

BRB No. 10-0122 BLA

MARY MAYNARD)	
(Widow of CARL B. MAYNARD))	
)	
Claimant-Respondent)	
)	
v.)	
)	
KENTUCKY CARBON CORPORATION)	DATE ISSUED: 10/22/2010
)	
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 – Awarding Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2005-BLA-5373) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) with respect to a survivor's claim¹ filed on November 13, 2003, pursuant to the provisions of

¹ Claimant is the widow of the miner, who died on October 5, 2003. Director's

the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with at least thirty-five years of coal mine employment based on the parties' stipulation. The administrative law judge noted that the miner was receiving benefits at the time of his death, pursuant to a final award by Administrative Law Judge W. Ralph Musgrove.³ Based on the doctrine of collateral estoppel,⁴ the administrative law judge found that employer was barred from relitigating the issues of the existence of pneumoconiosis⁵ and that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. The administrative law judge further found the medical evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded survivor's benefits. However, noting that claimant had not established the eligibility requirements pursuant to 20 C.F.R. §725.212(a), the administrative law judge stated that the award of benefits is contingent on these elements being established.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), arguing that the administrative law judge erred in weighing the conflicting medical opinion evidence. In addition, employer contends that the administrative law judge erred in failing to resolve the issue of whether claimant

Exhibit 7. The miner was receiving federal black lung benefits at the time of his death. Director's Exhibit 1.

² As employer and the Director, Office of Workers' Compensation Programs, correctly assert, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant filed her survivor's claim prior to January 1, 2005.

³ On November 30, 1989, Administrative Law Judge W. Ralph Musgrove issued a Decision and Order awarding benefits in the miner's claim.

⁴ Collateral estoppel forecloses the relitigation of issues of fact or law that are identical to issues that have been actually determined and necessarily decided in prior litigation, and in which the parties had a full and fair opportunity to litigate. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).

⁵ Judge Musgrove found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

qualified as a surviving spouse pursuant to Section 725.212(a), prior to awarding benefits. Claimant has not filed a brief in response to employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a letter, stating that he will not submit a formal response to claimant's appeal, unless requested to do so by the Board.⁶

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁷ 33 U.S.C. §921(b)(3), as incorporated 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 survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. Death will also be considered due to pneumoconiosis if the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). 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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Initially, we address the procedural issue raised in employer's contention that the administrative law judge erred in failing to resolve the issue of whether claimant qualifies as an eligible surviving spouse pursuant to Section 725.212, prior to the award of benefits. The administrative law judge noted that, because claimant did not attend the

⁶ The parties do not challenge Administrative Law Judge Kenneth A. Krantz's crediting of the miner with at least thirty-five years of coal mine employment, or his application of the doctrine of collateral estoppel to find the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a) and 718.203. These findings are, therefore, affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁷ The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner's last coal mine employment occurred in Kentucky. See *Shupe v. Director*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

hearing, it has not been established whether claimant meets the eligibility requirements set forth at Section 725.212, *i.e.*, that she is not married and was dependent on the miner at the time of his death; therefore, claimant's counsel was given thirty days post-hearing to establish these elements. Decision and Order at 2; Hearing Transcript at 6, 11-12. Claimant's counsel did not submit this information. Nonetheless, the administrative law judge adjudicated the claim and awarded benefits, stating that because claimant's eligibility is a necessary element of entitlement, the award of benefits in this case is contingent upon the district director's determination that claimant has met the requirement. Decision and Order at 2, 8.

Pursuant to Section 725.212(a),⁸ an individual filing for survivor's benefits must establish that she is not married and was dependent on the miner at the time of his death, in addition to establishing the necessary conditions of entitlement on the merits of her claim. 20 C.F.R. §§725.212(a), 718.205(c). Here, the administrative law judge has not made the necessary findings regarding claimant's eligibility pursuant to Section 725.212; therefore, we vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to determine whether claimant meets the necessary conditions of eligibility pursuant to Section 725.212(a).

However, in the interest of judicial economy, we will address employer's arguments concerning the administrative law judge's weighing of the medical opinion evidence at Section 718.205(c). Employer argues that the administrative law judge erred in discounting the opinions of Drs. Jarboe and Castle, given that he failed to meaningfully discuss these opinions or to adequately explain his rationale for according them little weight. Specifically, employer asserts the administrative law judge erred in summarily

⁸ Section 725.212(a), in pertinent part, states:

- (a) An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:
 - (1) Is not married;
 - (2) Was dependent on the miner at the pertinent time; and
 - (3) The deceased miner either:
 - (i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of his death ...;
 - (ii) ... A surviving spouse or surviving divorced spouse of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to benefits ...

20 C.F.R. §725.212.

discounting Dr. Jarboe's opinion because Dr. Jarboe did not examine the miner. Employer's Brief at 8-9. Employer further asserts that the administrative law judge erred in failing to fully discuss Dr. Jarboe's opinion, given that he did not consider the doctor's alternative finding that, even if he assumed the existence of pneumoconiosis, it would not change his ultimate conclusion that coal workers' pneumoconiosis played no role in the miner's death. *Id.* at 10. We disagree.

Contrary to employer's assertion, the administrative law judge considered the specifics of Dr. Jarboe's conclusion that the miner's death was not related to coal workers' pneumoconiosis. In particular, the administrative law judge noted that Dr. Jarboe disagreed with the listing on the death certificate that the miner's cerebrovascular accident was related to, or a consequence of, his chronic obstructive lung disease. *Compare* Director's Exhibit 7 with Employer's Exhibit 6 at 17-18. Moreover, the administrative law judge considered Dr. Jarboe's finding that, even if he assumed that coal workers' pneumoconiosis was present, it did not cause the miner's death because there is no evidence that a cerebrovascular accident, or stroke, is in any way related to the inhalation of coal dust or coal workers' pneumoconiosis. Employer's Exhibit 6 at 18. The administrative law judge properly accorded little weight to Dr. Jarboe's opinion regarding the cause of the miner's death, because the doctor's conclusion that the miner did not suffer from pneumoconiosis contradicted the finding that the miner suffered from pneumoconiosis, which was made by Judge Musgrove in the miner's claim and accepted by the administrative law judge in the survivor's claim, based on the doctrine of collateral estoppel. *See 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); Decision and Order at 7; Director's Exhibit 11; Employer's Exhibit 6 at 15-16. Thus, we reject employer's assertion that the administrative law judge erred in failing to fully discuss Dr. Jarboe's opinion or to adequately explain his rationale for according it little weight. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Employer also asserts that the administrative law judge erred in failing to attribute any probative weight to the opinion of Dr. Castle, arguing that the administrative law judge identified no specific error in Dr. Castle's analysis or his conclusions. Employer's Brief at 12-13. Specifically, employer asserts that the administrative law judge erred by engaging in a selective analysis of the medical evidence and appears to have substituted his opinion for that of the medical expert in failing to fully consider Dr. Castle's opinion. *Id.* at 13-14. Contrary to employer's contention, the administrative law judge fully discussed Dr. Castle's opinion, including the doctor's additional discussion that, even if he assumed the presence of pneumoconiosis, it would not change his opinion because the miner died as a result of a cerebrovascular accident caused by atherosclerosis and coal mine dust does not cause strokes or cerebrovascular accidents. Decision and Order at 7;

Employer's Exhibit 5 at 15, 16, 21-22. As with Dr. Jarboe's opinion, the administrative law judge properly accorded little weight to Dr. Castle's opinion because the doctor's conclusion that the miner did not suffer from pneumoconiosis contradicted the finding that the miner suffered from pneumoconiosis. *See Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83; Decision and Order at 7; Employer's Exhibits 4, 5 at 13-14. Thus, we reject employer's assertion that the administrative law judge erred in weighing Dr. Castle's opinion. *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Ward*, 93 F.3d at 211, 20 BLR at 2-360; *Clark*, 12 BLR at 1-155.

Finally, employer asserts that the administrative law judge erred in failing to adequately discuss the opinions of Drs. Mahmood and Perper. Employer argues that the administrative law judge erred in crediting Dr. Mahmood's one-page report as being reasoned or documented. As noted above, Drs. Mahmood and Perper opined that pneumoconiosis contributed to, or hastened, the miner's death. The administrative law judge considered the entirety of Dr. Mahmood's records, including his report and the treatment notes accompanying his report, in determining the credibility of the doctor's conclusions. *See Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); Decision and Order at 5-7, 8; Director's Exhibits 9-11. However, the administrative law judge did not adequately explain why he concluded that Dr. Mahmood's opinion, that the miner's recurrent lung infection and hypoxemia were due to his pneumoconiosis, was supported by the treatment notes. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Thus, the administrative law judge did not provide a valid basis for crediting Dr. Mahmood's opinion in support of his finding that pneumoconiosis was a substantially contributing cause of the miner's death at Section 718.205(c). Moreover, the administrative law judge did not provide any discussion of how Dr. Perper's opinion is supportive of Dr. Mahmood's conclusions. *Id.*

If, on remand, the administrative law judge finds that claimant has established that she is an eligible surviving spouse pursuant to Section 725.212(a), the administrative law judge must reconsider the medical evidence at Section 718.205(c) and provide a detailed explanation of his rationale for weighing this evidence. 20 C.F.R. §718.205(c); *see Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings 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