

BRB No. 08-0451 BLA

F.F. (o/b/o and as)
Widow of J.F.))
)
Claimant-Respondent)
)
v.)
)
CONSOLIDATION COAL COMPANY) DATE ISSUED: 03/26/2009
)
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Debra L. Henry, Greensburg, Pennsylvania, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (06-BLA-5685) of Administrative Law Judge Ralph A. Romano on a miner’s claim and a survivor’s claim¹ 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). The administrative law judge

¹ Claimant is the widow of the miner. The miner filed a claim for benefits on June 5, 2003. Director’s Exhibit 2. While his claim was pending, the miner died on December 11, 2005. Director’s Exhibit 97. Claimant filed a survivor’s claim for benefits on August 22, 2006. Director’s Exhibit 96. Both claims are presently pending on appeal.

accepted the parties' stipulation that the miner worked in qualifying coal mine employment for forty-three years. Adjudicating both the miner's claim and the survivor's claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) on both claims. The administrative law judge also found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) in the miner's claim,² and established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) on the survivor's claim. Accordingly, the administrative law judge awarded benefits on both claims.

On appeal, employer argues that the administrative law judge erroneously awarded benefits on both the miner's claim and the survivor's claim because he erred in finding the existence of pneumoconiosis established at Section 718.202(a). Claimant responds, urging affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, 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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits on a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

To establish entitlement to survivor's benefits, claimant must establish 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). On a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death,

² The administrative law judge noted that employer conceded that the miner suffered from a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b); Decision and Order at 5; Hearing Tr. at 12.

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)-(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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Employer first contends that the administrative law judge erred in "mechanically" according controlling weight to the report of Dr. Holimon solely because he conducted the autopsy. Employer further contends that the administrative law judge erred in finding Dr. Holimon's autopsy report buttressed by the report of Dr. Green, a reviewing pathologist, without sufficiently considering the contrary reports of Drs. Fino, Oesterling, and Tomashefski, reviewing physicians and pathologists.

The relevant evidence consists of the following: Under the final anatomic diagnoses contained in his autopsy report, Dr. Holimon, who is Board-certified in Anatomic and Clinical Pathology, diagnosed "Honeycomb lung (end stage lung disease)" and listed the following: "pneumoconiosis, diffuse alveolar space dilatation, parenchymal fibrosis, bronchial hyperplasia, metaplasia, pulmonary thromboemboli, and acute pneumonitis." Director's Exhibit 99; Employer's Exhibit 1 at 17, 20.

Dr. Green, who is Board-certified in Anatomic Pathology, reviewed the autopsy slides and opined that the miner's "severe and disabling interstitial fibrotic lung disease was causally related to his exposure to coal mine dust" and that "he showed occasional classic lesions of coal workers' pneumoconiosis." Claimant's Exhibit 1.

Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Diseases, found, on review of the miner's medical records, autopsy report slides and the reports of Drs. Oesterling and Tomashefski, that the miner had minimal anthracotic pigmentation present, no coal workers' pneumoconiosis and no deposition of anthracotic pigment within the pulmonary fibrosis. Dr. Fino diagnosed interstitial pulmonary fibrosis, but opined that it was not caused by coal dust inhalation. Employer's Exhibit 4.

The administrative law judge accorded greater weight to the report of Dr. Holimon, that the miner had pneumoconiosis, over the contrary reports of Drs. Fino, Oesterling, and Tomashefski, because Dr. Holimon, as the autopsy prosector, had examined the miner's "entire respiratory system as well as his other body systems." Decision and Order at 12. In addition, the administrative law judge noted that Dr. Holimon's autopsy finding of pneumoconiosis was supported by the report of Dr. Green, who expanded on Dr. Holimon's finding of pneumoconiosis by concluding that the miner had coal workers' pneumoconiosis, based on his review of the autopsy slides. Hence, the administrative law judge concluded that pneumoconiosis was established at Section

718.202(a)(2), based on the autopsy report of Dr. Holimon, as buttressed by the report of Dr. Green. The administrative law judge further found that when weighed together, the autopsy evidence outweighed the contrary x-ray and medical opinion evidence and that pneumoconiosis was accordingly established at Section 718.202(a).³ Decision and Order at 12-13.

As employer contends, however, the administrative law judge may not accord controlling weight to the report of an autopsy prosector solely on the basis of his status as autopsy prosector, without explaining why that status confers more credibility on his report than on the reports of the physicians who reviewed the autopsy slides. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992). In this case, the administrative law judge summarily stated that Dr. Holimon's report, as the report of the autopsy prosector, was entitled to controlling weight because the autopsy prosector "sees the entire respiratory system as well as other body systems." Decision and Order at 12. The administrative law judge did not, however, explain how Dr. Holimon's review of the miner's entire respiratory system and other body systems enabled him to provide a more accurate diagnosis as to whether the miner had pneumoconiosis, than that of Drs. Fino, Oesterling, and Tomashefski, who found that the miner did not have pneumoconiosis. Further, although the administrative law judge noted that Dr. Holimon's autopsy report was consistent with the report of Dr. Green, who reviewed autopsy slides and found that the miner had coal workers' pneumoconiosis, the administrative law judge did not explain how Dr. Green's opinion was more accurate than the contrary opinions of Drs. Fino, Oesterling, and Tomashefski. Consequently, the administrative law judge erred in granting an automatic deference to Dr. Holimon's autopsy report, as buttressed by Dr. Green's autopsy slides review, without determining the relative weight and credibility of all of the physicians' opinions. *See Urgolites*, 17 BLR at 1-23. Accordingly, we vacate the administrative law judge's finding of pneumoconiosis at Section 718.202(a), and remand the case for the administrative law judge to reconsider all of the relevant evidence and to provide a sufficient rationale for his weighing of that evidence.

A more complete analysis of the medical evidence is critical where, as here, the record contains conflicting evidence. Because the administrative law judge's conclusory opinion does not encompass a discussion of the evidence, it does not contain an adequate rationale for his crediting of the evidence. *See generally Barren Creek Coal Co. v.*

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3. The Third Circuit has held that all relevant evidence at 20 C.F.R. §718.202(a)(1)-(4) must be weighed together in determining whether pneumoconiosis is established at 20 C.F.R. §718.202(a). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Witmer, 111 F.3d 352, 354, 21 BLR 2-83, 2-87 (3d Cir. 1997) (noting that the absence of explanation in certain portions of administrative law judge's Decision and Order renders meaningful review impossible by appellate court); *Marx v. Director, OWCP*, 870 F.2d 114, 119, 12 BLR 2-199, 2-207 (3d Cir. 1989).

Dr. Oesterling, who is Board-certified in Anatomic and Clinical Pathology and Nuclear Medicine, opined, after reviewing the autopsy slides, that the miner had limited anthracotic pigmentation secondary to coal mine dust. He also found evidence of interstitial fibrosis that was not due to coal mine dust. Director's Exhibit 103.

Based on his review of the autopsy report slides, the autopsy report and the miner's medical records, Dr. Tomashefski concluded that while there was minimal fine black pigment present, the miner did not have coal workers' pneumoconiosis. Dr. Tomashefski found end stage pulmonary fibrosis with honeycomb change in all lung sizes. Employer's Exhibit 2.

On remand, therefore, the administrative law judge must evaluate the evidence and provide reasons for his weighing of the evidence. *See generally Director, OWCP v. Siwec*, 894 F.2d 635, 639, 13 BLR 2-259, 2-267 (3d Cir. 1990)(recognizing that administrative law judge is not bound to accept opinion or theory of any medical expert, but may weigh the medical evidence and draw his own inferences). Further, as employer contends, in weighing the evidence on remand, the administrative law judge must address: Dr. Fino's criticisms of the inconsistencies contained in Dr. Green's textbook, upon which Dr. Green relied to conclude that the miner had coal workers' pneumoconiosis; Dr. Oesterling's opinion that the fibrogenesis evident at autopsy was not consistent with a coal mine dust-induced lung disease due to the absence of an abundance of silica crystals; and Dr. Tomashefski's conclusion that, while the miner's medical records demonstrated a pulmonary impairment prior to the miner's retirement from the coal mines in 1991, the miner's symptomatology, pulmonary function studies, prescription records, and autopsy indicated findings typical of idiopathic pulmonary fibrosis, not coal workers' pneumoconiosis.

In conclusion, we vacate the administrative law judge's determination that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a). On remand the administrative law judge must reconsider all of the relevant evidence at Section 718.202(a) in accordance with *Williams*, 114 F.3d at 25, 21 BLR at 2-111.

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is vacated, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge