BRB No. 01-0825 BLA

ELLA L. HAYNES (Widow of HOWARD HAYNES) Claimant-Respondent v. OLD BEN COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-1325) of Administrative Law Judge Rudolf L. Jansen 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

[1]The 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 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All

twenty-three years of qualifying coal mine employment as stipulated by the parties and supported by the record, and accepted employer's concession that the miner had pneumoconiosis arising out of coal mine employment. The administrative law judge then found that the weight of the evidence of record established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), consistent with *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).[2] Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings pursuant to Section 718.205(c). Claimant[3] responds, urging affirmance. The Director, Office of Worker' Compensation Appeals (the Director), has not participated in this appeal.[4]

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

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit as the miner was last employed in the coal mine industry in the State of Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]Claimant is Ella L. Haynes, the miner's widow, who filed her claim for survivor's benefits herein on October 29, 1998.

[4]We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the length of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer contends that the administrative law judge's weighing of the evidence does not comport with controlling case law issued by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises. Specifically, employer asserts that, contrary to the administrative law judge's findings, the opinions of Drs. Naeye and Caffrey are not hostile to the Act. Employer further argues that, while a consensus of medical opinions attributed the miner's death to severe chronic obstructive pulmonary disease in the form of bronchitis, bullous emphysema and/or centrilobular emphysema, the administrative law judge failed to resolve the central conflicts in the evidence herein, *i.e.*, whether any of these conditions arose in part out of coal dust exposure and whether the miner's clinical pneumoconiosis and focal emphysema were too mild to hasten death. Rather, employer maintains that the administrative law judge mechanically discounted the opinions of Drs. Naeye, Caffrey, Tuteur, Renn and Repsher, that the miner's death was unrelated to clinical or legal pneumoconiosis, and credited the contrary opinions of Drs. Abraham, Green and Cohen, that the miner's death was hastened by pneumoconiosis, without analyzing the bases for the physicians' conflicting conclusions. Employer's arguments have merit.

In evaluating the relevant medical opinions at Section 718.205(c),[5] the administrative law judge summarized each physician's ultimate conclusion and the evidence reviewed, and determined that because Board-certified pathologists Drs. Naeye and Caffrey testified that simple pneumoconiosis does not progress after cessation of exposure to coal dust, their opinions were contrary to the Act and therefore entitled to no weight. Decision and Order at 9. The administrative law judge further found that while Drs. Renn, Repsher and Tuteur were all highly qualified pulmonologists who based their opinions upon a review of the medical evidence of record, their opinions were entitled to less weight due to their reliance, at least in part, on the pathology reports of Drs. Naeye and Caffrey. *Id.* The administrative law judge then found that although Dr. Abraham's credentials as a pathologist were unknown,[6]

[5]We reject employer's argument that the administrative law judge failed to consider all relevant evidence, specifically the opinions of Drs. Katubig and Travis, and the clinical evidence developed in the miner's claims for benefits. The administrative law judge accurately reviewed the autopsy findings of Drs. Katubig and Travis, which included clinical and pathological diagnoses but not the physicians' conclusions regarding the contributing causes of the miner's death. Decision and Order at 4; Director's Exhibits 3, 5. The administrative law judge also indicated that he reviewed the clinical evidence and medical reports developed in the miner's claims for benefits, but found that they were not informative on the issue of the miner's death. Decision and Order at 4, n. 1.

[6]In his Decision and Order at 5, the administrative law judge acknowledged, and the record reflects, that Dr. Abraham is Board-certified in pathology (specifically Anatomic Pathology). Director's Exhibit 14; Claimant's Exhibit 13. Employer correctly maintains that

his opinion was well reasoned and documented, and that the opinions of the highly qualified Dr. Green, a pathologist, and Dr. Cohen, a pulmonologist, were well reasoned and documented and entitled to the most weight. Decision and Order at 9-10.

The "hostility to the Act" rule in the Seventh Circuit allows an administrative law judge to disregard medical testimony when it is affected by the physician's subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions. *See Pancake v. Amax Coal Co.*, 858 F.2d 1250 (7th Cir. 1988). Contrary to the administrative law judge's findings, however, the opinions of Drs. Naeye and Caffrey do not fall within a traditionally hostile category, nor do they contravene the Act's definition of pneumoconiosis. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). Moreover, even where a physician expresses a view which is at odds with the Act, the administrative law judge, in applying the rule, may not automatically reject the physician's conclusions but must determine whether and to what extent the hostile opinion affected the physician's medical diagnoses. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987). In the present case, employer correctly notes that its experts reviewed all of the medical evidence of record, responded to any criticisms of their reports, and explained how the objective evidence of record and/or medical literature supported their conclusions rather than those of claimant's experts. Inasmuch as the administrative law judge did not provide a medical reason for preferring claimant's experts over employer's experts, *see Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001), we vacate the administrative law judge's findings pursuant to Section 718.205(c), and remand this case for the administrative law judge to reevaluate the credibility of the conflicting opinions thereunder based on his view of the reliability of the physicians' medical analyses and the depth of support for their conclusions. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

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the administrative law judge did not compare all of the relevant qualifications of the respective physicians, but merely noted various Board-certifications, Decision and Order at 4-7, and observed that Dr. Green is "very widely published in the area of occupational pulmonary disease," Decision and Order at 5, 7, and is "likely the pre-eminent occupational lung pathologist in the world," Decision and Order at 9.

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