

BRB No. 06-0780 BLA

ANNA M. HOLLOMAN)	
(Widow of THOMAS A. HOLLOMAN))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 05/31/2007
)	
U.S. STEEL MINING COMPANY)	
)	
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 – Granting Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

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

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Granting Benefits (2004-BLA-6532)

of Administrative Law Judge Michael P. Lesniak on a survivor's claim¹ filed pursuant to the provisions of the Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Based on a stipulation of the parties, the administrative law judge credited the miner with twenty-five years of coal mine employment, Decision and Order at 2, and adjudicated this claim pursuant to 20 C.F.R. Part 718. While noting that the miner was receiving benefits at the time of his death,² the administrative law judge found that claimant must, nonetheless, establish the existence of pneumoconiosis arising out of coal mine employment as the doctrine of collateral estoppel is not applicable in this case. Decision and Order at 10-11. Weighing the evidence admitted into the record in the survivor's claim,³ the administrative law judge found the medical evidence sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order 13. In addition, he found that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge then found that the medical evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in this survivor's claim, and further found one dependent for purposes of augmentation of benefits.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical opinions of Drs. Kaplan and McMonagle. In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not be submitting a substantive response to employer's appeal.⁴ In a footnote, however, the Director states that the United States

¹ Claimant is the widow of the miner, who died on November 2, 2002. Director's Exhibits 1, 11. Claimant filed her survivor's claim on November 12, 2002. Director's Exhibit 3.

² The miner filed an application for benefits on January 11, 1984. Following a formal hearing, Administrative Law Judge George P. Morin awarded benefits in a Decision and Order issued on January 29, 1988. Director's Exhibit 1.

³ The administrative law judge noted that none of the parties requested that the evidence from the miner's claim be admitted into the record in this survivor's claim. Therefore, the medical evidence from the miner's claim was not admitted into the record herein pursuant to 20 C.F.R. §725.414. Decision and Order at 5, n.2.

⁴ The parties do not challenge the administrative law judge's finding that claimant has one dependent, her disabled adult son, for purposes of augmentation of benefits. This

Court of Appeals for the Fourth Circuit overruled the collateral estoppel portion of the Board's decision in *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), which was cited by the administrative law judge in support of his decision to bar claimant from relying on the finding of pneumoconiosis in the miner's claim in this case. Director's Letter at 1 n.1; *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006).

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).

In order to establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). In survivors' claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if it was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastened 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).⁵

In challenging the administrative law judge's award of benefits, employer contends that the administrative law judge did not properly weigh the medical opinions of

finding is therefore affirmed as unchallenged. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ The record supports the administrative law judge's finding that this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's most recent coal mine employment was in Pennsylvania. Decision and Order at 10 n.5; Director's Exhibit 4; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Dr. McMonagle, the miner's treating physician, and Dr. Kaplan.⁶ With regard to Dr. McMonagle's opinion, employer contends that the administrative law judge erred in according determinative weight the opinion of Dr. McMonagle, that the miner suffered from pneumoconiosis and that his death was due to pneumoconiosis, arguing that the administrative law judge failed to provide a rationale other than that Dr. McMonagle was the miner's treating physician. Specifically, employer contends that the administrative law judge failed to consider the significant difference between the forty years of coal mine employment on which Dr. McMonagle relied and the twenty-five years credited by the administrative law judge. Employer's Brief at 8-9. Employer's contention has merit.

The administrative law judge, in weighing the relevant evidence, found Dr. McMonagle's medical opinion, that the miner was suffering from pneumoconiosis and that pneumoconiosis was a substantially contributing cause of the miner's death, is well-reasoned and documented. Decision and Order at 12; Director's Exhibits 12, 14, 15; Claimant's Exhibit 3. In particular, the administrative law judge found that in rendering his opinion, Dr. McMonagle was aware of both the miner's history of coal mine dust exposure and his tobacco abuse, as well as the miner's other medical conditions, based on his treatment of the miner for almost twenty years. However, in stating that Dr. McMonagle was aware of the miner's history of coal dust exposure, the administrative law judge did not specifically discuss the 15 year discrepancy in the coal mine employment relied upon by Dr. McMonagle and that credited by the administrative law judge. Compare Decision and Order at 2 with Director's Exhibit 15. Thus, while it was not improper for the administrative law judge to credit the opinion of Dr. McMonagle, based on the physician's history of treating the miner and on the administrative law judge's determination that the opinion was supported by the miner's treatment records, 20 C.F.R. §718.104(d); *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997), the inclusion of and reliance on an inaccurate coal mine employment history may affect the weight to be accorded to this opinion. *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Baker v. Director, OWCP*, 6 BLR 1-976 (1984).

⁶ The administrative law judge also considered the medical opinion in which Dr. Perper diagnosed the existence of pneumoconiosis and further stated that pneumoconiosis was a substantially contributing cause of the miner's death. Decision and Order at 5-6; Claimant's Exhibit 1. The administrative law judge found this opinion to be unpersuasive as it was based, in part, on evidence not contained in the record and also not supported by its underlying documentation. Decision and Order at 12. Because none of the parties challenges the administrative law judge's findings regarding Dr. Perper's opinion, they are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Consequently, because the administrative law judge failed to address the discrepancy between his finding regarding coal mine employment and the history relied on by Dr. McMonagle, we vacate the administrative law judge's crediting of Dr. McMonagle's opinion and remand the case for the administrative law judge to determine whether the discrepancy affects the credibility of Dr. McMonagle's opinion. Moreover, because the administrative law judge relied on the opinion of Dr. McMonagle in establishing the existence of pneumoconiosis pursuant to Section 718.202(a), and also in finding that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c), we vacate both findings and remand the case for further evaluation of Dr. McMonagle's opinion under both of these regulations.

Employer also contends that the administrative law judge erred in discrediting Dr. Kaplan's opinion, arguing that it was error for the administrative law judge to conclude that Dr. Kaplan's opinion is hostile to the Act and implementing regulations. Employer's Brief at 10-11. Employer specifically contends that the administrative law judge mischaracterized Dr. Kaplan's statements because his opinion does not foreclose the possibility that chronic obstructive pulmonary disease (COPD) can be related to coal dust exposure, but, rather, states that it is most commonly associated with cigarette smoking. *Id.* There is some merit to employer's contentions.

The administrative law judge, in weighing Dr. Kaplan's opinion, states that Dr. Kaplan did not adequately consider the entire regulatory definition of pneumoconiosis. Specifically, the administrative law judge found that "his opinion on what constitutes pneumoconiosis does not fully encompass the legal definition of pneumoconiosis and, therefore, found Dr. Kaplan's opinion unpersuasive on the issue of the existence of pneumoconiosis. Decision and Order at 12. The administrative law judge further found that Dr. Kaplan opined that COPD cannot be caused by coal mine employment, which he found to be contrary to the Act and regulations. *Id.*

The administrative law judge may reject the opinion of a physician whose basic medical assumptions are contrary to or in conflict with the spirit and purposes of the Act. *Wetherill v. Green Construction Co.*, 5 BLR 1-248, 1-252 (1982); *see Hoffman v. B & G Construction Co.*, 8 BLR 1-65, 1-67 (1985); *see also Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 (1988) (medical report can be rejected as hostile only if it forecloses any possibility that simple pneumoconiosis can be totally disabling). In determining whether a medical opinion rises to the level of being hostile to the Act, or contrary to the spirit of the Act, the administrative law judge must consider the entirety of the physician's opinion and adequately explain how the physician's medical assumptions affect his conclusions. *Id.*

Herein, the administrative law judge has not adequately explained his finding that

Dr. Kaplan's opinion is contrary to the Act. In finding that Dr. Kaplan opined that COPD cannot be caused by coal mine dust exposure, the administrative law judge did not discuss the entirety of Dr. Kaplan's comments regarding COPD and its relationship to pneumoconiosis. Specifically, the administrative law judge did not discuss Dr. Kaplan's agreement that COPD is a part of the legal definition of pneumoconiosis because it is a sequelae. Employer's Exhibit 2 at p. 24. Consequently, the administrative law judge has not provided an adequate discussion as to whether Dr. Kaplan's opinion forecloses all possibility that COPD can be caused by coal dust exposure or, whether Dr. Kaplan found that, in this case, COPD was not occupationally induced and, therefore, does not foreclose the possibility of claimant establishing legal pneumoconiosis. *See Hoffman*, 8 BLR at 1-67; *Wetherill*, 5 BLR at 1-252; *see also* 20 C.F.R. §§718.201, 718.202(a)(4); *see Kline v. Director, OWCP*, 877 F.2d 1175, 12 BLR 2-346 (3d Cir. 1989); *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985).

In light of the decision to vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to re-evaluate the medical opinions of Drs. McMonagle and Kaplan, the administrative law judge should also reconsider the applicability of the doctrine of collateral estoppel. Specifically, in finding that collateral estoppel was not applicable in this case to preclude employer from relitigating the issue of the existence of pneumoconiosis, which was established in the miner's claim, the administrative law judge relied upon the Board's holding in *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003). Decision and Order at 9-10. The Board, in *Collins*, held that collateral estoppel was not applicable since the issue of the existence of pneumoconiosis was not identical in the survivor's claim because the administrative law judge was now required to weigh the evidence under all of the subsections at Section 718.202(a) in accordance with the decision of the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Collins*, 22 BLR at 1-232-233. While noting that this case arises in the Third Circuit, the administrative law judge nonetheless found *Collins* applicable, indicating that subsequent to the award of benefits in the miner's claim, the Third Circuit adopted a standard similar to the Fourth Circuit's *Compton* standard and, therefore, the analysis in *Collins* is consistent with the facts of this case. Decision and Order at 10, *citing Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Therefore, the administrative law judge found that collateral estoppel did not apply in this case and that claimant must establish the existence of pneumoconiosis pursuant to Section 718.202(a). Decision and Order at 11.

However, as the Director notes in his response letter to the Board, subsequent to the administrative law judge's Decision and Order, the Fourth Circuit court, within whose jurisdiction *Collins* arose, reversed the Board's holding therein regarding collateral estoppel and held that a widow seeking benefits under the Act may generally rely on the doctrine of offensive non-mutual collateral estoppel to establish that her deceased husband developed pneumoconiosis arising out of his coal mine employment. Director's

Letter at 1 n.1; *Collins*, 468 F.3d at 222-223, 23 BLR at 2-409-410 (4th Cir. 2006). In light of his reliance on the Board's holding in *Collins* and the Fourth Circuit's reversal of that holding, the administrative law judge on remand must reassess whether, under the facts of this case, collateral estoppel is applicable.

Accordingly, the administrative law judge's Decision and Order – Granting Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration of this survivor's claim 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