

BRB No. 07-0471 BLA

B.H.)
(Survivor of and o/b/o D.H.))
)
Claimant-Petitioner)
)
v.)
)
U.S. STEEL MINING COMPANY) DATE ISSUED: 02/29/2008
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (Law Care), Greensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns, White & Hickton, L.L.C.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant¹, appeals the Decision and Order on Remand–Denying Benefits (2003-BLA-218 and 2003-BLA-6162) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) 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

¹ Claimant is the widow of the miner, who died on August 22, 2001. Director’s Exhibit 10. Claimant is pursuing both modification of the denial of the miner’s claim filed on March 15, 1984, and her own survivor’s claim filed on March 6, 2002.

amended, 30 U.S.C. §901 *et seq.* (the Act). When this case was most recently before the Board,² the Board held that the administrative law judge failed to correctly consider the new medical opinion evidence on disability causation at 20 C.F.R. §718.204(c) in the miner's claim. The Board, therefore, remanded the case for further consideration. Further, the Board held that if the new medical opinion evidence established disability causation and, therefore, a change in conditions at 20 C.F.R. §725.310 (2000) on the miner's claim, the administrative law judge must consider all of the evidence of record on the issue of disability causation. Regarding the survivor's claim, the Board held that the administrative law judge erred in finding the medical opinion evidence of record insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Board, therefore, vacated the denial of benefits on both the miner's claim and the survivor's claim and remanded the case for further consideration of the relevant medical opinion evidence. [*B.H., Survivor of and o/b/o D.H.*] *v. U.S. Steel Mining Co.*, BRB No. 05-0668 BLA (Apr. 20, 2006) (*unpub.*).

On remand, the administrative law judge found that the new medical opinion evidence failed to establish disability causation at Section 718.204(c), and therefore failed to establish a change in conditions sufficient to warrant modifying the denial of the miner's claim at Section 725.310 (2000). The administrative law judge found that the medical opinion evidence of record failed to establish death due to pneumoconiosis at Section 718.205(c) in the survivor's claim. Accordingly, benefits were denied on both claims.

² The extensive procedural history of this case is set forth in the Board's prior decision in [*B.H., Survivor of and o/b/o D.H.*] *v. U.S. Steel Mining Co.*, BRB No. 05-0668 BLA (April 20, 2006) (*unpub.*). In that decision, the Board noted that it had been determined that the miner had twenty-two and one-half years of coal mine employment, that the existence of clinical pneumoconiosis was established at 20 C.F.R. §718.202(a)(1)(2000), that the miner was entitled to the presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b)(2000), and that the miner was totally disabled at 20 C.F.R. §718.204(c)(2000) (now found at 20 C.F.R. §718.204(b)). The Board noted, therefore, that the sole issue left to be determined was whether the new evidence established disability causation at 20 C.F.R. §718.204(b) (2000) (now found at 20 C.F.R. §718.204(c)), and therefore, a change in conditions sufficient to warrant modification of the denial of the miner's claim. The Board, therefore, remanded the case for the administrative law judge to determine if disability causation and a change in conditions was established in the miner's claim. The Board affirmed the finding of the administrative law judge that a mistake in a determination of fact had not been made in the previous decision. 20 C.F.R. §725.310 (2000). The Board also held that remand of the case was required for the administrative law judge to reconsider the medical opinion evidence on death due to pneumoconiosis at 20 C.F.R. §718.205(c), in the survivor's claim.

On appeal, claimant contends that employer's stipulation to the existence of legal pneumoconiosis establishes that the miner's total disability was due to pneumoconiosis. Claimant also contends that the administrative law judge erred in his evaluation of the medical opinion evidence on the issues of disability causation and death due to pneumoconiosis. Employer responds, arguing that the administrative law judge's Decision and Order denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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.³ 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).

At the outset, we reject claimant's argument that disability causation is established once legal pneumoconiosis has been established.⁴ This argument was previously addressed and rejected by the Board. *See* Board's 2006 Decision and Order at 8. The existence of pneumoconiosis and disability due to pneumoconiosis are separate elements of entitlement and, absent entitlement to a presumption, claimant must establish each and every element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1989).

Claimant next contends that the administrative law judge erred in his evaluation of the new medical opinion evidence, *i.e.*, the opinions of Drs. Oesterling and Wald, on the issue of disability causation. Disability causation is established at Section 718.204(c) if pneumoconiosis is a substantially contributing cause of the miner's total respiratory disability. Pneumoconiosis is a substantially contributing cause if it has either a materially adverse effect on the miner's respiratory condition, or if it materially worsens a totally disabling respiratory impairment caused by a disease unrelated to coal mine employment. 20 C.F.R. §718.204(a)(1), (2).

³ The law of the United States Court of Appeals for the Third Circuit applies because the miner was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

⁴ Moreover, as noted by the Board in its prior decision, the miner was never found to have been suffering from "legal" pneumoconiosis in this case. *See* Board's April 20, 2006 Decision at 7 n.9. Only the existence of clinical pneumoconiosis by x-ray evidence pursuant to Section 718.202(a)(1) was found to have been established. Further, as noted by the Board, employer conceded only to the presence of pneumoconiosis, not the presence of "legal" pneumoconiosis. Board's April 20, 2006 Decision at 7.

Considering the new medical opinions, the administrative law judge credited the opinion of Dr. Oesterling, a Board-certified pathologist,⁵ that the miner's minimal coal workers' pneumoconiosis would not have altered the miner's pulmonary function and that he saw no structural change, from pneumoconiosis, that would have produced any degree of respiratory impairment. The administrative law judge further credited Dr. Oesterling's opinion because he found it better reasoned than the opinion of Dr. Wald, a Board-certified internist, and Dr. Oesterling's findings were not contradicted by the medical data of record. The administrative law judge further noted that Dr. Wald had, in fact, agreed with Dr. Oesterling that the miner's pneumoconiosis would not have substantially altered the miner's respiratory function. The administrative law judge noted that Dr. Wald's unwillingness to attribute the miner's disabling emphysema and bronchitis to smoking alone was not supported by the medical data but was based solely on the miner's history of coal dust exposure.⁶ The administrative law judge concluded, therefore, that Dr. Wald's opinion was insufficient to establish that "the miner's pneumoconiosis had a material adverse effect on the miner's respiratory condition or materially worsened a totally disabling respiratory impairment caused by a disease unrelated to coal mine employment." Decision and Order at 4. We, therefore, affirm the administrative law judge's findings that disability causation was not established by the new medical opinion evidence at Section 718.204(c) and that a change in conditions was not established pursuant to Section 725.310 (2000). 20 C.F.R. §§718.204(c)(1), (2), 725.310 (2000); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Regarding the survivor's claim, citing 20 C.F.R. §718.104(d), claimant first contends that the administrative law judge erred in not according greater weight to the opinions of Dr. Rasheed and Bursali, who had treated the miner for over thirty years. As the Board previously held, however, the administrative law judge properly discounted the

⁵ Dr. Oesterling found that the miner had disabling emphysema which was due to his lengthy smoking history. Dr. Oesterling also found that the miner had asthma, which was related to his smoking induced emphysema. Dr. Oesterling further found that there was insufficient coal dust in the miner's lungs for his coal workers' pneumoconiosis to have played any role in the development of his asthma and that the emphysema the miner had was not associated with coal dust exposure. Employer's Exhibit 1.

⁶ Dr. Wald accepted Dr. Oesterling's finding that the coal dust in the miner's lungs was so minimal that it would not cause a respiratory impairment and agreed that the pathology evidence of the miner's coal workers' pneumoconiosis would not have substantially altered the miner's respiratory functions. Nonetheless, Dr. Wald concluded that the miner's disabling respiratory impairment was due to coal dust exposure and cigarette smoking. Claimant's Exhibit 1.

opinions of Drs. Rasheed and Bursali, despite their status as the miner's treating physicians, because he found their opinions were insufficiently reasoned. *See* 20 C.F.R. §718.104(d)(5); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We will not, therefore, reconsider claimant's argument regarding the weight accorded to the opinions of Drs. Rasheed and Bursali. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Claimant also contends that the administrative law judge did not properly weigh the opinions of Drs. Oesterling and Wald in finding that the evidence did not establish death due to pneumoconiosis at Section 718.205(c). The Board previously held that the administrative law judge erred in discounting the opinion of Dr. Wald that the miner's death was hastened by pneumoconiosis because, unlike Dr. Oesterling,⁷ he had not reviewed the miner's autopsy slides or autopsy report. The Board also directed the administrative law judge to consider Dr. Wald's status as a Board-certified internist in weighing his opinion. The Board, therefore, vacated the administrative law judge's finding that the evidence was insufficient to establish death due to pneumoconiosis at Section 718.205(c) and remanded the case to the administrative law judge to reconsider the opinion of Dr. Wald with that of Dr. Oesterling.

In considering the opinions of Drs. Oesterling and Wald, the administrative law judge found that while both doctors attributed the miner's death to emphysema, Dr. Oesterling attributed the miner's emphysema solely to smoking, while Dr. Wald attributed it to both smoking and coal mine employment. The administrative law judge credited Dr. Oesterling's opinion as better reasoned because, although both physicians conducted a thorough review of the medical evidence, Dr. Oesterling's opinion was supported by the miner's lengthy smoking history and the results of the autopsy, which confirmed that the miner's type of emphysema was caused by smoking. The administrative law judge further noted that the minimal dust deposition seen on the miner's histological slides supported Dr. Oesterling's conclusions and that Dr. Wald agreed that autopsy slides showed only minimal dust deposition in the miner's lungs. The administrative law judge further concluded that Dr. Oesterling's finding of asthma was supported in a hospital record. Considering the qualifications of the physicians, the administrative law judge properly found that Dr. Oesterling's expertise as a pathologist permitted according his opinion greater weight because it made him "an expert in the changes in body tissues and organs that are caused by disease." Decision and Order on Remand at 5. The administrative law judge, therefore, rationally concluded that the evidence failed to establish that the miner's pneumoconiosis contributed to or hastened

⁷ Dr. Oesterling opined that the miner's pneumoconiosis did not play any role in his death. Employer's Exhibit 1.

his death. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Clark*, 12 BLR 1-155; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). The administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at Section 718.205(c) is, therefore, affirmed.

Accordingly, the administrative law judge's Decision and Order on Remand—Denying Benefits on the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge