

BRB No. 05-0324 BLA

BETTY BAILEY)
(Widow of THOMAS BAILEY))
)
 Claimant-Respondent)
)
 v.)
)
 CONSOLIDATION COAL COMPANY) DATE ISSUED: 09/30/2005
)
 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 Remand of Stuart A. Levin,
Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West
Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia.,
for employer.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-BLA-0825) of
Administrative Law Judge Stuart A. Levin 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). This case is before the Board for the
third time. The history of this case is set forth in the Board's prior decision in *Bailey v.*
Consolidation Coal Co., BRB No. 03-0181 BLA (Nov. 7, 2003)(unpub.). When the case
was most recently before the Board, the Board vacated the administrative law judge's
award of benefits and remanded the case for further consideration of whether: the
existence of complicated pneumoconiosis was established at Section 718.304, thereby

entitling claimant to the irrebuttable presumption that the miner's death was due to pneumoconiosis; the existence of simple pneumoconiosis was established at Section 718.202(a)(1) and (4); pneumoconiosis arose out of coal mine employment; and death was due to pneumoconiosis. *Bailey*, BRB No. 03-0181 BLA.

On remand, the administrative law judge found that the existence of complicated pneumoconiosis was not established, but that the existence of simple pneumoconiosis arising out of coal mine employment was established. Decision and Order on Remand at 3-7. The administrative law judge also found that the miner's death was due to pneumoconiosis. Benefits were accordingly awarded in this survivor's claim.

On appeal, employer argues that the administrative law judge erred in finding the existence of pneumoconiosis and death due to pneumoconiosis established. The Director, Office of Workers' Compensation Programs, (the Director) is not participating in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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 benefits in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. Death is due to pneumoconiosis where pneumoconiosis is a substantially contributing cause or factor leading to the miner's death, where death is caused by complications of pneumoconiosis, or where the presumption set forth at Section 718.304, relating to complicated pneumoconiosis, is applicable. 20 C.F.R. §§718.202(a), 718.203, 718.205(c); 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). Pneumoconiosis is a "substantially contributing 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, 979-80, 16 BLR 2-90, 2-92-93 (4th 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).

Regarding the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis,¹ employer argues that the administrative

¹ The record consists of forty-three x-ray interpretations of record from the time period from 1986 until the miner's death in 1997, ten positive readings rendered by Drs.

law judge erred in not crediting the readings of Drs. Wheeler, Castle, and Fino, the best qualified physicians of record,² who found that the x-ray evidence did not show the existence of pneumoconiosis, but instead showed other disease processes.³ The administrative law judge discredited these opinions because he found that the doctors' alternative diagnoses were not supported by the miner's hospital treatment notes, which did not contain a diagnosis of any of the disease processes diagnosed by Drs. Wheeler, Castle, and Fino. Employer contends, however, the administrative law judge's refusal to accept the x-ray findings of these physicians erroneously shifted the burden of proof to employer to disprove the existence of pneumoconiosis by requiring Drs. Wheeler, Castle and Fino to conclusively establish alternative diagnoses in order to rule out the existence of pneumoconiosis. Additionally, employer argues that the administrative law judge's crediting of the positive x-ray readings of Dr. Dahhan, Employer's Exhibit 6, because they were supported by unclassified x-ray readings showing the existence of pneumoconiosis taken while the miner was hospitalized, is error. Employer contends that these hospital x-rays cannot be used as support for Dr. Dahhan's positive readings because they did not meet regulatory requirements set forth at 20 C.F.R. §718.102, *i.e.*, they were portable films, were not properly classified, did not contain the credentials of the physician submitting the x-ray, or the quality of the x-ray film. Employer further contends that, contrary to the administrative law judge's finding, these readings cannot be viewed as more objective because they were taken in the course of the miner's hospitalization as opposed to being taken for the purpose of litigation.

Dahhan and Gaziano, B-readers, and by Dr. Aycoth, who is a B-reader and is Board-eligible in radiology, and thirty-three negative readings rendered by Drs. Castle and Fino, B-readers, and by Dr. Wheeler, a Board-certified radiologist and B-reader, Director's Exhibits 9, 17, 18; Employer's Exhibits 1, 2, 6. In addition, seven readings were made during claimant's hospitalizations by Drs. Rao, Shahan, and Fowler, physicians whose radiological qualifications are not of record, who found evidence of pneumoconiosis or chronic interstitial lung disease, but did not classify their findings according to the ILO-U/C system. 20 C.F.R. §718.202(a)(1); Claimant's Exhibit 1.

² Dr. Wheeler is both a Board-certified radiologist and a B-reader, as well as a Professor of Radiology; Drs. Castle and Fino are Board-certified pulmonary specialists and B-readers.

³ Dr. Wheeler opined that the x-ray and CT scan showed conglomerate tuberculosis or histoplasmosis, inflammatory disease or tumor, minimal emphysema, but no evidence of coal workers' pneumoconiosis. Dr. Castle opined that claimant's x-rays and CT scans demonstrated the existence of sarcoidosis, a pulmonary process unrelated to coal mine employment, and also the possibility of self-healing tuberculosis, not coal workers' pneumoconiosis. Dr. Fino opined that the x-ray evidence showed the existence of sarcoidosis or an idiopathic interstitial fibrosis unrelated to coal dust exposure.

Turning to the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis, employer contends that the administrative law judge erred in crediting the medical opinion of Dr. Khokar, the miner's treating physician, that the miner had pneumoconiosis, Claimant's Exhibits 1, 2, over the contrary opinions of Drs. Fino and Castle, Employer's Exhibits 1, 2, 8. Specifically, employer argues that the administrative law judge erred in: failing to inquire fully as to which physicians had the greatest awareness of the miner's smoking history; discrediting the opinion of Dr. Castle, even though he concluded that the miner suffered from sarcoidosis, not pneumoconiosis, because he was unable to affirmatively establish the existence of sarcoidosis; discrediting the diagnoses of either sarcoidosis or interstitial pulmonary fibrosis unrelated to coal mine employment made by Dr. Fino because those diagnoses were not supported by the miner's hospital treatment records; and discrediting Dr. Fino's opinion because he relied on negative x-ray evidence.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge must weigh together all of the relevant evidence, like and unlike, to determine whether the existence of pneumoconiosis is established at 20 C.F.R. §718.202(a)(1)-(4). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). We will, therefore, consider whether the administrative law judge's finding of pneumoconiosis is supported by the x-ray and medical opinion evidence when considered together. In finding that the evidence as a whole supported the existence of pneumoconiosis pursuant to Section 718.202(a), the administrative law judge found the positive chest x-ray readings, the medical opinions diagnosing the existence of pneumoconiosis along with treatment records diagnosing the existence of the disease, outweighed the contrary x-ray and medical opinion evidence. Decision and Order on Remand at 6.

While we agree with employer that the administrative law judge erred in considering x-ray evidence that was not in compliance with the regulatory requirements, 20 C.F.R. §§718.202(a)(4), 718.102 and erred in inferring that x-rays taken during the course of hospitalization and not for the purpose of litigation were more probative, *Melnick v. Consolidation Coal Co.*, 17 BLR 1-31, 1-36 (1991)(*en banc*); *Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906 (1985); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985), we nonetheless affirm the administrative law judge's finding that the medical opinion evidence and x-ray evidence, when considered as a whole, establishes the existence of pneumoconiosis pursuant to *Compton*.

The administrative law judge permissibly accorded greatest weight to the opinion of the miner's treating physician, Dr. Khokar, as he found the doctor's opinion to be well-supported by the weight of the chest x-ray evidence as well as the reports of reviewing physicians Drs. Morgan, Gaziano and Dahhan and his experience over a four year period

as the miner's treating physician. The administrative law judge permissibly discredited the opinions of Dr. Fino and Dr. Castle, despite the doctors' superior credentials, because Dr. Castle opined that the miner had a "significant" smoking history and Dr. Fino relied on the "possibility of smoking" in diagnosing a pulmonary condition, but the record included only one sentence stating that the miner had "smoked in the past," Decision and Order on Remand at 4; Claimant's Exhibit 1; the administrative law judge observed that that sentence "contrast[ed] to the rest of the records where the miner consistently informed physicians he was a non-smoker" and concluded that the statement was likely in error. Decision and Order at 4. The administrative law judge also discredited the doctors' conclusions that the miner had a disease process, other than pneumoconiosis, because they were not supported by the miner's hospital treatment records which did not make any reference to these other conditions. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

When this case was previously before the Board, it held that the opinion of Dr. Khokar, that the miner suffered from pneumoconiosis, was entitled to greatest weight based on his status as the miner's treating physician under 20 C.F.R. §718.104(d), see *Bailey*, 03-0181 BLA, slip op. at 8-9. Nevertheless, the Board concluded that remand was necessary for further consideration of the contrary opinions of Drs. Fino and Castle in light of the administrative law judge's previous mischaracterization of those opinions. *Id.* Since the administrative law judge has now provided valid reasons for according lesser weight to the opinions of Drs. Fino and Castle, we affirm the administrative law judge's decision to accord superior weight to the medical opinion of Dr. Khokar as well as his finding that the evidence as a whole, supported a finding of the existence of pneumoconiosis. Accordingly, the administrative law judge's finding of the existence of pneumoconiosis, based on consideration of both the x-ray and medical opinion evidence together is affirmed. See *Compton*, 211 F.3d 203, 22 BLR 2-162.

Lastly, employer argues that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer asserts that the administrative law judge irrationally discredited the opinions of Drs. Dahhan and Castle, who concluded that pneumoconiosis played no role in the miner's death, while providing no credible explanation for crediting the opinions of Drs. Hatahet, Khokar and Fino, that the miner's underlying pulmonary condition contributed to his death. Specifically, employer contends that the administrative law judge erred in rejecting Dr. Dahhan's opinion for the reason he did not address whether pneumoconiosis could have contributed to the miner's weakened pulmonary state and his susceptibility to pneumonia, since Dr. Dahhan

explained that pneumoconiosis does not cause pneumonia. Likewise, employer argues that the administrative law judge erred in rejecting the opinion of Dr. Castle, who offered a detailed explanation that the miner's steroid treatment led to the pneumonia which caused death and that the steroid treatment was not related to any coal dust induced pulmonary disease. Employer contends that the administrative law judge erred in crediting the opinions of Drs. Hatahet and Khoker. Employer also contends that the administrative law judge erred in crediting the opinions of Drs. Hatahet and Khokar who found that the miner suffered from complicated pneumoconiosis, because they were in direct conflict with the administrative law judge's conclusion that the existence of complicated pneumoconiosis was not established.

In finding that claimant established that the miner's death was due to pneumoconiosis, the administrative law judge found that the evidence of record established that pneumoconiosis was a substantially contributing cause of the miner's death. The administrative law judge accorded greatest weight to the opinions of Drs. Hatahet and Khokar, that the miner's underlying lung disease arising from pneumoconiosis contributed to the miner's pneumonia, which was the ultimate cause of the miner's death. Decision and Order on Remand at 7; Claimant's Exhibits 1, 3. We note that as the Secretary observed when promulgating Section 718.205(c)(5), the proposition that persons weakened by pneumoconiosis may expire quicker from other diseases *is* a medical point, with some empirical support. *See* 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000). *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 335, 22 BLR 2-581, 2-588 (7th Cir. 2002). The administrative law judge further found that Dr. Fino's opinion, that the miner's underlying chronic lung disease contributed to his death, supported the findings of Drs. Hatahet and Khokar notwithstanding Dr. Fino's conclusion that the miner's chronic lung disease was not pneumoconiosis. The administrative law judge found that Dr. Dahhan's opinion was entitled to less weight because he based his finding, that pneumoconiosis did not cause the miner's death, on his belief that pneumoconiosis did not cause pneumonia or pulmonary emboli. The administrative law judge found, however, that Dr. Dahhan failed to consider whether the miner's pneumoconiosis contributed to his weakened state or his susceptibility to developing pneumonia. The administrative law judge rejected Dr. Castle's opinion because the doctor found that the significant changes present in the miner's lungs were not pneumoconiosis, a finding outweighed by more persuasive evidence.

We affirm the administrative law judge's determination that claimant established that the miner's death was due to pneumoconiosis. Contrary to employer's assertion, the mere fact that Drs. Khokar and Hatahet opined that the miner suffered from complicated pneumoconiosis did not undermine their conclusions that pneumoconiosis played a role in the miner's death. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 761-762, 21 BLR 2-587, 2-602 (4th Cir. 1999); *see also Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). Further, contrary to employer's assertion, the administrative

law judge provided a legally permissible basis for crediting the opinions when he concluded that such opinions were the most persuasive of record. *See Villain*, 312 F.3d 332, 22 BLR 2-581; *Clark*, 12 BLR 1-149 (1989); *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46. In addition, we reject employer's assertion and hold that the administrative law judge permissibly accorded lesser weight to Dr. Dahhan's opinion as he failed to address whether pneumoconiosis contributed to claimant's weakened pulmonary state, and thus contributed to a susceptibility to pneumonia which eventually caused the death miner's death. *See* 20 C.F.R. §718.205(c)(5); *Shuff*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-3. Further, we affirm the administrative law judge's decision to accord less weight to the opinion of Dr. Castle regarding the cause of the miner's death for the reason that that physician opined that the miner did not suffer from pneumoconiosis, a finding contrary to the administrative law judge's determination. *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *see Stark v. Director, OWCP*, 9 BLR 1-36 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see also Villain*, 312 F.3d 332, 22 BLR 2-581. We therefore affirm the administrative law judge's determination that claimant has established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). 20 C.F.R. §718.205(c)(2), (5).

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge