

BRB No. 00-0560 BLA

HESTER SMITH)
(Widow of CHALLIS SMITH))
)
 Claimant-Respondent)
)
 v.)
)
 HARLAN FUEL COMPANY,)
 INCORPORATED) DATE ISSUED:
)
 and)
)
 GREAT WESTERN RESOURCES)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS=)
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge,
United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for claimant.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard,
Kentucky, for employer/carrier.

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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON,

Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0830) of Administrative Law Judge Robert L. Hillyard, awarding benefits on a survivor=s 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 judge credited the miner with thirty-three and one-half years of coal mine employment and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ' ' 718.202 and 718.203 (2000) and that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c) (2000).² Accordingly, the administrative law judge awarded benefits in the survivor=s claim.

On appeal, employer challenges the administrative law judge=s findings under Section 718.205(c) (2000). In response, claimant argues that the administrative law judge=s award of survivor=s benefits is supported by substantial evidence. The Director, Office of Workers= Compensation Programs (the Director), has declined to file a brief on the merits in this appeal.³

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

¹Claimant filed a claim for survivor=s benefits on February 24, 1998. Director=s Exhibit 35. The miner=s claim, filed on March 2, 1992, was awarded by Administrative Law Judge Bernard J. Gilday, on April 1, 1988. Director=s Exhibit 29. The miner died on January 20, 1998. Director=s Exhibit 8.

²The 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.

³The administrative law judge=s length of coal mine employment determination as well as his finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ' ' 718.202(a)(1) and 718.203(b) (2000), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 all the parties have responded. Based on the briefs submitted by the parties 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.⁴

The Board's scope of review is defined by statute. The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

In order to establish entitlement to survivor's benefits under Part 718 in a claim filed 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 suffered from 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 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction

⁴Claimant, asserts that the new regulations affect the resolution of this claim and that the new regulations should be implemented. The Director asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer contends that the regulations at issue, if applied, will have an effect on the outcome of this claim. Employer also states that the case must be stayed for the duration of the briefing, hearing, and decision schedule in accordance with the preliminary injunction of the United States District Court for the District of Columbia or the case must be remanded to the district director to allow the parties to develop evidence in light of the new regulations. The disposition of the present appeal concerns the administrative law judge's application of 20 C.F.R. § 718.205(c). Inasmuch as this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which currently applies the hastening death standard that has been codified in the amended Part 718 regulations, the outcome of the present case is not affected by the new regulations. 65 Fed. Reg. 80,050 (2000)(to be codified at 20 C.F.R. § 718.205(c)(5)). See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-1365 (6th Cir. 1993)

this case arises, has held that the requirements of Section 718.205(c) (2000) are satisfied if claimant proves that pneumoconiosis hastened the miner=s death in any way.⁵ *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-1365 (6th Cir. 1993).

Regarding the administrative law judge=s findings under Section 718.205(c) (2000), employer argues that the administrative law judge did not apply the correct standard in determining that claimant met her burden of proof. Employer also maintains that the administrative law judge erred in according greatest weight to Dr. Morgan=s opinion. Contrary to employer=s contention, the administrative law judge applied the appropriate standard by considering whether the medical evidence of record supported a finding that the miner=s death was hastened by pneumoconiosis. Decision and Order at 14; *see Griffith, supra*; *Brown, supra*. With respect to Dr. Morgan=s opinion, the administrative law judge found that his conclusion that pneumoconiosis was a *Adirect cause@ of and Aparticipant@ in the miner=s death was entitled to greatest weight based upon Dr. Morgan=s status as the miner=s treating physician from May of 1996 to January of 1998. Decision and Order at 14, 16; Director=s Exhibit 21. The administrative law judge further found that Dr. Morgan=s opinion was bolstered by the report in which Dr. Jones indicated that the miner=s death was due to pneumoconiosis. Decision and Order at 16; Director=s Exhibit 19. However, employer is correct in asserting that the administrative law judge did not fully address whether Dr. Morgan=s opinion is adequately reasoned and documented.*

Although an administrative law judge may give greater weight to a medical report based upon the doctor=s status as a treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), this is only one factor to be considered in assessing a physician=s opinion. The administrative law judge must also determine whether the opinion at issue is reasoned and documented. *See Griffith, supra*; *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). In the present case, the administrative law judge did not render such a finding with respect to Dr. Morgan's conclusion that pneumoconiosis hastened the miner=s death. This omission is significant, as the basis of Dr. Morgan=s opinion is not apparent. The documentation in the record regarding Dr. Morgan=s opinion consists of treatment notes, the death certificate dated January 20, 1998, and two brief letters, prepared in January of 1999. In the treatment

⁵This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner=s coal mine employment occurred in the Commonwealth of Kentucky. Director=s Exhibit 29-208; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

notes, which describe the miner's numerous hospitalizations beginning in May of 1996 and ending with his death in January of 1998, Dr. Morgan did not diagnose pneumoconiosis or attribute any of the miner's pulmonary conditions to coal dust exposure nor did he refer to pneumoconiosis or coal dust exposure as a contributing or aggravating factor in the development of the miner's pulmonary problems and subsequent death. Director's Exhibit 9. When Dr. Morgan prepared the death certificate, he cited aspiration pneumonia due to central nervous system hemorrhage as the sole cause of death. Director's Exhibit 8. In the first of two letters, Dr. Morgan indicated that pneumoconiosis was a direct cause of and a participant in the miner's death, as the disease altered the miner's lung function to the point that he could not tolerate any other lung problems. Director's Exhibit 20. In the second letter, Dr. Morgan did not opine that pneumoconiosis played a role in the miner's demise, but stated that the miner had pneumoconiosis which was a contributing factor to the development of his recurrent respiratory infections and that the miner's ultimate death was due to lung cancer. Director's Exhibit 21. Neither letter contains references to any data supporting Dr. Morgan's conclusions.

We must, therefore, vacate the administrative law judge's finding that pneumoconiosis hastened the miner's death and remand the case to the administrative law judge for reconsideration of Dr. Morgan's opinion under Section 718.205(c) (2000). *See Griffith, supra; Tedesco, supra.* If the administrative law judge determines on remand that Dr. Morgan's opinion is not adequately reasoned and documented, he must reconsider Dr. Jones's opinion, as Dr. Jones relied, in part, upon Dr. Morgan's conclusion in formulating his own opinion.⁶

⁶We affirm the administrative law judge's determination that the opinions of Drs. Fino, Broudy, Naeye, and Younes are entitled to little weight under 20 C.F.R. ' 718.205(c) (2000). The only specific allegations of error that employer raises with respect to the administrative law judge's consideration of these opinions is that the administrative law judge did not provide an adequate explanation of his findings and did not address Dr. Younes's opinion as to the cause of the miner's death. These contentions are without merit, as the administrative law judge accurately summarized all of the relevant medical reports, including Dr. Younes's, and set forth in detail his rationale for discrediting each opinion. Decision and Order at 15-16.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge