

BRB No. 00-0533 BLA

VIRGINIA A. PARNELL	)	
(Widow of SAMUEL PARNELL)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
U.S. STEEL MINING COMPANY	)	
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Second Decision and Order on Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Christopher Pierson (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer.

Michelle S. Gerdano (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Second Decision and Order on Remand (97-BLA-0054) of Administrative Law Judge Richard A. Morgan awarding benefits on a survivor's<sup>1</sup> 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).<sup>2</sup> This case is before the Board for the third time. By Decision and Order dated October 26, 1999, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis, and remanded the case to the administrative law judge for further consideration of all relevant evidence consistent with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-11 (3d Cir. 1997). *Parnell v. U.S. Steel Mining Co.*, BRB No. 99-0171 BLA (Oct. 26, 1999)(unpublished). The Board further vacated the administrative law judge's findings of pneumoconiosis arising out of coal mine employment and that pneumoconiosis contributed to the miner's death. On remand, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. '718.202(a)(4), 718.203(b)(2000). The administrative law judge further found that the medical opinions established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c)(2)(2000). Accordingly, the administrative law judge awarded benefits.

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<sup>1</sup>Claimant, Virginia A. Parnell, is the surviving spouse of the deceased miner, who died on October 19, 1995. Director's Exhibits 7, 8. Claimant filed her claim for survivor's benefits on November 29, 1995. Director's Exhibit 1.

<sup>2</sup>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 65 Fed. 80,045-80,107(2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, employer challenges the administrative law judge's findings that claimant established pneumoconiosis arising out of coal mine employment and that pneumoconiosis contributed to the miner's death. Claimant has not responded, and the Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which the Director and employer have responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to the Board's order.<sup>3</sup> Based on the briefs submitted by the Director and employer, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. "718.1, 718.202, 718.203, 718.205(c), 718.304 (2000); see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR (1988). The United States Court of Appeals for the Third Circuit, has held that evidence demonstrating that pneumoconiosis hastened the miner's

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<sup>3</sup>Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

death establishes that pneumoconiosis was a substantially contributing cause of the miner=s death pursuant to Section 718.205(c)(5). See *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989).

Employer argues that the administrative law judge failed to properly weigh all the evidence of record regarding the existence of pneumoconiosis. Employer specifically argues that the administrative law judge did not discuss how the objective medical evidence supported the conclusion that claimant had pneumoconiosis. Employer also alleges that the administrative law judge misconstrued Dr. Powell=s opinion and erred in according Dr. Powell=s opinion additional weight because he was a treating physician.

Contrary to employer=s contention, the administrative law judge properly construed Dr. Powell=s diagnoses of “[chronic obstructive pulmonary disease], chronic obstructive bronchitis, acute exacerbation of asthmatic bronchitis and coal workers’ pneumoconiosis with pulmonary fibrosis” as “legal” pneumoconiosis. 20 C.F.R. 718.201 (2000); Second Decision and Order on Remand at 3; Director’s Exhibit 10. The administrative law judge correctly found that Dr. Powell opined that in spite of the negative chest x-ray readings, the miner had coal workers’ pneumoconiosis as defined by Section 718.201 (2000), which includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *Id.* The administrative law judge rationally found that Dr. Powell’s opinion was based on his observations from treating the miner for several years and on evidence of a moderately severe airflow obstruction in addition to radiographic evidence of interstitial fibrosis related to coal dust exposure.<sup>4</sup> Second Decision and Order on Remand at 3; Director=s Exhibits 8, 10. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-49 (1989)(*en banc*). Further, the administrative law judge, within a proper exercise of his discretion, found Dr. Powell=s opinion, that the miner=s asthmatic bronchitis was caused by tobacco use and coal dust exposure, more consistent with the miner=s smoking and coal mine employment histories as opposed to Dr. Fino’s opinion that claimant’s condition was caused by cigarette smoking. *Clark, supra*; Second Decision and Order on Remand at 3. Director’s Exhibit 10; Claimant’s Exhibit 1. Therefore, we affirm the administrative law judge’s finding that the opinion

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<sup>4</sup>Dr. Powell referred to x-rays dated September 13 and 18, 1995, and a qualifying pulmonary function study performed on April 5, 1993, to support his opinion that the etiology of the miner=s lung disease included occupational exposure to coal dust and tobacco abuse. Director=s Exhibits 10, 12, 13; Claimant=s Exhibit 1.

of Dr. Powell is well reasoned, and entitled to additional weight based on his observations of the miner's symptoms, the miner's recorded medical, smoking and coal mine employment histories, his status as a treating physician and his Board-certification in internal medicine with a subspecialty in pulmonary diseases. *Schaaf v. Mathews*, 574 F.2d 157 (3d Cir. 1978); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989).

Employer also contends that the administrative law judge failed to comply with the Board's remand instructions to weigh all types of evidence relevant to the existence of pneumoconiosis together consistent with *Williams, supra*. We disagree. Although the administrative law judge did not cite to *Williams*, he permissibly credited the treating physicians'<sup>5</sup> diagnoses of legal pneumoconiosis and found that the negative x-rays and CT scans did not affect the credibility of the legal pneumoconiosis diagnosis. Second Decision and Order on Remand at 3, 4. Therefore, we affirm the administrative law judge's finding that the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(2000).

Pursuant to Section 718.205(c)(2)(2000), employer contends that the administrative law judge failed to "adequately explain what aspects of Dr. Powell's opinion takes his opinion from a mere general hypothesis and make it a specific statement that this particular miner's pneumoconiosis actually hastened his death." Employer's Brief at 8. Contrary to employer's contention, the administrative law judge rationally found that Dr. Powell stated more than a general hypothesis as he specifically opined that "the miner's pneumoconiosis was a substantially contributing factor resulting in [his] overall deterioration and ultimate death." Director's Exhibit 10; Second Decision and Order at 5. To further support and explain his finding, the administrative law judge stated that Dr. Powell in his March 18, 1996 opinion concluded that:

the miner's underlying lung disease 'certainly was' of sufficient severity that it could account for a cardiomyopathy...that arrhythmia occur in the presence of cardiomyopathy and that arrhythmias are 'quite' common in patients with severe obstructive lung disease.... and [the miner's] disease fell under the classification of 'any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'

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<sup>5</sup>The administrative law also found that Dr. DiLeo was the miner's treating physician.

Second Decision and Order at 5.

We reject employer's contention that Dr. Powell's opinion is equivocal regarding the etiology of the miner's respiratory disease. Additionally, employer has not demonstrated how Dr. Powell relied "upon the fact that Claimant's medical bills were being paid by the United Mine Workers' of America," Employer's Brief at 12, since Dr. Powell's opinion on the cause of the miner's death was originally made in his 1996 report where there is no reference to the physician's reliance on a prior award of insurance coverage. Subsequent to his March 18, 1996 opinion, Dr. Powell considered Dr. Fino's opinion, that the miner's pulmonary disease was related to his cigarette smoking, and maintained his opinion that the miner's lung disease was due to his exposure to coal dust and tobacco abuse. Claimant's Exhibit 1. In finding that the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge reasonably accorded greater weight to Dr. Powell because of his years of observing the miner's condition and because his opinion was more consistent with the miner's thirty-eight years of coal dust exposure and thirty years of cigarette smoking. *Clark, supra; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Second Decision and Order on Remand at 5. Consequently, we affirm the administrative law judge's findings pursuant to Section 718.205(c) (2000) and his award of benefits. *Lukosevicz, supra.*

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge