust exposure as a factor in the formation of the miner's asthma and emphysema when it was recognized that coal dust exposure can be related to the development of both diseases. *See* 20 C.F.R. §718.201; *Compton*, 211 F.3d at 213, 22 BLR at 2-177; *Hicks*, 138 F.2d at 532 n.9, 21 BLR at 2-335 n.9.

Accordingly, we affirm the administrative law judge's finding that the opinion of Dr. Rasmussen, the miner's treating physician, buttressed by the opinion of Dr. Cohen establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Nonetheless, because the administrative law judge must weigh together all the evidence relevant to the existence of pneumoconiosis before concluding that claimant has established the existence of pneumoconiosis pursuant to *Compton*, and the administrative law judge erred in his consideration of the x-ray and CT scan evidence, we vacate the administrative law judge's finding of pneumoconiosis and remand the case for the administrative law judge to reconsider all the evidence together in making a

determination as to whether claimant has established the existence of pneumoconiosis. *Compton*, 211 F.3d 203, 22 BLR 2-162.[5]

Finally, employer argues that the administrative law judge erred in finding that the evidence established death due to pneumoconiosis based on Dr. Cohen's opinion without considering the other opinions of record and erred in discrediting the opinions of Drs. Bush, Naeye, Caffrey, Zaldivar, Castle, Morgan and Rosenberg that pneumoconiosis did not cause death because they did not address whether the miner's pneumoconiosis, however minor, could have hastened death.

In finding that death due to pneumoconiosis was established, the administrative law judge credited the well-reasoned and well documented opinion of Dr. Cohen that the miner died from the effects of lung cancer on an already impaired pulmonary function, *i.e.*, Dr. Cohen concluded that the miner had a curable lesion, but was prevented from having surgery due to his severe pulmonary dysfunction. The administrative law judge noted that Dr. Cohen's conclusion was supported by the opinion of Dr. Gaziano, who also opined that curative surgery was thwarted by the miner's severe lung disease due to coal workers' pneumoconiosis and emphysema. In addition the administrative law judge noted that Dr. Cohen found that the miner's occupational history and smoking history was significantly contributory to the development of his severe obstructive lung disease and that this disease was significant enough to have caused total disability and hastened the miner's death.

Considering the opinions of the other physicians, the administrative law judge accorded less weight to the opinion of Dr. Rosenberg because of several inconsistencies in his reports. This was rational. *Hicks*, 138 F.2d 524, 21 BLR 2-323; *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984). Addressing the opinion of Dr. Bush, the administrative law judge gave it little weight because Dr. Bush relied on the absence of abnormal blood gases, cor pulmonale, and consistent radiographic changes to find that death was not due to pneumoconiosis when the record showed that the miner's chronic obstructive pulmonary disease had interfered with blood gas exchange as far back as 1989, Employer's Exhibit 9, and cor pulmonale had been diagnosed by claimant's treating physician as far back as 1997, Director Exhibit 14. *Hicks*, 138 F.2d 524, 21 BLR 2-323; *Stark*, 9 BLR at 1-37. Turning to Dr. Caffrey's opinion, the administrative law judge found it fundamentally flawed because Dr. Caffrey found that even if the miner had coal workers' pneumoconiosis it would have been so mild that it would not "by itself" have caused a pulmonary disability. Thus, the administrative law judge accorded it little weight because there is no requirement that pneumoconiosis be the primary cause of the miner's death. 20 C.F.R. §718.205(c). Further the administrative law judge noted that

[5] The administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3) are affirmed as unchallenged on appeal. *Skrack*, 6 BLR 1-710.

while the effects of mild simple pneumoconiosis on a healthy individual might be minor, Dr. Caffrey failed to consider the effects that even a mild, simple pneumoconiosis might have on a miner suffering from the effects of a prolonged, heavy smoking and lung cancer, and whether it could hasten that miner's death in any way. *Hicks*, 138 F.2d 524, 21 BLR 2-323; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90, *cert. denied* 113 S.Ct. 969. Turning next to Dr. Castle's opinion, the administrative law judge noted that Dr. Castle's statement, that the miner's emphysema would not cause "significant" abnormalities, implied that it may have caused less than significant abnormalities. Thus, the administrative law judge concluded that Dr. Castle failed to adequately explain how, given the miner's history of prolonged, heavy, smoking and lung cancer, even the miner's minimal emphysema could have played no role in the severe respiratory impairment which prevented the miner from having surgery to remove his malignant tumor at an early stage, nor did he explain how the miner's exposure to coal mine dust could be eliminated as a possible cause of the miner's significant asthmatic process. *See Compton*, 211 F.3d at 213, 214, 22 BLR at 2-177; *Hicks*, 138 F.2d 524, 21 BLR 2-323; *Stark*, 9 BLR 1-37. Addressing Dr. Naeye's opinion, the administrative law judge noted that while Dr. Naeye opined that smoking was the major cause of pulmonary disability and death in coal miners and coal dust exposure played a comparatively minor part, Dr. Naeye failed to explain how even minor effects from coal dust exposure would not have hastened the miner's death, given his history of prolonged heavy smoking and advanced lung cancer. *Compton*, 211 F.3d 203, 22 BLR 2-162; *Shuff*, 967 F.2d 977, 16 BLR 2-90; *Hicks*, 138 F.2d 524, 21 BLR 2-323; *Stark*, 9 BLR 1-36. Likewise, the administrative law judge accorded less weight to Dr. Zaldivar's opinion because he did not adequately explain how he was able to eliminate coal mine dust exposure as a cause or factor in the miner's asthma and development of emphysema. *See Compton*, 211 F.3d at 213, 214, 22 BLR 2-177; *Hicks*, 138 F.2d 524, 21 BLR 2-323. Finally, the administrative law judge accorded little weight to Dr. Morgan's opinion because he had premised his conclusion on the notion that the miner had not been exposed to harmful coal mine dust or silica. *See Compton*, 211 F.3d 203, 22 BLR 2-162.

We, therefore, reject employer's argument that the administrative law judge's reasons for according little weight to the opinions of employer's physicians on the cause of death were irrational and unsubstantiated. The administrative law judge gave valid reasons for according those opinions little weight. *Hicks*, 138 F.2d 524, 21 BLR 2-323; *Clark*, 12 BLR 1 at 155; *Anderson*, 11 BLR 1-113; *Stark*, 9 BLR at 1-37; *Brown*, 7 BLR at 1-733. We, therefore, affirm the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, J., concurring:

I fully concur in my colleagues' decision except in their determination that the administrative law judge erred in finding the 1990 x-ray was the most relevant and probative x-ray evidence of the miner's because it was eleven months more recent than the next most recent x-ray. The United States Court of Appeals for the Fourth Circuit has expressly approved evaluating x-ray evidence based on recency when it shows a worsening of claimant's condition. *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65 (4th Cir. 1992). The court explained that because pneumoconiosis is a progressive disease and claimants do not get better, earlier negative x-ray evidence does not necessarily conflict with later, positive x-rays: each x-ray shows the miner's condition at the time it is taken. Since there must be a date on which pneumoconiosis attains sufficient mass to be observed by x-ray, it is not unreasonable for the administrative law judge to deduce that the pneumoconiosis developed within the eleven months preceding the most recent x-ray and for that reason prior x-rays do not reflect his condition at the time of death. This determination is properly committed to the administrative law judge's discretion. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

In all other respects I concur in the majority's decision.

REGINA C. McGRANERY
Administrative Appeals Judge