BRB No. 06-0922 BLA

J.F. (Widow of R.J.F.) Claimant-Respondent v. ZEIGLER COAL COMPANY and INSURANCE COMPANY OF NORTH AMERICA Employer/Bondholder - Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/28/2007 DECISION and ORDER

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

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

Fred C. Statum and Philip L. Robertson (Manier & Herod), Nashville, Tennessee, for employer/bondholder.

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

PER CURIAM:

Employer/bondholder appeals the Decision and Order on Second Remand – Awarding Benefits (00-BLA-0053) of Administrative Law Judge Rudolf L. Jansen rendered 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).[1] This case is before the Board for a third time. The miner filed a duplicate claim on September 15, 1993, but later died on September 23, 1995. His claim is being pursued by his widow (claimant), who also filed a survivor's claim on March 14, 1996. Director's Exhibits 1, 34. These two claims were consolidated by the district director and forwarded to the Office of Administrative Law Judges for a hearing, which was held on May 16, 2000. In his initial Decision and Order dated February 6, 2001, the administrative law judge credited the miner with sixteen years of coal mine employment. Because he determined that the newly submitted biopsy evidence was sufficient to establish the existence of clinical pneumoconiosis, he found that the miner established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Weighing all record evidence together, both old and new, the administrative law judge found that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2),(4) (2000) and 718.203(b) (2000), that the miner was totally disabled due pneumoconiosis pursuant to 20 C.F.R. §§718.204(c), (b) (2000), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge awarded benefits on both claims.

Employer appealed, and the Board affirmed the administrative law judge's finding that the biopsy evidence was sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment, and thereby a material change in conditions pursuant to 20 C.F.R. §§718.202(a)(2) (2000), 718.203(b) (2000), 725.309 (2000) with respect to the miner's claim. [*J.F.*] *v. Zeigler Coal Co.*, BRB No. 01-0490 BLA, slip op. at 4 (Apr. 1, 2002) (unpub.).[2] The Board affirmed, as supported by

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The amendments to the regulation at 20 C.F.R. §725.309 (2002) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

[2] The Board further affirmed, as unchallenged on appeal, the administrative law judge's finding that the miner worked sixteen years in coal mine employment, and that he was entitled to a presumption that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). [*J.F.*] *v. Zeigler Coal Co.*, BRB No. 01-0490 BLA, slip op. at 4 (Apr. 1, 2002) (unpub.), slip op. at 4 n.6.

substantial evidence, the administrative law judge's finding that the miner was totally disabled by a respiratory or pulmonary impairment prior to his death. *Id.*, slip. op. at 8. The Board, however, agreed with employer that the administrative law judge erred in weighing the conflicting medical opinions as to the existence of legal pneumoconiosis, and vacated his findings pursuant to Section 718.202(a)(4) (2000). *Id.*, slip op. at 6. Because the administrative law judge predicated his finding that the miner's total disability and death were due to pneumoconiosis on his determination that the miner suffered from legal pneumoconiosis,[3] the Board also vacated his findings pursuant to Sections 718.204(b) (2000) and 718.205(c) (2000), and remanded the case for further consideration under those subsections as necessary. *Id.*

In a Decision and Order on Remand dated June 25, 2003, the administrative law judge determined that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis, that the miner was totally disabled due to pneumoconiosis, and that the miner's death was due to pneumoconiosis. Accordingly, benefits were awarded. Employer appealed, and the Board specifically rejected employer's assertion that the administrative law judge erred in finding that the opinions of Drs. Cohen, Hinkamp, Combs and Koenig, that the miner's chronic obstructive pulmonary disease was due, in part, to coal dust exposure, were well-reasoned and documented. [*J.F.*] *v. Zeigler Coal Co.*, BRB No. 03-0700 BLA, slip op. at 4-6 (July 20, 2004) (unpub.). The Board also rejected employer's argument that the claimant was required to establish that the miner suffered from a form of pneumoconiosis that was both latent and progressive. *Id*., slip op. at 4. The Board, however, agreed with employer that the administrative law judge failed to explain in his Decision and Order on Remand why Dr. Jeevan's opinion was entitled to greater weight, based on his status as the miner's treating physician, in light of the administrative law judge's specific finding in his February 6, 2001 Decision and Order that Dr. Jeevan's opinion was inadequately

[3] Because the administrative law judge found the existence of clinical pneumoconiosis established based on the biopsy evidence, claimant was not required to also establish the existence of legal pneumoconiosis. However, in this case, 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 issue presented to the administrative law judge was whether the miner was totally disabled by chronic obstructive pulmonary disease due, in part, to coal dust exposure, and whether that respiratory condition hastened the miner's death. Thus, the Board determined that it was necessary for the administrative law judge to properly address the conflict in the medical evidence as to the existence of legal pneumoconiosis at Section 718.202(a)(4).

documented and reasoned. *Id.*, slip op. at 5-6. The Board also held that the administrative law judge erred in failing to treat Dr. Tuteur's opinion as an unequivocal opinion that the miner did not have pneumoconiosis; that he erred in simply finding the opinions of Drs. Renn and Hippensteel to be outweighed, and that he failed to properly weigh Dr. Naeye's opinion. *Id.*, slip op at 6-7. The Board instructed the administrative law judge on remand to discuss the reasoning provided by each of the physicians of record in determining whether claimant's chronic obstructive pulmonary disease was due to coal dust exposure, and to resolve the conflicting interpretations of Drs. Tuteur and Koenig with respect to the 1995 CT scan. *Id.*, slip op. at 7. Consequently, the Board vacated the award of benefits in both claims, and remanded the case for the administrative law judge to reweigh the medical opinion evidence pursuant to Sections 718.202(a)(4), 718.204(c), and 718.205(c). *Id*.

On remand, by Order dated December 1, 2004, the administrative law judge advised the parties that employer's counsel had withdrawn its representation due to the bankruptcy of employer's parent company. The Director, Office of Worker's Compensation Programs (the Director), subsequently identified the Insurance Company of North America (INA) as a surety/bondholder potentially liable for the payment of benefits. On June 1, 2006, the administrative law judge granted a petition to intervene filed on behalf of INA, and set a schedule for the parties to file briefs. In his Decision and Order on Second Remand dated August 29, 2006, the administrative law judge reweighed the evidence and assigned controlling weight to the opinions of claimant's experts, that the miner suffered from coal workers' pneumoconiosis, that he was totally disabled due to pneumoconiosis, and that his death was hastened by pneumoconiosis. Accordingly, the administrative law judge awarded benefits on both the miner's claim and the survivor's claim.

Employer appeals, alleging that the administrative law judge ignored the Board's directive with respect to Dr. Jeevan. Employer also challenges the weight accorded its medical experts pursuant to Sections 718.202(a)(4), 718.204(c) and 718.205(c). Claimant responds, urging affirmance of the denial of benefits. The Director has declined to file a brief.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge failed to comply with the Board's directive that he explain the basis for his finding that Dr. Jeevan's opinion was reasoned and documented. Employer's Petition for Review and Memorandum in Support

(Employer's Memorandum) at 16-20. Employer's contention has merit. We agree, that, on remand, the administrative law judge failed not only to reconcile his conflicting findings with regard to Dr. Jeevan, but to also explain why he found Dr. Jeevan's opinion to be documented and reasoned. Decision and Order on Second Remand at 6. However, we consider this error to be harmless, s*ee Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), insofar as the administrative law judge did not solely rely on Dr. Jeevan's opinion, and his award of benefits is supported by the reasoned and documented opinions of Drs. Combs, Cohen, Hinkamp and Koenig, that the miner was totally disabled due to pneumoconiosis, and that his death was hastened by pneumoconiosis. Moreover, as discussed below, the administrative law judge's treatment of Dr. Jeevan's opinion is of no consequence, since he gave permissible reasons for according less weight to all of employer's medical experts on the relevant issues of entitlement in both the miner's claim and the widow's claim. *Id*.

A. The Miner's Claim:

Employer challenges the weight accorded its medical experts as to the issues of the existence of legal pneumoconiosis[4] and disability causation in the miner's claim. Contrary to employer's assertion, the administrative law judge permissibly assigned less probative weight to the opinions of Drs. Tuteur, Renn, Naeye and Hippensteel, that the miner's chronic obstructive pulmonary disease (COPD) was in no way related to coal dust exposure. In weighing the conflicting medical opinions at Section 718.202(a)(4), the administrative law judge correctly noted that the Board affirmed his determination that the opinions of Drs. Cohen, Hinkamp, and Koenig, finding the miner's COPD was due at least, in part to coal dust exposure, were reasoned and documented. [*J.F.*], BRB No. 03-0700 BLA, slip op. at 4-6 (July 20, 2004) (unpub.). The administrative law judge, therefore, focused his analysis on the opinions of employer's experts and found that their diagnoses, that claimant did not suffer from COPD due to coal dust exposure, were not as well-reasoned. *Id*. As discussed below, we affirm the administrative law judge's credibility determinations in this case.

[4] The Act defines "pneumoconiosis" as "a chronic *dust* disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b) (emphasis added). The revised regulation at 20 C.F.R. 718.201(a) provides that this definition includes both clinical and legal pneumoconiosis, and further defines "legal" pneumoconiosis as including "any chronic lung disease or impairment or its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulations define a disease "arising out of coal mine employment" as including only those chronic pulmonary diseases or respiratory or pulmonary impairments significantly related to or substantially aggravated by, *dust exposure* in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added).

With respect to Dr. Hippensteel, the administrative law judge noted, that, in support of his opinion that the miner's COPD was due entirely to smoking, Dr. Hippensteel testified that "it isn't expected that one would develop x-ray evidence of coal workers' pneumoconiosis after leaving work in the mines when it wasn't present while [the miner was] exposed to coal dust." Decision and Order on Second Remand at 5, citing Employer's Exhibit 20 at 9. Similarly, the administrative law judge noted that, while Dr. Naeye opined that the miner did not have a coal-dust related respiratory condition, he also stated that "simple pneumoconiosis does not progress after a miner quits working in the industry." Decision and Order on Second Remand at 6, citing Employer's Exhibit 1. In this case, because the miner was first diagnosed with COPD after he stopped working in the mines, the administrative law judge reasonably questioned whether the views of Drs. Hippensteel and Tuteur tainted their diagnoses in this case. Contrary to employer's assertion, the administrative law judge permissibly assigned diminished weight to the opinions of Drs. Hippensteel and Castle, as to the etiology of claimant's obstructive respiratory disease, since he found that their opinions failed to recognize that pneumoconiosis is a latent and progressive disease, which can first manifest itself after cessation of coal mine employment. *See Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 999, 23 BLR 2-301, 2-318 (7th Cir. 2005); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 492, 23 BLR 2-18, 2-29 (7th Cir. 2004). Accordingly, we affirm the administrative law judge's treatment of the opinions of Drs. Hippensteel and Naeye.

In weighing Dr. Renn's opinion, the administrative law judge properly noted that, while Dr. Renn stated that the miner did not have pneumoconiosis, he failed to explain how the documentary evidence of record supports his opinion. Therefore, the administrative law judge concluded that Dr. Renn's opinion was not sufficiently reasoned to overcome the contrary evidence. This was rational. Because an administrative law judge has discretion to determine whether a physician's opinion is reasoned and documented, we affirm his rejection of Dr. Renn's opinion pursuant to Section 718.202(a)(4). *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Anderson v. Valley Camp Coal Co. of Utah*, 12 BLR 1-111 (1989).

Additionally, we reject employer's contention that the administrative law judge erred in discrediting Dr. Tuteur's opinion as to the existence of legal pneumoconiosis. The administrative law judge cited several permissible reasons for assigning less weight to Dr. Tuteur's opinion that the miner's COPD was unrelated to coal dust exposure. First, the administrative law judge found Dr. Tuteur's opinion was less compelling since he "only grudgingly acknowledged [in his 2000 deposition] that it was possible for coal dust exposure to cause obstruction." Decision and Order on Second Remand at 9. Second, the administrative law judge noted that Dr. Tuteur's "deposition responses concerning how he knows that coal dust did not contribute to [the miner's] obstruction

were general in nature" and failed to explain why the miner in this case did not develop COPD from his coal dust exposure. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); Decision and Order on Second Remand at 9. Third, the administrative law judge found that Dr. Tuteur cited medical science in support of his opinion that was specifically rejected by the Department of Labor in promulgating the revised regulations at 20 C.F.R. §718.201. Decision and Order on Second Remand at 9-10.

An administrative law judge may evaluate expert opinions in conjunction with the Department of Labor's discussion of sound medical science in the preamble to the revised regulations. The preamble to the revised regulations sets forth how the Department of Labor has chosen to resolve questions of scientific fact. *See Shores*, 358 F.3d at 490, 23 BLR at 2-26. A determination of whether a medical opinion is supported by accepted scientific evidence, as determined by the Department of Labor, is a valid criterion in deciding whether to credit the opinion. *Zeigler Coal Co. v. OWCP* [*Griskell*], 490 F.3d 609, --- BLR --- (7th Cir. 2007), *citing Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7. Because the administrative law judge's credibility determination was within his discretion, we affirm the administrative law judge's finding that Dr. Tuteur's opinion was entitled to less weight pursuant to Section 718.202(a)(4). *See McCandless*, 255 F.3d at 465, 22 BLR at 2-311; *Clark*, 12 BLR at 1-149.

Employer's final contention with regard to Section 718.202(a)(4) is that the administrative law judge failed to resolve the conflicting interpretations of Drs. Tuteur and Koenig as to the presence of pneumoconiosis on the 1995 CT scan. Employer's contention is without merit. The administrative law judge specifically rejected Dr. Tuteur's opinion that the presence of bullae on the CT scan is evidence that the miner's COPD is due to smoking and not coal dust exposure, since the administrative law judge found that Dr. Tuteur's opinion was based on a viewpoint at odds with the medical literature relied upon by the Department of Labor in the preamble to the revised regulations. Although Dr. Tuteur cited to several medical articles, which conclude that there is no causal link between coal dust exposure and emphysema in the absence of progressive massive fibrosis, the administrative law judge correctly determined that "the foundation of Dr. Tuteur's argument is divergent from what the Department of Labor has found acceptable," Decision and Order on Second Remand, citing 65 Fed. Reg. 79939-79942. Therefore, the administrative law judge determined, based on Dr. Koenig's opinion, that the 1995 CT scan showed evidence of bullae emphysema consistent with COPD due in part to coal dust exposure. Consequently, the administrative law judge determined that the CT scan was supportive of a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Because the administrative law judge properly exercised his discretion in weighing the conflicting medical opinions of Drs. Tuteur and Koenig, we affirm his finding with respect to the CT scan evidence. *See McCandless*, 255 F.3d at 465, 22 BLR at 2-311; *Clark*, 12 BLR at 1-149.

Weighing all of the evidence together at Section 718.202(a)(4), the administrative law judge found that claimant established the existence of legal pneumoconiosis by a preponderance of the reasoned medical opinion evidence and CT scan evidence. Decision and Order on Second Remand at 11. We affirm this finding as supported by substantial evidence. Consequently, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) in the miner's claim.

Employer next contends that the administrative law judge erred in finding that claimant satisfied her burden of proving that that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. As noted by the administrative law judge, Drs. Combs, Cohen, Hinkamp and Koenig opined that the miner's disabling respiratory impairment was substantially caused by pneumoconiosis, while Drs. Hippensteel and Tuteur opined that the miner was not totally disabled due to pneumoconiosis.[5] The administrative law judge permissibly found that the opinions of Drs. Hippensteel and Tuteur were entitled to less weight on the issue of disability causation "as these physicians found no evidence of pneumoconiosis." Decision and Order on Second Remand at 12; *see Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2--514 (7th Cir. 2002);. *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). In contrast, the administrative law judge properly relied on the documented and reasoned opinions of Drs. Combs, Cohen, Hinkamp and Koening in finding that claimant satisfied her burden of proving that the miner was totally disabled due to pneumoconiosis. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). Because claimant established all of the requisite elements of entitlement under Part 718 in the miner's claim,[6] we affirm the administrative law judge's award of benefits with respect to that claim.

[5] The administrative law judge did not specifically weigh Dr. Renn's opinion at 20 C.F.R. §718.204(c), noting that "the Board affirmed my original finding that Dr. Renn's opinion was not reliable, as there is no indication in the record that this physician was familiar with the [m]iner's usual coal mine duties." Decision and Order on Second Remand at 12. The administrative law judge also noted that Dr. Naeye did not address the issue of disability causation. *Id*. at 13.

[6] To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of

B. The Survivior's Claim

Turning to the survivor's claim, in order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §§718.201, 718.202, 718.203, 718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *see also Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992).

Pursuant to Section 718.205(c), the administrative law judge found that the medical evidence was sufficient to establish that the miner's death was due to pneumoconiosis. Specifically, the administrative law judge credited the well-reasoned and documented opinions of Drs. Cohen, Hinkamp and Koenig, that coal dust, at least, hastened the miner's death, as opposed to the contrary opinions of Drs. Hippensteel, Naeye, Renn, and Tuteur, that the miner's death was not hastened by pneumoconiosis. The administrative law judge rationally found that the opinions of employer's experts were entitled to less weight on the issue of death causation as "they are based on the erroneous premise that the miner did not suffer from pneumoconiosis." Decision and Order on Second Remand at 14, *see Chubb*, 312 F.3d at 890-891, 22 BLR at 2-528-29. We affirm this determination. Thus, because substantial evidence supports the administrative law judge's determination that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c), *see Railey*, 972 F.2d at 183, 16 BLR at 2-12, we affirm his award of benefits in the survivor's claim.

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entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, the Decision and Order on Second Remand – Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge