

BRB No. 99-0710 BLA

_____	)	
_____	)	
BERNICE HYSLOP	)	
(Widow of HUGH B. HYSLOP)	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	DECISION and ORDER

Party-in-Interest

Appeal of the Decision and Order Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Richard A. Dean (Arter & Hadden LLP), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-BLA-1622) of Administrative Law Judge Donald W. Mosser rendered on a miner's claim and a survivor's claim

\_\_\_\_\_

<sup>1</sup> The miner filed his current claim on May 19, 1988, more than one year after the denial of his previous claim. Director's Exhibits 1, 52. Therefore, the administrative law judge properly found the deceased miner's claim to be a duplicate claim pursuant to 20 C.F.R. §725.309(d).

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 accepted the parties' stipulation to thirty-eight years of coal mine employment and found that the medical evidence established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). The administrative law judge concluded, however, that neither the miner's total disability nor death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), 718.205(c). Accordingly, the administrative law judge denied benefits on both the miner's and survivor's claims.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical evidence pursuant to Sections 718.204(b) and 718.205(c). Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his 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). For survivor's claims filed on or after January 1, 1982, death will be considered 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)(1), (2), (4). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a

---

<sup>2</sup> We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, and that the medical evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(3), 718.304(a). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

substantially contributing cause of death if it hastens the miner's death in any way. *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The administrative law judge found that the evidence generated since the denial of the miner's previous claim established that the miner developed pneumoconiosis arising out of coal mine employment and became totally disabled by a respiratory impairment, *see Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997); *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.3d 554, 15 BLR 2-227 (7th Cir. 1991), but did not establish that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(b). The administrative law judge found that although the miner had pneumoconiosis, the medical opinion evidence established that the miner was disabled by an unrelated respiratory condition, idiopathic pulmonary fibrosis.

Claimant contends that the medical opinions credited by the administrative law judge lack probative value as a matter of law because the physicians' belief that the miner did not have pneumoconiosis contradicts the administrative law judge's finding that the miner had pneumoconiosis. Review of the record, however, does not demonstrate such a conflict.

Pursuant to Section 718.202(a), the administrative law judge found that the autopsy prosector's report was the most reliable evidence, and established that the miner had anthracosis, a disease which is included within the definition of pneumoconiosis. *See* 20 C.F.R. §718.201; *Railey*, 972 F.2d at 183, 16 BLR at 2-127-28. Pursuant to Section 718.204(b), however, the administrative law judge found that the opinions of Dr. Tuteur, Crouch, Naeye, and Wiot established that a separate, non-coal mine employment disease, idiopathic pulmonary fibrosis, caused the miner's total disability. Contrary to claimant's contention, none of these physicians premised their opinions on the assumption that the miner did not have anthracosis. *See Peabody Coal Co. v. Shonk*, 906 F.2d

---

<sup>3</sup>Employer's contention that anthracosis is not pneumoconiosis but merely a descriptive term downplays considerable authority to the contrary. *See Railey, supra; Peabody Coal Co. v. Shonk*, 906 F.2d 264, 268 (7th Cir. 1991). Moreover, in this case the autopsy prosector did not merely describe anthracosis; based on his description he diagnosed "chronic lung disease consistent with environmental lung disease (Black Lung Disease)." Director's Exhibit 12A; *see* 20 C.F.R. §718.201. Because substantial evidence supports the administrative law judge's finding that employer's consulting pathologists, Drs. Naeye and Crouch, did not contradict the prosector's finding of anthracosis, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(2). *See Railey, supra*.

264, 271 (7th Cir. 1991). Rather, they concluded that the miner's total disability was unrelated to coal mine employment. Therefore, the medical opinions submitted by employer do not merely contradict the administrative law judge's finding that the miner had anthracosis. Accordingly, we reject claimant's contention that these medical opinions must be rejected as a matter of law.

However, we agree with claimant that the administrative law judge did not provide adequate reasons for crediting these medical opinions. The administrative law judge relied primarily upon Dr. Tuteur's opinion, as supported by Drs. Crouch, Naeye, and Wiot. The record indicates that Dr. Tuteur, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence and concluded that the miner was disabled by and died due to idiopathic pulmonary fibrosis superimposed upon preexisting chronic obstructive pulmonary disease due to smoking. Employer's Exhibits 2, 23. In contrast, Dr. Cohen, who is also Board-certified in Internal Medicine and Pulmonary disease, reviewed the medical evidence and opined that the miner's anthracosis, pulmonary fibrosis, and emphysema were all related to coal dust exposure and contributed to the miner's total disability and death. Claimant's Exhibit 1. In crediting Dr. Tuteur's opinion, the administrative law judge stated that Dr. Tuteur's credentials were "more impressive." Decision and Order at 25. However, as claimant contends, the administrative law judge did not compare the physicians' qualifications and explain why he found Dr. Tuteur's credentials more impressive. *See Railey*, 972 F.3d at 182, 16 BLR at 2-127. Additionally, the administrative law judge stated that he found Dr. Tuteur's report better reasoned. However, the only reason the administrative law judge identified for this conclusion, that Dr. Cohen dismissed the miner's heart disease as a potential cause of disability or death, is not supported by substantial evidence. Claimant's Exhibit 1. Consequently, we must vacate the administrative law judge's finding pursuant to Section 718.204(b) and remand the case for him to reweigh the relevant evidence to determine whether pneumoconiosis was a contributing cause of the miner's total disability. *Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990).

Pursuant to Section 718.205(c)(2), the administrative law judge again relied primarily upon Dr. Tuteur's opinion based on Dr. Tuteur's qualifications and the administrative law judge's conclusion that Dr. Tuteur's opinion was better reasoned, to find that pneumoconiosis did not hasten the miner's death. As these were the same reasons which were not adequately explained previously, we must vacate the administrative law judge's finding and instruct him on remand to reweigh the medical evidence to determine whether pneumoconiosis hastened the miner's death. *See Railey, supra*.

Accordingly, the administrative law judge's Decision and Order Denying 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