

BRB No. 06-0313 BLA

PHYLLIS I. MABE)
(Widow of ROBERT M. MABE))
)
Claimant-Respondent)
)
v.)
)
CONSOLIDATION COAL COMPANY) DATE ISSUED: 01/17/2007
)
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 on Third Remand-Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton, & Hayes), Bluefield, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Third Remand-Award of Benefits (98-BLA-0008) of Administrative Law Judge Robert L. Hillyard on 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). This case is on appeal to the Board for the fourth time.¹ Pursuant to employer's most recent appeal, the Board vacated

¹ The complete procedural history of this claim is contained in the Board's prior decisions. *See Mabe v. Consolidation Coal Co.*, BRB No. 04-0415 BLA (Jan. 31, 2005)

the administrative law judge's findings that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Board, therefore, vacated the award of benefits and remanded the case for reconsideration of all the relevant evidence of record. On remand, the administrative law judge found the evidence sufficient to establish the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), and sufficient to establish that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings that the evidence is sufficient to establish the existence of pneumoconiosis and sufficient to establish death due to pneumoconiosis. Specifically, employer contends that the administrative law judge did not sufficiently explain his reasons for rejecting Dr. Castle's opinion that the miner did not have coal worker's pneumoconiosis or any coal-dust induced pulmonary disease. Employer further argues that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis, particularly alleging error in the administrative law judge's analysis of the opinions of Drs. Repsher and Castle. Claimant² responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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

(unpub.); *Mabe v. Consolidation Coal Co.*, BRB No. 02-0370 BLA (Nov. 20, 2002) (unpub.); *Mabe v. Consolidation Coal Co.*, BRB No. 00-0373 BLA (Jan. 30, 2001) (unpub.).

² Claimant is the widow of the miner. Director's Exhibit 1. The miner filed a claim with the Social Security Administration on June 25, 1973. Director's Exhibit 13. After denials by the Social Security Administration, the claim was finally denied by the Department of Labor (DOL) on February 10, 1981. *Id.* The miner filed a subsequent claim with the DOL on October 30, 1984. *Id.* On October 7, 1988, Administrative Law Judge Robert J. Shea issued a Decision and Order denying benefits on that claim. *Id.* The miner filed another claim with the DOL on February 21, 1990. *Id.* On July 10, 1992, Administrative Law Judge Lawrence Gray issued a Decision and Order awarding benefits. *Id.* The miner died on November 9, 1996. Director's Exhibits 1, 3. No autopsy was performed. Claimant filed a survivor's claim on November 22, 1996. Director's Exhibit 1.

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).

Employer first contends that the administrative law judge erred in his consideration of Dr. Castle’s opinion, that the miner did not suffer from pneumoconiosis, Employer’s Exhibit 16, and that the administrative law judge failed to comply with the Board’s most recent remand instruction to provide a sufficient basis for discrediting Dr. Castle’s opinion.³ Employer contends that the administrative law judge failed to address Dr. Castle’s reasoning and failed to demonstrate that he had reconsidered the merits of the physician’s opinion in a manner consistent with the Board’s remand instructions. Employer contends, therefore, that the Board must again instruct the administrative law judge to reconsider Dr. Castle’s opinion regarding the existence of pneumoconiosis.

In its most recent decision, the Board, agreeing with employer, held that, contrary to the administrative law judge’s finding, Dr. Castle did provide an alternative explanation for the x-ray evidence diagnosing the existence of pneumoconiosis and did thoroughly explain how objective testing supported his determination that claimant did not suffer from the disease. The Board held, therefore, that the administrative law judge mischaracterized Dr. Castle’s opinion and erred in discrediting it because Dr. Castle did not find the existence of pneumoconiosis. *Mabe v. Consolidation Coal Co.*, BRB No. 04-0415 BLA, *slip op.* at 5-6.

On remand, the administrative law judge again reviewed Dr. Castle’s opinion. This time he determined that Dr. Castle’s consultation report was entitled to “some probative weight,” Decision and Order on Third Remand at 7. The administrative law judge noted that Dr. Castle recognized that numerous other physicians diagnosed the existence of pneumoconiosis, and that he considered x-ray interpretations, pulmonary function studies, arterial blood gas studies, a CT scan, medical narratives associated with objective testing and the death certificate, in reaching his conclusion that if the miner had suffered from pneumoconiosis, he would have shown a restrictive respiratory impairment. Nonetheless, the administrative law judge found this opinion outweighed by the contrary opinions of Drs. Bhasin and Hatahet, as supported by the opinions of Drs. Chillag and Dahhan. *Id.* Thus, inasmuch as the administrative law judge reconsidered Dr. Castle’s opinion and correctly categorized the bases for the physician’s conclusions,

³ Employer acknowledges that while the administrative law judge’s “decision appears to be in technical compliance with [the] Board’s [remand] instruction, [the administrative law judge] failed to provide sufficient discussion to show he reconsidered the merits of Dr. Castle’s report on remand in weighing the relevant physicians’ opinions at 20 C.F.R. §718.202(a)(4). Employer’s Brief at 6.

we reject employer's generalized assertion that the administrative law judge has not provided sufficient explanation for his analysis of Dr. Castle's opinion. The administrative law judge permissibly accorded greater weight to the opinions of Drs. Bhasin and Hatahet, as supported by the opinions of Drs. Chillag and Dahhan, which he found outweighed the opinion of Dr. Castle.⁴ See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In the absence of any further challenge to the administrative law judge's determination that claimant established that the miner suffered from pneumoconiosis,⁵ we affirm the administrative law judge's determination that the miner suffered from the disease. See 20 C.F.R. §718.202(a); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer next argues that the administrative law judge erred in applying the holdings of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70 (4th Cir. 1995) to discredit the opinions of Drs. Castle and Repsher regarding the cause of the miner's death. Specifically, employer contends that, inasmuch as death causation is a separate element from the existence of pneumoconiosis, the administrative law judge erred in discrediting the opinions of Drs. Castle and Repsher merely because he did not agree with their conclusions concerning the existence of pneumoconiosis. Pursuant to *Scott*, employer contends that the Fourth Circuit has identified two lines of cases. In

⁴ The Board held, in its most recent opinion, that the administrative law judge acted within his discretion in crediting the opinion of Dr. Bhasin. *Mabe*, 04-0415 BLA, *slip op.* at 5; see *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

⁵ Employer asserts, in a footnote, that the administrative law judge "followed only the letter of the Board's [most recent] decision, rather than its spirit," in his analysis of the CT scan evidence of record. Employer's Brief at 7 n.4. Employer does not allege specific error committed by the administrative law judge in his consideration of such evidence and we thus have no substantive issue to review. See *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); see also *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). Accordingly, employer's assertion is rejected.

Piney Mountain Coal Co. v. Mays, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), the Fourth Circuit held that an administrative law judge may credit physicians' assessments regarding disability or death causation even when the physicians' opinions are contrary to the administrative law judge's finding concerning the existence of pneumoconiosis. The court instructed that doctors' opinions that claimant does not have clinical pneumoconiosis, but does have legal pneumoconiosis or symptoms consistent with legal pneumoconiosis, do not necessarily contradict an administrative law judge's finding that claimant has legal pneumoconiosis. In *Scott* and *Toler*, the Fourth Circuit held that physicians who find, contrary to an administrative law judge's determination, that the miner has neither legal or clinical pneumoconiosis, can be discredited. In this case, employer contends that the administrative law judge should have applied *Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), *Ballard*, 65 F.3d 1189, 19 BLR 2-304; and *Hobbs*, 45 F.3d 819, 19 BLR 2-86, since both Drs. Castle and Repsher found that claimant had symptoms which could be consistent with legal pneumoconiosis.

In considering the cause of the miner's death, the administrative law judge accorded greatest weight to the opinions of Drs. Bhasin and Hatahet, who found that the miner's pneumoconiosis hastened his death, as he found that these treating physicians offered the best reasoned and documented opinions of record. Regarding the opinion of Dr. Repsher, the administrative law judge found that because Dr. Repsher found that pneumoconiosis, even if present, was of no clinical significance, the doctor "could only come to the conclusion that pneumoconiosis did not contribute to or hasten the miner's death." Decision and Order at 13. Similarly, the administrative law judge found that because Dr. Castle did not diagnose the existence of pneumoconiosis, he "must necessarily conclude that the [m]iner's death was not caused by pneumoconiosis." Decision and Order at 14. Accordingly, the administrative law judge accorded these opinions on death causation less weight.

As employer contends, however, inasmuch as both Drs. Castle and Repsher acknowledged that the miner suffered from symptoms which could be viewed as consistent with legal pneumoconiosis, and Dr. Repsher diagnosed possible mild clinical pneumoconiosis; Employer's Exhibits 8, 9, their opinions may be credited pursuant to *Mays*, *Ballard* and *Hobbs*. Accordingly, because the administrative law judge failed to consider the holdings in *Mays*, *Ballard* and *Hobbs*, we agree with employer that the administrative law judge's finding that the miner's death was due to pneumoconiosis must be vacated and the case remanded. On remand, the administrative law judge must consider whether *Mays*, *Ballard* and *Hobbs* or *Scott* and *Toler* apply to this case. We thus vacate the administrative law judge's determination that claimant established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and remand the case for further consideration. See 20 C.F.R. §718.205(c); *Bill Branch Coal Corp. v.*

Sparks, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Stiltner*, 86 F.3d 337, 20 BLR 2-246; *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Underwood*, 105 F.3d 946, 21 BLR 2-23; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992); *Clark*, 12 BLR 1-149 (1989).

Accordingly, the administrative law judge's Decision and Order on Third Remand-Award of Benefits is affirmed in part, vacated in part, and the 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

JUDITH S. BOGGS
Administrative Appeals Judge