

BRB No. 94-2181 BLA

JOSEPHINE STETTS )  
(Widow of METRO STETTS) )

)  
Claimant-Petitioner )

)  
v. )

) DATE ISSUED:  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

)  
Respondent ) DECISION and ORDER

Appeal of the Decision and Order Upon Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Charles M. Miller (Rubright, Domalakes, Troy & Miller), Green Park, Pennsylvania, for claimant.

Gary K. Stearman (J. Davitt McAteer, Acting 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: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Upon Remand (84-BLA-5546) of Administrative Law Judge Ainsworth H. Brown denying benefits on a claim filed

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<sup>1</sup>Claimant is Josephine Stetts, the miner's widow. Metro Stetts, the miner, filed an application for benefits on June 14, 1973, which was denied on August 4, 1981.

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 before the Board for the third time. Initially, the administrative law judge credited

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Director's Exhibits 15, 19. The miner died on November 18, 1984, Director's Exhibit 9, and claimant filed a survivor's claim on February 11, 1985, Director's Exhibit 1.

the miner with twelve years of qualifying coal mine employment and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. [1987] Decision and Order at 3-5. On appeal, the Board vacated the administrative law judge's weighing of Dr. Mika's opinion and remanded the case for reweighing of the evidence pursuant to Section 718.202(a)(4). *Stetts v. Director, OWCP*, BRB No. 87-1861 BLA (Sep. 28, 1989)(unpub.).

On remand, the administrative law judge again found that claimant failed to establish pneumoconiosis pursuant to Section 718.202(a)(4). Accordingly, benefits were again denied. [1990] Decision and Order at 2-3. On appeal, the Board again vacated the administrative law judge's weighing of Dr. Mika's opinion and remanded the case for reconsideration pursuant to Section 718.202(a)(4) and 20 C.F.R. §§718.203(b) and 718.205(c) if necessary. *Stetts v. Director, OWCP*, BRB No. 90-0892 BLA (Mar. 26, 1993)(unpub.).

On remand, the administrative law judge ordered the Director, Office of Workers' Compensation Programs (the Director), to refer the matter to a pulmonary expert, provide him with the evidence of record, and request that he respond to six questions. Claimant was given time to respond to the expert's opinion with rebuttal evidence and legal argument. Order for Additional Medical Opinion dated July 8, 1993. The administrative law judge then reconsidered Dr. Mika's original opinion and deposition, his deposition submitted as rebuttal evidence, and the opinion of Dr. Michos, and concluded that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing Dr. Mika's opinion and in admitting Dr. Michos' opinion. Claimant's Brief at 9-12. The Director responds, urging affirmance of the administrative law judge's Decision and Order.

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).

Claimant first contends that the administrative law judge erred in admitting Dr. Michos' opinion. Claimant's Brief at 9. After reviewing the case file on remand, the

administrative law judge determined that further clarification of the evidence was required and ordered the Director to provide a consultant's opinion regarding Dr. Mika's opinion and the issue of the cause of the miner's death. [1993] Order at 1. The administrative law judge provided claimant with "at least 45 days to respond with rebuttal evidence and her legal argument." [1993] Order at 2.

On October 22, 1993, claimant sent a letter to the administrative law judge, objecting to the admission of Dr. Michos' opinion on the ground that she had been denied her due process right to cross-examine Dr. Michos. Letter of October 22, 1993. On November 16, 1993, the administrative law judge responded, stating that claimant's objections were without merit because she had not been prevented from cross-examining Dr. Michos. The administrative law judge noted that claimant had scheduled a deposition of Dr. Mika, although the Board did not mandate or suggest further testimony from Dr. Mika. Letter of November 16, 1993. Claimant responded to the administrative law judge's letter by stating that she was offering Dr. Mika's deposition testimony and the re-reading of an x-ray as rebuttal to Dr. Michos' opinion and by requesting that the record be closed upon the submission of this evidence. Letter of November 23, 1993.

Inasmuch as it is within the administrative law judge's discretion to re-open the record on remand for the submission of evidence, see 20 C.F.R. §725.456(e); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Toler v. Associated Coal Co.*, 12 BLR 1-49 (1989); *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1988), and as claimant has failed to show that she was not given an opportunity to cross-examine Dr. Michos, see *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989), we reject claimant's contention that the administrative law judge erred in admitting Dr. Michos' opinion.

Claimant next contends that the administrative law judge erred in weighing the opinions of Drs. Mika and Michos. Claimant's Brief at 11. Dr. Mika opined that the miner had significant anthracosilicosis and pulmonary emphysema which would prevent him from engaging in any work similar to his usual coal-mine-employment and that the miner's death was due to anthracosilicosis among other causes. Director's Exhibit 11; Claimant's Exhibit 1. Dr. Michos opined that the miner had no coal mine related respiratory condition and that the miner's death was not hastened by a coal-mine-related breathing condition. Director's Exhibit 23.

The administrative law judge found that there was a "significant chink in the armor" of Dr. Mika's rationale because Dr. Mika relied on a negative smoking history and claimant testified at the hearing that the miner smoked until fifteen years prior to his death. Decision and Order Upon Remand at 4; Director's Exhibit 11; Claimant's Exhibit 1; Hearing Transcript at 22. The administrative law judge then found Dr.

Michos' opinion entitled to greater weight due to his superior qualifications. Decision and Order Upon Remand at 4.

Inasmuch as the administrative law judge may find a physician's opinion less persuasive in view of a significant discrepancy between the smoking history noted in the medical report and that to which claimant testified at the hearing, see *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988), and may assign more weight to a physician's opinion based on his superior qualifications, see *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*), *rev'd on other grounds*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), we affirm the administrative law judge's weighing of the medical opinions pursuant to Section 718.202(a)(4). Further, because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order Upon Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge