

BRB No. 10-0390 BLA

SHEILA PUGH)	
(Widow of JIMMY PUGH))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 03/21/2011
)	
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 Second Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Douglas A. Smoot and Wendy G. Adkins (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 on Second Remand (05-BLA-5061) of Administrative Law Judge Richard A. Morgan awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)). This case, involving a survivor's claim filed on September 17, 2003, is before the Board for the third time. In the initial decision, the administrative law judge, after crediting the miner with nineteen years of coal mine

employment,¹ found that the autopsy and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). Moreover, weighing all of the relevant evidence together, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis, he also found that claimant was not entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal,² the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c), and remanded the case for further consideration. *S.P. [Pugh] v. Westmoreland Coal Co.*, BRB No. 06-0961 BLA (Sept. 25, 2007) (unpub.). The Board also vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.304. *Id.*

On remand, the administrative law judge again found that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. However, the administrative law judge found that the evidence established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal and claimant's cross-appeal, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.205(c) and 718.304, and remanded the case for further consideration. *S.P. [Pugh] v. Westmoreland Coal Co.*, BRB Nos. 08-0766 BLA, 08-0766 BLA-A (July 29, 2009) (unpub.).

On remand for the second time, the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20

¹ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

² Claimant is the surviving spouse of the deceased miner, who died on October 20, 2002. Director's Exhibit 14.

C.F.R. §718.304. However, the administrative law judge found that the evidence established the existence of legal pneumoconiosis,³ in the form of chronic obstructive pulmonary disease (COPD) arising, in part, out of coal mine employment, pursuant to Section 718.202(a)(4). The administrative law judge also found that the evidence established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also argues that the administrative law judge erred in finding that the evidence established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer finally contends that the administrative law judge erred in crediting Dr. Cohen's equivalency determination in his consideration of whether claimant was entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁴

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). A miner's death will be considered to be 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). Pneumoconiosis is a "substantially contributing

³ Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁴ Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to this claim because it was filed on September 17, 2003.

cause” of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). However, before any finding of entitlement can be made in a survivor’s claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁵ In this case, the administrative law judge considered the medical opinions of Drs. Cohen, Green, Caffrey, Bush, and Castle. Dr. Cohen diagnosed legal pneumoconiosis, opining that the miner suffered from COPD due to both cigarette smoking and coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Claimant’s Exhibit 2. Dr. Green also diagnosed legal pneumoconiosis, opining that the miner suffered from emphysema due to his coal mine dust exposure. Claimant’s Exhibit 3. Drs. Caffrey, Bush, and Castle diagnosed cigarette smoking-induced emphysema. Employer’s Exhibits 1, 2A, 3, 5. Drs. Caffrey, Bush, and Castle opined that the miner’s coal mine dust exposure did not contribute to his emphysema.⁶ *Id.*

The administrative law judge accorded less weight to Dr. Caffrey’s opinion because he found, *inter alia*, that it was based on an assumption contrary to the regulations, *i.e.*, that whether coal mine dust exposure contributes to COPD is dependent upon the severity of a miner’s clinical pneumoconiosis. Decision and Order on Second Remand at 18. The administrative law judge accorded less weight to the opinions of Drs. Bush and Castle because he found that the doctors failed to adequately explain how they eliminated the miner’s nineteen years of coal mine employment as a contributor to his emphysema. *Id.* 18-19. Conversely, the administrative law judge credited Dr. Cohen’s opinion, finding that it was well reasoned and consistent with the regulations. *Id.* at 19. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁷

⁵ “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

⁶ Although Dr. Kahn also diagnosed chronic obstructive pulmonary disease (COPD) and emphysema, the administrative law judge found that his opinion does not support a finding of legal pneumoconiosis because the doctor did not address the cause of these diseases. Decision and Order on Second Remand at 17 n.12; Director’s Exhibit 21.

⁷ In finding that the medical opinion evidence established the existence of legal

Employer contends that the administrative law judge erred in relying on Dr. Cohen's opinion to establish legal pneumoconiosis. Employer asserts that Dr. Cohen's opinion is not sufficient to satisfy claimant's burden of proof because Dr. Cohen's reasoning was speculative and conclusory. Employer's Brief at 11-12. Employer also maintains that the administrative law judge provided claimant with an impermissible presumption that his COPD was due to his coal mine dust exposure. *Id.* These arguments are without merit.

In addressing the cause of the miner's severe obstructive pulmonary impairment, Dr. Cohen explained that he was able to eliminate asthma and rheumatoid arthritis as potential causes.⁸ Claimant's Exhibit 2. Dr. Cohen next noted that epidemiologic studies have shown that "exposure to either coal mine dust or cigarette smoke can cause obstructive pulmonary disease, and [that] exposure to both toxins create[s] an additive risk." *Id.* Given the miner's nineteen year coal mine dust exposure history and his twenty-eight pack year smoking history, Dr. Cohen explained that both exposures substantially contributed to the miner's COPD. *Id.* Dr. Cohen also explained that the pathological evidence of clinical pneumoconiosis supported a finding that the miner's coal mine dust exposure substantially contributed to his COPD. *Id.*

Contrary to employer's contention, the administrative law judge permissibly concluded that Dr. Cohen's opinion was reasoned, because Dr. Cohen supported his opinion, that the miner's COPD was due in part to coal mine dust exposure, with reference to medical studies. The administrative law judge found that Dr. Cohen's opinion was consistent with the Department of Labor's recognition that smoking miners have an additive risk for developing significant obstructive lung disease. *See* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); Decision and Order on Second Remand at 19. Because the administrative law judge specifically found that Dr. Cohen set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that the miner's COPD was due to both smoking and coal dust exposure, we affirm the administrative law judge's permissible finding that Dr. Cohen's

pneumoconiosis, the administrative law judge did not rely upon Dr. Green's diagnosis of legal pneumoconiosis.

⁸ Dr. Cohen eliminated asthma as a cause of the miner's obstructive impairment because there was no clinical record of episodic bronchospasms, and because the miner's severe obstructive impairment was only minimally reversible. Claimant's Exhibit 2. Dr. Cohen explained that rheumatoid lung disease was also unlikely to be the cause of the miner's obstructive impairment because it causes a restrictive impairment. *Id.*

diagnosis of legal pneumoconiosis was reasoned. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order on Second Remand at 19. Moreover, because Dr. Cohen specifically opined that the miner’s coal mine dust exposure substantially contributed to his COPD, we affirm the administrative law judge’s conclusion that Dr. Cohen’s opinion is sufficient to satisfy claimant’s burden of proof. See 20 C.F.R. §718.201(a)(2), (b).

Employer next contends that the administrative law judge erred in his consideration of Dr. Caffrey’s opinion. We disagree. Dr. Caffrey ruled out coal dust exposure as a significant factor in the miner’s emphysema based, in part, on his view that the amount of emphysema due to coal dust exposure is based on the severity of clinical pneumoconiosis that is present.⁹ Employer’s Exhibit 2A. The administrative law judge permissibly accorded less weight to Dr. Caffrey’s opinion because the doctor provided no support for his position that a diagnosis of coal mine dust-induced COPD/emphysema is dependent upon the severity of a miner’s clinical pneumoconiosis. See 65 Fed. Reg. 79,940 (Dec. 20, 2000) (indicating that “[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]”); see also *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26; Decision and Order on Second Remand at 18.

We also reject employer’s contention that the administrative law judge erred in his consideration of the opinions of Drs. Bush and Castle. The administrative law judge permissibly questioned the opinions of Drs. Bush and Castle, that the miner’s emphysema was due solely to smoking, because neither physician adequately explained how he eliminated the miner’s coal dust exposure as a source of the miner’s obstructive impairment. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order on Second Remand at 18-19. The administrative law judge permissibly found that Drs. Bush and Castle did not adequately explain why claimant’s nineteen years of coal dust exposure did not contribute, along with the miner’s smoking history, to his COPD. See *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge, therefore, properly accorded less weight to the opinions of Drs. Bush and Castle.

⁹ Although Dr. Caffrey acknowledged that coal mine dust exposure can cause emphysema in a susceptible individual, he noted that the miner had only a mild degree of simple pneumoconiosis. Employer’s Exhibit 2A.

Because it is supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD due to coal mine dust exposure and cigarette smoking, is affirmed. 20 C.F.R. §718.202(a)(4).

Death Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

In evaluating the medical evidence regarding the cause of death, the administrative law judge found that, while there is evidence that rheumatoid lung disease may have contributed to the miner's death, the medical evidence also established that the miner's COPD/emphysema contributed to his death. Decision and Order on Second Remand at 20. A majority of the physicians who addressed the miner's cause of death, Drs. Cohen, Kahn, Green, Bush, and Castle, agreed that the miner's COPD/emphysema contributed to his death.¹⁰ The administrative law judge also accurately noted that Dr. Lye, the miner's

¹⁰ Dr. Cohen opined that the miner's coal mine dust exposure and cigarette smoking contributed to his pulmonary impairment, "which was ultimately fatal." Claimant's Exhibit 2. Based upon his diagnoses of COPD and pneumoconiosis, as well as evidence of gas exchange abnormalities, Dr. Cohen opined that the miner's coal mine dust exposure and cigarette smoking each "contributed significantly to his death." *Id.*

Dr. Kahn opined that the miner's lung diseases (pneumoconiosis, silicosis, COPD, emphysema, and chronic bronchitis) contributed to the miner's death. Director's Exhibit 21; Claimant's Exhibit 1.

Dr. Green opined that the miner's pneumoconiosis and emphysema "had an adverse effect on [the miner's] lung function and contributed significantly to his respiratory failure." Claimant's Exhibit 3.

Although Dr. Bush opined that the miner's rheumatoid lung disease was responsible for his "eventual respiratory failure and death," Employer's Exhibit 1, he further opined that the miner "died of multiple diseases, including [COPD] resulting from cigarette smoking." Employer's Exhibit 5.

Dr. Castle opined that the miner died "as a result of bronchopneumonia occurring in the setting of an individual with severe rheumatoid lung disease and tobacco smoke induced pulmonary emphysema." Employer's Exhibit 3.

attending physician during his terminal hospitalization, listed COPD as the miner's immediate cause of death on the death certificate. Director's Exhibit 14. Dr. Caffrey did not address whether the miner's COPD contributed to his death.¹¹

The administrative law judge rationally discounted the opinions of Drs. Bush, Caffrey, and Castle because they did not diagnose legal pneumoconiosis. *i.e.*, they did not attribute the miner's COPD/emphysema to his coal mine dust exposure. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Second Remand at 20. Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Cohen to find that claimant established the existence of legal pneumoconiosis, he permissibly found that Dr. Cohen's opinion, as supported by the opinions of Drs. Kahn and Green, established that the miner's death was due to legal pneumoconiosis.¹² *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. 718.205(c).¹³

¹¹ Dr. Caffrey indicated that, without a complete medical history, it was difficult to address the miner's immediate cause of death. Employer's Exhibit 2A. Dr. Caffrey did not directly address the cause of the miner's death, opining only that the miner's clinical pneumoconiosis did not contribute to it. *Id.*

¹² Employer contends that Dr. Green's opinion is not relevant to the issue of the cause of the miner's death. The Board previously rejected this argument, explaining that because the miner died of respiratory failure, and because Dr. Green opined that the miner's pneumoconiosis and emphysema contributed to the respiratory failure, "Dr. Green's opinion is relevant to the issue of whether pneumoconiosis contributed to the miner's death." *S.P. [Pugh] v. Westmoreland Coal Co.*, BRB No. 06-0961 BLA, slip op. at 6-7 (Sept. 25, 2007) (unpub.).

¹³ In light of our affirmance of the administrative law judge's finding that the evidence established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we decline to address employer's contention of error regarding the administrative law judge's treatment of Dr. Cohen's equivalency determination pursuant to 20 C.F.R. §718.304. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge