BRB No. 01-0702 BLA

MARY E. RAY (Widow of CHESTER W. RAY) Claimant-Petitioner v. PEABODY COAL COMPANY Employer-Respondent 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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Timothy S. Williams (Eugene Scalia, 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, United States Department of Labor.

Before: SMITH, HALL, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (00-BLA-0433) of Administrative Law

Judge Robert L. Hillyard denying benefits on a miner's claim and 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).[2] The administrative law judge credited the miner with thirty-seven years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 9-10. Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718,[3] the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Decision and Order at 12-18. Additionally, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied on both claims.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence regarding the existence of pneumoconiosis and total respiratory disability.[4] Claimant's Brief at 9-24. Claimant additionally contends that the administrative law judge erred in failing to find that the miner's death was due to pneumoconiosis. Claimant's Brief at 24-25. Employer responds, urging affirmance of the denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has filed a limited response to this appeal.[5]

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).

Initially, we address the administrative law judge's finding that the miner's first claim remained viable because a hearing was requested on this claim but none was provided. Decision and Order at 3 n.3. The miner's first claim for benefits, filed on February 23, 1989, was denied on August 11, 1989. Director's Exhibits 41-145, 41-85. Thereafter, the miner requested a formal hearing by letter dated September 13, 1989. Director's Exhibit 41-84. Although no formal hearing was held, the miner's first claim was again denied on November 9, 1989. Director's Exhibit 41-76. The miner filed his second claim for benefits on July 13, 1998. Director's Exhibit 2. The administrative law judge, citing 20 C.F.R. §§725.421 (2000), 725.450 (2000), found that because a hearing was requested on the miner's 1989 claim, but none was provided, the miner's first claim for benefits remained viable. Decision and Order at 3 n.3. Therefore, the administrative law judge found that the miner's claim for benefits constitutes an original claim and not a duplicate claim. *Id.*

Given the facts of this case and because "an administrative law judge is afforded broad discretion in dealing with procedural matters," *Clark v. Karst-Robbins Coal Co.*, 12

BLR 1-149, 1-153 (1989)(*en banc*); *see also Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985), we affirm the administrative law judge's determination that the miner's 1989 claim is still viable inasmuch as it was rational, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), and not an abuse of his discretion.[6]

On the merits of the miner's claim pursuant to Section 718.202(a)(4) (2000), claimant asserts that the administrative law judge erred in his consideration of the medical opinion evidence. Claimant's Brief at 9-21. For the reasons outlined below, we vacate the administrative law judge's Section 718.202(a)(4) (2000) finding and remand this case for the administrative law judge to reconsider the opinions of Drs. Lane, O'Bryan, and Wright pursuant to this subsection.

Regarding Dr. Lane's opinion, claimant asserts that the administrative law judge erred in finding this physician's opinion less persuasive. Claimant's Brief at 14-15. In his medical report, Dr. Lane found that the miner has coal workers' pneumoconiosis, 1/0 and stated that the miner has an occupational lung disease caused by his coal mine employment based upon an x-ray. Director's Exhibit 41-60. At a subsequent deposition, Dr. Lane initially testified that coal mine employment was not a causative factor in the miner's chronic obstructive pulmonary disease (COPD), but later stated that it is possible that coal dust may have made a small contribution. Director's Exhibit 41-29 at 10, 12-13, 28. The administrative law judge accorded less weight to Dr. Lane's opinion because he found that this physician "recanted his earlier finding of an occupational lung disease with an equivocal finding that coal dust exposure may 'possibly' have contributed to the Miner's obstructive impairment." Decision and Order at 15. Claimant asserts that the administrative law judge erred in considering Dr. Lane's opinion by failing to "differentiate Dr. Lane's opinions with regard to clinical coal workers' pneumoconiosis and legal pneumoconiosis." Claimant's Brief at 15. Claimant's assertion has merit. The administrative law judge permissibly found that Dr. Lane's finding of legal pneumoconiosis was equivocal, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). However, Dr. Lane unequivocally found coal workers' pneumoconiosis in his February 3, 1991 report, Director's Exhibit 41-60, and the administrative law judge did not consider the credibility of Dr. Lane's finding of clinical pneumoconiosis. Accordingly, we instruct the administrative law judge to consider Dr. Lane's finding of clinical pneumoconiosis on remand. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Claimant presents a similar challenge to the administrative law judge's treatment of Dr. O'Bryan's opinion. Claimant's Brief at 20. Dr. O'Bryan found category 1 pneumoconiosis "presumed" due to coal dust exposure and asthmatic bronchitis due to possible allergies, and stated that "the miner's smoking and coal dust exposure played an equal part in this process developing." Director's Exhibit 41-60. The administrative law

judge found Dr. O'Bryan's finding that the miner's pneumoconiosis is presumed due to coal dust exposure to be equivocal, but, as claimant asserts, failed to address Dr. O'Bryan's other finding that coal dust exposure played an equal part in the development of the miner's asthmatic bronchitis. *See Wojtowicz*, *supra*; *Tenney*, *supra*. This finding by Dr. O'Bryan could, if credited, support a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.201. *See Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1987). Therefore, we remand this case for the administrative law judge to consider Dr. O'Bryan's diagnosis regarding the miner's asthmatic bronchitis.

Claimant additionally asserts that the administrative law judge erred in his consideration of Dr. Wright's opinion. Claimant's Brief at 19-20. Dr. Wright found that the miner had simple coal workers' pneumoconiosis, 2/1 and severe COPD associated with smoking and inhalation of respirable dust. Director's Exhibit 10. The administrative law judge accorded less weight to Dr. Wright's opinion, stating that he "gave positive x-ray readings and diagnosed pneumoconiosis [and] I have found the x-ray evidence to be negative for pneumoconiosis." Decision and Order at 16.

The administrative law judge erred in his analysis of Dr. Wright's opinion for two reasons. First, as claimant asserts, the administrative law judge erred in according less weight to this medical opinion because Dr. Wright relied, in part, on a positive x-ray reading, which conflicts with the weight of the x-ray evidence. *See Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). As Section 718.202(a) provides alternative methods of establishing pneumoconiosis, *see Dixon v. North Camp Coal* Co., 8 BLR 1-344 (1985); *but see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir.1997), the administrative law judge's reasoning here essentially forecloses the possibility that claimant can establish the existence of pneumoconiosis by medical opinion, simply because she has failed to establish pneumoconiosis by x-ray, *see Taylor, supra; Dixon, supra; see also Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Second, as claimant also asserts, the administrative law judge failed to discuss or discredit Dr. Wright's finding of severe COPD associated with smoking and inhalation of respirable dust.[7] This finding of Dr. Wright's could, if credited, also support a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.201. *See Southard, supra*; *Shaffer, supra*; *Biggs*, *supra*. Accordingly, we instruct the administrative law judge to consider this evidence and explain his rationale for crediting or discrediting it on remand. *See Wojtowicz, supra*; *Tenney*, *supra*.

Claimant additionally challenges the administrative law judge's consideration of the other medical opinions in the record, but these assertions are without merit.[8] First, contrary to claimant's contention, the administrative law judge properly found the opinions of Drs.

Gallo and Culbertson to be sufficient to support a finding of the absence of pneumoconiosis because Dr. Gallo specifically stated that the miner does not have coal workers' pneumoconiosis and Dr. Culbertson found that there is no evidence of pneumoconiosis. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Second, claimant contends that the administrative law judge erred in finding Dr. Caffrey's opinion regarding the existence of pneumoconiosis to be equivocal. Claimant's Brief at 15. Dr. Caffrey opined that it is "most likely" that the miner had a mild degree of simple coal workers' pneumoconiosis and later stated that "[i]f [the miner] did have simple coal workers' pneumoconiosis, and I believe that is possible, to a mild degree, it did not cause him pulmonary disability...." Employer's Exhibit 3. Consequently, the administrative law judge permissibly found his opinion regarding pneumoconiosis to be equivocal. *See Justice*, *supra*; *see also Griffith, supra.*

Moreover, claimant challenges the administrative law judge's determination that Dr. Bell's opinion is entitled to little weight because he did not know the miner's smoking history. Claimant's Brief at 18. Claimant states that Dr. Bell was aware that the miner was "a long-term cigarette smoker." *Id.* Dr. Bell, in fact, testified that he did not know how long the miner smoked and that he thought the miner had quit. Employer's Exhibit 1 at 26. The administrative law judge found that the miner had a fifty-four pack year smoking history. Decision and Order at 4. Therefore, the administrative law judge permissibly accorded less weight to Dr. Bell's opinion because he did not know the miner's smoking history. *See Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Based on the foregoing, we vacate the administrative law judge's Section 718.202(a)(4) (2000) finding and remand this case for the administrative law judge to reconsider the opinions of Drs. Lane, O'Bryan, and Wright pursuant to this subsection.

We next address the administrative law judge's consideration of whether claimant established total respiratory disability. For the reasons outlined below, we vacate the administrative law judge's findings regarding total respiratory disability and remand this case for him to reconsider the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Initially, the administrative law judge noted that Drs. Branscomb, Fino, Caffrey, Lane, Anderson, Culbertson, and O'Bryan found that the miner was not totally disabled from a respiratory standpoint whereas Drs. Bell, Traughber, Houser, and Wright found the miner to be totally disabled from a respiratory standpoint. Decision and Order at 17. The administrative law judge accorded "substantial weight" to the medical opinions of Drs. Branscomb, Fino, and Culbertson because he found their opinions to be well-reasoned and well-documented. Decision and Order at 14, 17. The administrative law judge further found the opinions of Drs. Caffrey, Lane, Anderson, and O'Bryan to be entitled to "substantial

weight" inasmuch as he found them to be "supported by the objective medical evidence on which they relied." Decision and Order at 18. The administrative law judge stated that the opinion of Dr. Bell, the miner's treating physician, was "unreasoned, undocumented, and is unsupported by the evidence" because this physician "did not perform any pulmonary function or arterial blood gas studies." Decision and Order at 16. Moreover, the administrative law judge stated that the opinions of Drs. Traughber, Houser, and Wright were "unsupported by the objective evidence on which they relied." Decision and Order at 18. Therefore, the administrative law judge found that "Claimant has failed to establish by a preponderance of the evidence that the Miner was totally disabled from a pulmonary or respiratory standpoint." *Id.*

Claimant asserts that the administrative law judge erred in according less weight to the opinions of Drs. Traughber, Houser, and Wright because their opinions were unsupported by the objective evidence of record. Claimant's Brief at 23-24. Claimant's assertion has merit. While the administrative law judge may discredit a medical opinion that he finds is not adequately supported by its underlying documentation, *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), or is not well reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*), the administrative law judge's rationale for discrediting the opinions of Drs. Traughber, Houser, and Wright in this case raises questions as to whether he impermissibly substituted his judgment for that of the physician, *see Parulis v. Director, OWCP,* 15 BLR 1-28 (1991); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *see generally Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985). Even though the pulmonary function studies relied upon by Drs. Traughber, Houser, and Wright were non-qualifying,[9] these physicians found them to be supportive of their findings of total respiratory disability.[10] Accordingly, we vacate the administrative law judge's finding that claimant failed to demonstrate that the miner established a total respiratory disability based on the medical opinion evidence and instruct the administrative law judge to reconsider this evidence on remand.[11]

Claimant additionally contends that the administrative law judge erred in relying on Dr. Caffrey's opinion to support his Section 718.204(c)(4) (2000) finding because this physician failed to accept the progressive nature of pneumoconiosis. Claimant's Brief at 22. In his medical report, Dr. Caffrey stated:

> It is a well accepted fact that simple coal workers' pneumoconiosis does not progress after a miner is removed from the environment, which caused the coal workers' pneumoconiosis.

Employer's Exhibit 3. The United States Supreme Court and the U.S. Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, have recognized the progressive nature of pneumoconiosis. *See Mullins Coal Co. Inc. of Virginia v. Director, OWCP*, 484

U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Consolidation Coal Co. v. McMahon*, 77 F.3d 898, 20 BLR 2-152 (6th Cir. 1996). In addition, the revised regulation at 20 C.F.R. §718.201(c) specifically states that pneumoconiosis is a latent and progressive disease. Given that the revised regulations and the case law of the U.S. Supreme Court and the Sixth Circuit support the proposition that pneumoconiosis is progressive, we instruct the administrative law judge to reconsider Dr. Caffrey's opinion on remand and determine whether the credibility of his opinion is affected by his statement that pneumoconiosis is not progressive.

Furthermore, the Sixth Circuit court noted in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), that a physician who has opined that claimant has some degree of respiratory impairment, *i.e.*, mild to moderate, should have knowledge of the exertional requirements of claimant's coal mine work before rationally determining whether claimant is or is not totally disabled from performing his usual coal mine employment. Therefore, we instruct the administrative law judge to consider whether the various physicians of record were aware of claimant's usual coal mine work in considering the weight to be accorded to each physician's opinion regarding disability on remand. *See Cornett, supra*.

If, on remand, the administrative law judge finds that the medical opinion evidence demonstrates total respiratory disability, he must then consider all the relevant evidence, like and unlike, to determine whether claimant has established total respiratory disability.[12] *See* 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Regarding the survivor's claim, the administrative law judge noted that while Drs. Caffrey, Branscomb, Fino, and Hansbarger found that the miner's death was not due to pneumoconiosis, Dr. Bell found that the miner's death was hastened by his pneumoconiosis. Decision and Order at 8-9, 19. The administrative law judge, citing *Griffith* and *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993), placed greater weight on the opinions of Drs. Caffrey, Branscomb, Fino, and Hansbarger and found "that the medical opinion evidence fails to support a finding that the Miner's death was caused or hastened by pneumoconiosis." Decision and Order at 18, 19. Claimant contends that the administrative law judge erred pursuant to 20 C.F.R. §718.205(c) (2000) by failing to address Dr. Bell's opinion that because the miner's treatment opportunities were limited by his occupational disease, it hastened his death. Claimant's Brief at 24-25.

Contrary to claimant's contention, the administrative law judge specifically discussed

the deposition testimony and all of the reports of Dr. Bell regarding the cause of the miner's death. Decision and Order at 8-9, 19. The administrative law judge accorded "little weight" to Dr. Bell's opinions because he found them to be unreasoned and undocumented even though Dr. Bell was the miner's treating physician. Decision and Order at 15-16, 19. Specifically, the administrative law judge noted that Dr. Bell testified at his deposition that his notation of "black lung" on the miner's death certificate and "pneumoconiosis" on a letter regarding the cause of the miner's death were solely based on the miner's statements to him that he had black lung. Decision and Order at 15-16. Additionally, the administrative law judge stated that while Dr. Bell testified that the miner's COPD was due both to his cigarette smoking and coal dust exposure, Dr. Bell also testified that he did not know how long the miner smoked. *Id*. Inasmuch as the administrative law judge has provided sufficient reasons for doing so, we hold that the administrative law judge permissibly discredited the opinion of Dr. Bell regarding the cause of the miner's death. *See Brown*, *supra*; *Clark*, *supra*; *Fields*, *supra*; *Lucostic*, *supra*.

Because the administrative law judge properly rejected the only medical opinion in the record which supports claimant's burden of establishing that the miner's death was due to pneumoconiosis, *see* discussion, *supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), we hold that claimant's contentions regarding the adequacy of the opposing medical opinions are moot. *See Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984); *see generally Creggar v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(c)(2), (c)(5); *see Brown*, *supra*.

Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis, *see Brown*, *supra*; *see also Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989), an essential element of entitlement in a survivor's claim, we also affirm his denial of survivor's benefits under 20 C.F.R. Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*); *see also Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Accordingly, the administrative law judge's Decision and Order denying benefits on the survivor's claim is affirmed and the administrative law judge's Decision and Order denying benefits on the miner's claim is affirmed in part and vacated in part. The case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge