

BRB No. 95-2068 BLA

JESSIE SUMPTER)	
(Widow of EUGENE SUMPTER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edgar Jerome Dew (Goodman, Eden, Millender & Bedrosian), Detroit, Michigan, for claimant.

Dorothy L. Page (J. Davitt McAteer, 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, the United States Department of Labor.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (93-BLA-1008) of

¹ Claimant is Jessie Sumpter, widow of Eugene Sumpter, the miner, who died on January 25, 1989. Director's Exhibit 5. Mrs. Sumpter filed her survivor's claim on April 17, 1991. Director's Exhibit 1.

Administrative Law Judge Daniel J. Roketenetz denying benefits on a 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 second time. Initially, the administrative law judge accepted the parties' stipulation to sixteen years of coal mine employment, found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and concluded

that therefore, death due to pneumoconiosis could not be established pursuant to Section 718.205(c).² Accordingly, he denied benefits.

On appeal, the Board vacated the administrative law judge's finding pursuant to Section 718.202(a)(4) and remanded the case for him to reconsider the reports of the miner's treating physician, determine whether an additional physician diagnosed pneumoconiosis, and make a specific finding regarding the length of the miner's smoking history, inasmuch as the administrative law judge weighed the medical opinions with reference to the miner's smoking habit.³ *Sumpter v. Director, OWCP*, BRB No. 94-2353 BLA (Feb. 13, 1995)(unpub.).

On remand, the administrative law judge considered the evidence as instructed and found that the miner had smoked "at the very least" one-half of a package of cigarettes a day for forty years. Decision and Order on Remand at 3. The administrative law judge found that "in light of . . . the miner's substantial smoking history," the opinions of Dr. Batmanghelichi, the miner's treating physician, and that of Dr. Villamin, were not "well-reasoned or documented" because they failed to explain how they considered the miner's smoking history in reaching their diagnoses of pneumoconiosis. Decision and Order on Remand at 4.

The administrative law judge also found that because Dr. Long "continually stated throughout her report that the miner did not suffer from pneumoconiosis," her unexplained inconsistency of checking "YES" in response to the question of whether the miner's pneumoconiosis arose out of coal mine employment did not establish the

² Where the existence of pneumoconiosis is at issue, before a finding of death due to pneumoconiosis can be made, the existence of pneumoconiosis must be established under any of the methods available at Section 718.202(a)(1)-(4). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

³ The Board affirmed as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Sumpter*, slip op. at 2 n.2.

existence of pneumoconiosis. Decision and Order on Remand at 4. Accordingly, the administrative law judge found that pneumoconiosis was not established pursuant to Section 718.202(a)(4) and that therefore, entitlement pursuant to Section 718.205(c) was not established.

On appeal, claimant challenges the administrative law judge's weighing of the evidence pursuant to Section 718.202(a)(4). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge "arbitrarily" determined the length of the miner's smoking history. Claimant's Brief at 4-5. We reject claimant's contention. The administrative law judge considered all the relevant evidence and found that, although the reports of the miner's smoking history varied in length, the best-documented reports established that the miner smoked at least one-half of a package of cigarettes a day for forty years. Substantial evidence supports the administrative law judge's finding, which we therefore affirm. Director's Exhibit 10 at 47, 57.

Claimant asserts that the administrative law judge erred by discrediting the opinions of Drs. Batmanghelichi and Villamin based on their consideration of an inaccurate smoking history. Claimant's Brief at 8. Contrary to claimant's contention, the administrative law judge permissibly accorded diminished weight to their reports because Dr. Villamin mistakenly believed that the miner had quit smoking fifteen years before his 1974 examination and failed to offer objective evidence in support of his diagnosis, see *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986), while Dr. Batmanghelichi did not explain how she considered the miner's forty-year smoking history in reaching her diagnosis. Director's Exhibits 8, 15, 21, 22 at 15-16; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Therefore, we reject claimant's contention.

We also reject claimant's related argument that the administrative law judge should have found the smoking histories taken by Drs. Thompson-Cardwell and Bouier unreliable because they treated the miner only briefly and the miner was in the "throes of death" when Dr. Bouier took his smoking history. Claimant's Brief at 6. Contrary to claimant's contention, the administrative law judge permissibly found the

hospitalization records prepared by Drs. Thompson-Cardwell and Bouier to be "well-documented," see *Clark; supra*, as well as the most recent and "credible evidence on the issue of the miner's smoking history." Decision and Order on Remand at 3; see *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). Moreover, the record supports the administrative law judge's consideration of the smoking history taken by Dr. Bouier,⁴ who indicated that on admission to the hospital, the miner was "alert, cooperative, and oriented." Director's Exhibit 7.

Claimant next asserts that the administrative law judge failed to apply the definition of pneumoconiosis at Section 718.201, which claimant contends necessarily encompasses the miner's diagnosed chronic obstructive pulmonary disease. Claimant's Brief at 8. Contrary to claimant's contention, the administrative law judge applied Section 718.201 to the medical opinions. Except for the diagnoses by Drs. Batmanghelichi and Villamin, to which the administrative law judge permissibly accorded diminished weight, see discussion, *supra*, the administrative law judge correctly found that none of the diagnoses of chronic obstructive pulmonary disease, asthma, or emphysema in the record was linked to the miner's coal dust exposure. Director's Exhibits 7, 10, 14, 18, 22; [1994] Decision and Order at 4; Decision and Order on Remand at 4; 20 C.F.R. §718.201. Therefore, we reject claimant's contention.

Claimant contends that the administrative law judge should not have credited the opinions of Drs. Thompson-Cardwell and Bouier because neither physician addressed the existence of pneumoconiosis. Claimant's Brief at 5. These physicians, who were aware of the miner's coal mine employment history, diagnosed and treated a variety of lung ailments yet did not link any of these impairments to his coal dust exposure. Director's Exhibits 5, 7, 10. Claimant bears the burden of proof, see *Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and thus the risk of non-persuasion if a medical opinion is found insufficient to establish an element of entitlement. See *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Therefore, we reject claimant's contention and affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

⁴ Dr. Bouier recorded a cigarette smoking history of one pack per day for sixty-two years. Director's Exhibit 7. The administrative law judge ultimately credited Dr. Thompson-Cardwell's report of a forty-year smoking history. See discussion, *supra*.

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

_____ JAMES F.
BROWN
Administrative Appeals Judge