

BRB No. 05-0795 BLA

JUDENE CHILDRESS)	
(Widow of JACK CHILDRESS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CHILDRESS CONSTRUCTION)	
COMPANY)	
)	
and)	
)	
KENTUCKY EMPLOYERS' MUTUAL)	DATE ISSUED: 03/27/2006
INSURANCE COMPANY)	
)	
Employer/Carrier-)	
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, and Rutherford), Norton, Virginia, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (02-BLA-0224) of Administrative Law Judge Thomas F. Phalen, Jr. denying 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). This case has been before the Board previously and involves a survivor's claim filed on January 7, 2000. In the original Decision and Order, the administrative law judge credited the miner with 33.67 years of coal mine employment and found that employer was the responsible operator. On the merits, the administrative law judge found that the medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In so finding, the administrative law judge discredited an autopsy report diagnosing the miner with pneumoconiosis because the autopsy prosector, Dr. Dennis, did not include a detailed gross macroscopic description of the miner's lungs in the report. Accordingly, the administrative law judge denied benefits.

Upon review of claimant's *pro se* appeal, the Board vacated the administrative law judge's finding that the autopsy evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Childress v. Childress Constr. Co.*, BRB No. 03-0609 BLA (Apr. 29, 2004)(unpub.). Specifically, the Board held that the administrative law judge erred in mechanically discrediting Dr. Dennis's autopsy report solely because it did not contain a macroscopic description of the lungs as required by 20 C.F.R. §718.106(a) (2000), the applicable quality standard in this case. *Childress*, slip op. at 6. Based on the Board's interpretation of 20 C.F.R. §718.106(a) (2000) set forth in *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), the Board instructed the administrative law judge to determine whether the missing macroscopic description was essential to the reliability or probative value of Dr. Dennis's autopsy report. *Childress*, slip op. at 4-6. The Board instructed the administrative law judge that if he found that the missing information was not essential, he could consider and accept the autopsy report, and he should reconsider whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2). *Childress*, slip op. at 6.

Upon review of the remainder of the administrative law judge's decision, the Board affirmed the findings that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that claimant was not entitled to any of the presumptions by which pneumoconiosis may be established under 20 C.F.R. §718.202(a)(3). *Childress*, slip op. at 3, 6. Pursuant to 20 C.F.R. §718.202(a)(4), the Board held that the administrative law judge properly accorded less weight to the opinion of Dr. Musgrave, the miner's treating physician, because her opinion was insufficiently reasoned. *Childress*, slip op. at 7. The Board further held that the administrative law judge permissibly credited the opinions of Drs. Broudy, Caffrey, Branscomb, Rosenberg, Naeye, and Castle that the miner did not suffer from pneumoconiosis, based upon their

superior credentials. *Childress*, slip op. at 7-8. However, the Board vacated the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), because the administrative law judge discredited a narrative medical report from Dr. Dennis diagnosing pneumoconiosis on the ground that the report was based on Dr. Dennis's discredited autopsy report. *Childress*, slip op. at 8. In view of the Board's decision to instruct the administrative law judge to reconsider Dr. Dennis's autopsy report, the Board also instructed the administrative law judge that if, on remand, he accepted Dr. Dennis's autopsy report, he should also reconsider whether Dr. Dennis's narrative report, when considered with all of the other relevant medical opinion evidence, was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

On remand, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge found that the information missing from Dr. Dennis's autopsy report was essential to the reliability of the report, and he determined that the record did not contain other supportive evidence to cure the defects in the report. Consequently, the administrative law judge found that Dr. Dennis's autopsy report was not "well-documented or well-reasoned," and he concluded that Dr. Dennis's conclusions were not "probative for the purpose of establishing the existence of pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order on Remand at 6. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that Dr. Dennis's narrative medical report was "not entitled to probative weight" because its "primary basis" was Dr. Dennis's autopsy report, which was "insufficient to establish the existence of pneumoconiosis" Decision and Order on Remand at 7. The administrative law judge incorporated by reference his prior analysis and findings as to the other medical opinions of record, and again found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to give probative weight to Dr. Dennis's autopsy report based on his status as the autopsy prosector, erred in failing to give probative weight to Dr. Musgrave's opinion based on her status as the miner's treating physician, and erred in his weighing of the remaining medical opinions. Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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. 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).

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, 1-87-88 (1993). For survivors’ claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner’s death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. 20 C.F.R. §718.205(c)(1)-(c)(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); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

As discussed, pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge found that Dr. Dennis’s autopsy report lacked information that was essential to the report’s reliability. Decision and Order on Remand at 4-6. On appeal, claimant does not challenge any of these specific findings. Instead, she argues that the administrative law judge erred in giving less weight to Dr. Dennis’s autopsy report because autopsy evidence is the best evidence of pneumoconiosis, and because the Board has held that an administrative law judge may choose to give greater weight to the autopsy prosector’s opinion. Claimant’s Brief at 3-5. Claimant presents no reason to disturb the administrative law judge’s findings. An administrative law judge may, but need not, give greater weight to the report of the autopsy prosector. *Urgolites v. Bethenergy Mines Inc.*, 17 BLR 1-20, 1-22-23 and n.3 (1992). Therefore, we reject claimant’s allegation of error and affirm the administrative law judge’s finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2).

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in failing to give probative weight to the medical opinion of Dr. Musgrave, the miner’s treating physician. We disagree. As we noted in our prior decision, “there is no rule requiring deference to the opinion of a treating physician in black lung claims.” *Childress*, slip op. at 7, citing *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). And, as we previously held, the administrative law judge permissibly accorded less weight to Dr. Musgrave’s opinion because he found that it was insufficiently reasoned. *Id.* Additionally, we previously held that the administrative law judge permissibly gave greater weight to the opinions of Drs. Broudy, Caffrey, Branscomb, Rosenberg, Naeye, and Castle that the miner did not have pneumoconiosis, based upon their superior credentials. *Childress*, slip op. at 7-8. We therefore reject claimant’s argument that the administrative law judge erred in again

crediting those opinions on remand, and we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4).

Because claimant did not establish the existence of pneumoconiosis, a necessary element of entitlement in a survivor's claim, we must affirm the denial of benefits. *See* 20 C.F.R. §718.205(a); *Trumbo*, 17 BLR at 1-87-88.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge