

BRB No. 01-0490 BLA

JOANN FINGER)	
(Widow of ROBERT J. FINGER))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ZEIGLER COAL COMPANY)	
)	DATE ISSUED:
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

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

Edward Waldman (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2000-BLA-0053) of Administrative Law Judge Rudolf L. Jansen awarding benefits on a miner's duplicate claim¹ 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 sixteen years of qualifying coal mine employment, and adjudicated both claims pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that new evidence submitted in support of the miner's duplicate claim was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4) (2000), an element of entitlement previously adjudicated against the miner, and thus was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Weighing all of the relevant old and new evidence of record together, the administrative law judge found that claimant, the miner's widow, established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b) (2000), total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1), (4) (2000), and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, benefits were awarded on both claims.

On appeal, employer challenges the administrative law judge's weighing of the evidence on the issues of the existence of pneumoconiosis, total disability, disability causation, and death due to pneumoconiosis. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, responds, declining to address the merits of this appeal but asserting that the amendments to the regulations do not affect the outcome of this case.

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

¹The miner's original claim for benefits, filed on August 29, 1989, was denied and abandoned. Director's Exhibit 26. The miner filed the instant duplicate claim for benefits on September 15, 1993, Director's Exhibit 1, and the miner died on September 23, 1995. Director's Exhibit 35. Claimant, the miner's widow, filed her survivor's claim on March 14, 1996. Director's Exhibit 34.

²The 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).

Employer initially challenges the administrative law judge's finding that the weight of the biopsy evidence of record establishes the existence of pneumoconiosis at Section 718.202(a)(2) (2000) and a material change in conditions at Section 725.309 (2000). Employer contends that the administrative law judge erred in failing to adequately address and weigh the opinions of Drs. Naeye, Tuteur and Hippensteel, which defined the term "anthracosis" and/or provided medical interpretations of the biopsy findings of Drs. DeWitt and Abraham. Employer also asserts that the opinion of Dr. Naeye, as buttressed by the opinions of Drs. Tuteur and Hippensteel, demonstrates that the tissue samples reviewed were too small to render a definitive diagnosis, and employer maintains that the biopsy findings of Drs. DeWitt and Abraham are insufficient to establish the existence of pneumoconiosis. Employer's arguments are without merit. The administrative law judge accurately reviewed the pathology reports of Drs. Naeye, DeWitt and Abraham, and determined that Drs. Naeye and Abraham were highly-qualified pathologists, whereas Dr. DeWitt's qualifications were not of record. Decision and Order at 9-11, 16. The administrative law judge acknowledged that Dr. Naeye considered the amount of tissue available for his review insufficient to form a diagnosis, and that Dr. DeWitt's observation of "anthracotic pigmentation" by itself did not constitute a positive diagnosis of pneumoconiosis. Decision and Order at 16; Director's Exhibits 41, 53, 63; Employer's Exhibit 1. In a proper exercise of his discretion, however, the administrative law judge reasonably determined that the opinions of Drs. DeWitt and Abraham,³ were sufficient to establish both the existence of pneumoconiosis as defined at 20 C.F.R. §718.201(a) (2000),⁴ *see Freeman United Coal Mining Co. v. Hunter*, 82 F.3d 764, 20

³Dr. DeWitt diagnosed "foci of interstitial fibrosis with anthracosis." Director's Exhibits 41, 63. Dr. Abraham stated that "this small biopsy documents macular coal dust lesions consistent with pneumoconiosis." Claimant's Exhibit 1. Dr. Abraham additionally indicated that "[a] portion of the lung parenchyma is well represented in one of the pieces biopsied....This parenchyma shows areas of interstitial dust accumulation and fibrosis in a macular pattern....The dust is a mixture of opaque and birefringent particles, many of which have the irregular black fragmented appearance typical of coal mine dust." *Id.*

⁴We reject employer's assertion that the administrative law judge, in finding the biopsy evidence sufficient to establish the existence of pneumoconiosis, adopted an overly broad and unsupported interpretation of the pathological descriptions of Drs. DeWitt and Abraham. Employer's Brief at 23-26. While Dr. Naeye found no fibrous tissue mixed with black pigment on the biopsy slides that he reviewed, and testified that the term "anthracosis" merely refers to the deposition of black pigment without clinical significance in the absence of associated fibrous tissue or focal emphysema, *see* Director's Exhibit 63 at 10, 19, 20, 22, both Drs. DeWitt and Abraham observed fibrosis. *See* Director's Exhibits 41, 53, Claimant's Exhibit 1. Dr. Naeye additionally testified that he would have diagnosed the presence of simple pneumoconiosis if he had seen what Dr. Abraham described seeing on the slide containing lung parenchyma. Director's Exhibit 63 at 25, 26. Further, Dr. Naeye admitted that he probably received recut biopsy specimens for interpretation rather than the original block containing more tissue, and that he and Dr. Abraham may not have reviewed the same

BLR 2-199 (7th Cir. 1996); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990), and a material change in conditions, *see Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*).⁵ Decision and Order at 16, 19; Director's Exhibits 41, 63; Claimant's Exhibit 1. Contrary to employer's arguments, inasmuch as Drs. Tuteur and Hippensteel did not personally view the biopsy slides, the administrative law judge was not required to weigh their interpretations of this evidence. As the administrative law judge's findings and inferences pursuant to Sections 718.202(a)(2) and 725.309 (2000) are supported by substantial evidence, they are affirmed.⁶

Inasmuch as the administrative law judge found the existence of clinical pneumoconiosis established, *see* 20 C.F.R. §718.201(a)(1) (2001), claimant need not additionally establish the existence of legal pneumoconiosis as defined at Section 718.201(a)(2) (2001). There is some merit, however, to employer's argument that the physicians of record did not base their conclusions regarding the cause of the miner's disability and death upon the presence or absence of clinical pneumoconiosis; rather, the physicians focused on the etiology of the miner's chronic obstructive pulmonary disease and/or emphysema and the effects of those conditions on his multiple health problems. As the administrative law judge found legal pneumoconiosis established by a preponderance of the evidence, and his weighing of the medical opinions on that issue affected his credibility determinations on the issues of disability causation and the cause of the miner's death, we will address employer's allegations of error at Section 718.202(a)(4) (2000).

tissue. Director's Exhibit 63 at 27-29.

⁵This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's last coal mine employment occurred in the State of Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁶We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the length of the miner's coal mine employment and his finding of invocation of the presumption at 20 C.F.R. §718.203(b) (2000), with no rebuttal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer maintains that the administrative law judge inaccurately assessed several medical opinions⁷ and the relative qualifications of the physicians. We agree. In finding that the weight of the medical opinions established the existence of pneumoconiosis, the administrative law judge determined that Dr. Renn's report was not probative because it was silent regarding the presence or absence of a disease process, although the physician concluded that the miner's death was not hastened by exposure to coal dust. Decision and Order at 18. Contrary to the administrative law judge's findings, however, Dr. Renn opined that the miner had a moderately severe to severe, significantly bronchoreversible obstructive ventilatory defect, and had emphysema but "did not have a pneumoconiosis." Employer's Exhibit 4. The administrative law judge also determined that Dr. Tuteur's diagnosis, that the miner did not have clinically, radiographically, physiologically, or pathologically significant coal workers' pneumoconiosis, constituted a positive finding of "insignificant" pneumoconiosis. Decision and Order at 18. Substantial evidence does not support the administrative law judge's conclusion, however, as Dr. Tuteur's report and deposition testimony describe his findings of smoking-induced chronic obstructive pulmonary disease manifested by chronic bronchitis and emphysema unrelated to coal dust exposure, but nothing suggestive of pneumoconiosis or "any other coal mine dust-induced disease process."⁸ Employer's Exhibit 3; *see also* Director's Exhibit 63; Employer's Exhibits 10, 19;

⁷We reject employer's argument that the administrative law judge overlooked Dr. Naeye's opinion when considering the medical opinions under 20 C.F.R. §718.202(a)(4) (2000). A review of the record reveals that Dr. Naeye was unable to determine whether pneumoconiosis was present or absent, Director's Exhibit 63, Employer's Exhibit 1, thus the opinion was not probative at Section 718.202(a)(4) (2000), but was considered on the issues of disability causation and cause of death. Dr. Naeye opined that if present, pneumoconiosis was too mild to have contributed to the miner's disability or death, based on the negative x-rays of record, normal blood gas study results after cessation of mining, and his belief that simple pneumoconiosis does not progress after a miner quits working in the industry. Director's Exhibit 63 at 24, 36, 52; Employer's Exhibit 1. The administrative law judge determined that this belief was inconsistent with the regulations and Seventh Circuit case law, and permissibly accorded it less weight. Decision and Order at 16, 26; *see* 20 C.F.R. §718.201(c) (2001); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*). While employer correctly notes that Dr. Naeye's opinion is not hostile to the Act, and that the physician recognized an exception to his belief, Director's Exhibit 63 at 46, 52, the administrative law judge could reasonably conclude that Dr. Naeye's beliefs were inconsistent with the regulatory definition of pneumoconiosis and affected his medical conclusions. *See generally* *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995).

⁸The administrative law judge relied upon the Board's unpublished decision in *Mooney v. Peabody Coal Co.*, BRB No. 93-1507 BLA (Oct. 30, 1996)(unpub.), to support his finding with regard to Dr. Tuteur's opinion. Decision and Order at 18. The administrative law judge did not indicate, however, that he was aware that the United States Court of Appeals for the

see generally Tackett v. Director, OWCP, 7 BLR 1-703 (1985).

Fourth Circuit reversed the Board's decision in *Mooney* on appeal. *Peabody Coal Co. v. Director, OWCP [Mooney]*, No. 00-1299 (4th Cir. May 2, 2001)(unpub.).

The administrative law judge went on to find that, with the exception of Dr. Jeevan's opinion, all of the relevant medical opinions were adequately reasoned and documented, with Drs. Combs, Koenig, Cohen, Hinkamp and Tuteur diagnosing pneumoconiosis, and with only Dr. Hippensteel finding no coal dust related condition. The administrative law judge then determined that Drs. Hippensteel and Koenig were the two best-qualified physicians,⁹ as each possessed equal certifications in the field of internal medicine. The administrative law judge found that Dr. Koenig was the better-qualified physician, however, because Dr. Hippensteel's curriculum vitae lists no publications or lectures regarding the issues pertinent to this case, while Dr. Koenig "has numerous publications and lectures in the fields of occupational lung disease, chronic obstructive pulmonary disease, restrictive pulmonary disease, and smoking compared to occupational lung disease." Decision and Order at 19. Consequently, the administrative law judge concluded that Dr. Koenig's opinion, as bolstered by the opinions of Drs. Cohen and Tuteur, was entitled to determinative weight. *Id.* Employer correctly notes, however, that Dr. Tuteur did not diagnose pneumoconiosis, and Dr. Koenig's curriculum vitae lists relevant lectures, but no pertinent publications.¹⁰ As the administrative law judge mischaracterized the quality and quantity of the medical opinion evidence in finding legal pneumoconiosis established, which necessarily impacted his credibility determinations with regard to the issues of disability causation and cause of death, we vacate the administrative law judge's findings pursuant to Sections 718.202(a)(4), 718.204(b) and 718.205(c) (2000), and remand this case for the administrative law judge to reevaluate the medical opinions of record under the amended regulations, consistent with *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2- (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 16 BLR 2-74 (7th Cir. 1992); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Peabody Coal Co. v. Shonk*, 906 F.2d 264, (7th Cir. 1990); *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990). On remand,

⁹The record reflects that Drs. Koenig, Cohen and Hippensteel are Board-certified in Internal Medicine with sub-specialties in Pulmonary Disease and Critical Care Medicine. Claimant's Exhibits 6, 9; Employer's Exhibit 8. Drs. Tuteur and Renn are Board-certified in Internal Medicine with a sub-specialty in Pulmonary Disease. Employer's Exhibits 6, 7. Dr. Hinkamp is Board-certified in General Preventive Medicine and Occupational Medicine, Claimant's Exhibit 7, and Dr. Combs's qualifications are not contained in the record.

¹⁰On the issues of disability causation and cause of death, the administrative law judge also compared Dr. Tuteur's curriculum vitae unfavorably with that of Dr. Koenig. Decision and Order at 23, 27. Employer argues, however, that factors such as years of medical practice, hospital experience, and academic positions and honors are also pertinent considerations in comparing qualifications, and employer correctly notes that Dr. Tuteur has published materials in prestigious publications covering relevant topics. Employer's Exhibit 6.

the administrative law judge must also reassess the opinion of the miner's attending physician, Dr. Jeevan, in light of *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992), and explain the discrepancy if he again finds that the opinion is inadequately documented and reasoned and thus entitled to diminished weight on the issue of the existence of pneumoconiosis, *see* Decision and Order at 18, yet entitled to significant weight on the issue of the cause of death, *see* Decision and Order at 25.

Employer also contends that the administrative law judge erred in finding total respiratory disability established pursuant to Section 718.204(c)(1), (4) (2000).¹¹ Specifically, employer asserts that the administrative law judge neglected to weigh the conflicting pulmonary function study results, including various validation and invalidation reports, together with the non-qualifying blood gas studies and the medical opinions of record, and that the administrative law judge should not have credited the opinion of Dr. Combs because it was unsupported and unexplained.¹² Any error in the administrative law judge's weighing of the evidence at Section 718.204(c)(1)-(4) (2000), however, is harmless. *See generally Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge determined that, while the blood gas study results were all insufficient to demonstrate total disability and the record contained no evidence of cor pulmonale with right-sided congestive heart failure, the miner produced qualifying results in valid pulmonary function studies.¹³ Notwithstanding

¹¹The administrative law judge applied the disability regulation set forth at 20 C.F.R. §718.204(c) (2000), and the disability causation regulation set forth at 20 C.F.R. §718.204(b) (2000). After revision of the regulations, the disability regulation is now set forth at Section 718.204(b) (2001), and the disability causation regulation is now set forth at Section 718.204(c) (2001).

¹²Employer asserts that Dr. Combs's opinion is conclusory and should not have been credited to support the administrative law judge's finding of total respiratory disability and/or disability causation. The administrative law judge accurately determined, however, that no physician of record opined that the miner was not totally disabled by his respiratory impairment at the time of his death. Decision and Order at 22. Further, the administrative law judge could properly find that Dr. Combs's opinion was minimally sufficient to qualify as a reasoned medical judgment, as it supported the conclusions of the other physicians on this issue, and Dr. Combs's report included the examination findings, history and symptoms, and the objective tests upon which his diagnosis was based. Director's Exhibit 12; *see Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 16 BLR 2-74 (7th Cir. 1992).

¹³A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718 (2000). A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2) (2000).

the presence of qualifying but invalidated and/or non-conforming pulmonary function tests in the record as summarized in his Decision and Order, the administrative law judge could properly credit the validated and qualifying pulmonary function study results obtained on October 13, 1993, as they were not in direct contradiction with earlier non-qualifying results given the passage of at least four years between the tests. Decision and Order at 6-8, 22; *see generally Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). The administrative law judge further determined that Drs. Combs, Cohen, Hinkamp, Hippensteel, Koenig and Tuteur opined that the miner's respiratory impairment prevented him from performing his usual coal mine employment, and that the record did not contain a well documented and reasoned opinion which demonstrated that at the time of his death, the miner was not totally disabled from a respiratory standpoint.¹⁴ Decision and Order at 22. Weighing all of the evidence together, the administrative law judge permissibly concluded that claimant established total respiratory disability by a preponderance of the evidence, and we affirm his findings pursuant to Section 718.204(c)(1)-(4) (2000), as they are supported by substantial evidence. *See generally Beatty v. Danri Corp.*, 16 BLR 1-11 (1991).

¹⁴The administrative law judge determined that Dr. Renn opined that the miner suffered from a moderately severe to severe obstructive defect, but did not indicate an awareness of the miner's usual coal mine employment duties. Decision and Order at 12, 22; Director's Exhibit 63; Employer's Exhibit 4. The administrative law judge thus rationally concluded that Dr. Renn's opinion was inadequately reasoned. Decision and Order at 22; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits 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