

BRB No. 00-0675 BLA

PATRICIA SHELL)
(Widow of WILLIAM SHELL))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: _____
)
BARNES AND TUCKER COMPANY)
)
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 Denying Benefits on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonik & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Michelle S. Gerdano (Judith E. Kramer, 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits on Remand (95-BLA-

1474) of Administrative Law Judge Thomas M. Burke on a 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 This case is before the Board for the third time. In an initial Decision and Order dated August 22, 1996, the administrative law judge credited the miner with thirty-two and one quarter years of coal mine employment, and considered the instant survivor's claim, which was filed on November 4, 1994, under the applicable regulations at 20 C.F.R. Part 718 (2000). The administrative law judge found the autopsy evidence of record sufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). The administrative law judge further found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). Accordingly, the administrative law judge awarded survivor's benefits. Employer appealed. The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(2) (2000). *Shell v. Barnes & Tucker Co.*, BRB No. 96-1631 BLA (Aug. 22, 1997)(unpublished). The Board vacated, however, the administrative law judge's finding that the evidence was sufficient to establish death due to pneumoconiosis under Section 718.205(c)(2) (2000), and remanded the case for reconsideration of the evidence thereunder.

In his Decision and Order on Remand dated March 2, 1998, the administrative law judge again found the evidence sufficient to establish death due to pneumoconiosis under Section 718.205(c)(2) (2000). Specifically, the administrative law judge relied upon the opinions of Drs. Perper, Mittal and Dvorchak, which indicate that the miner's pneumoconiosis hastened his death. Consequently, the administrative law judge awarded benefits. Employer appealed. The Board vacated the administrative law judge's weighing of the evidence at Section 718.205(c)(2) (2000), and remanded the case for further consideration of all of the relevant evidence thereunder. *Shell v. Barnes & Tucker Co.*, BRB No. 98-0909 BLA (Sep. 13, 1999)(unpublished).

In his Decision and Order Denying Benefits on Remand dated March 17, 2000, the administrative law judge found that the evidence in the record was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c)(2) (2000). Accordingly, he denied benefits. On appeal, claimant asserts that the opinions of Drs. Mittal, Dvorchak and Perper, which the administrative law judge credited in his prior decisions in awarding benefits, are sufficient to establish that the miner's death was hastened by his pneumoconiosis pursuant to Section 718.205(c)(2). Claimant argues that the Board improperly engaged in fact-finding in vacating the administrative law judge's previous two decisions to credit the opinions of these three physicians. Claimant contends that the Board's prior remand instructions for the administrative law judge to reconsider the three opinions and the other relevant medical opinion evidence at Section 718.205(c)(2) were so restrictive that they effectively gave the administrative law judge no choice but to deny benefits on remand. Employer responds in support of the administrative law judge's decision denying

benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating he does not presently intend to file a brief in response to claimant's contentions on appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule in an Order issued on March 2, 2001, to which the Director, claimant and employer have responded. The Director indicates that it is his position that the amended regulations will not affect the outcome of the case. Claimant states that she agrees with the Director that the amended regulations would not affect the outcome of this case. Employer asserts that the amended regulations creating a preference for a treating physician's opinion, and the regulations governing the issues of the definition of pneumoconiosis, total disability causation, and death due to pneumoconiosis could affect the outcome of this case and that, therefore, the case should be stayed.

The new regulation pertaining to establishing pneumoconiosis as a substantially contributing cause of a miner's death codifies the "hastening death" standard adopted by the United States Court of Appeals for the Third Circuit in *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989). *See* 20 C.F.R. §718.205(c)(2). Inasmuch as the new regulation is consistent with controlling precedent in the Third Circuit, the new regulation at Section 718.205(c)(2) will not affect the outcome of this case. In addition, the issue of the existence of pneumoconiosis and the issue of total disability have not been raised on appeal, and, thus, contrary to employer's suggestion, the regulations governing these two issues will not affect the outcome of this case. Finally, the revised regulation requiring that special consideration be given to the report of a treating physician applies only to evidence developed after January 19, 2001. *See* 20 C.F.R. §718.104(d). Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will adjudicate the merits of 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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, claimant contends that the Board erred in vacating the administrative law

judge's previous findings that the opinions of Drs. Mittal, Dvorchak and Perper were entitled to greater weight than the contrary opinions of record under Section 718.205(c)(2).³ Claimant argues that the Board's remand instructions for reconsideration of the three opinions "in effect usurp[ed] the [a]dministrative [l]aw [j]udge's role by weighing the evidence." Claimant's Brief at 5. Claimant's contentions lack merit.

In suggesting that the Board impermissibly engaged in fact-finding when vacating the administrative law judge's prior decision in his March 2, 1998 Decision and Order to credit the opinions of Drs. Mittal and Dvorchak, which indicate that the miner's death was caused by coronary artery disease, but that coal workers' pneumoconiosis played a substantial role in the miner's death, Director's Exhibits 9, 13; Claimant's Exhibit 3, claimant asserts that the Board held that the opinions of the two physicians were not well-reasoned, and that the Board thus improperly ordered the administrative law judge to reject the opinions on that basis on remand. Contrary to claimant's suggestion, however, the Board did not hold that the opinions must be rejected as unreasoned. Rather, in vacating the administrative law judge's decision to credit the opinions of Drs. Mittal and Dvorchak, the Board held that the administrative law judge failed to adequately address whether the opinions of the two physicians were well-reasoned, and held that the administrative law judge must provide an adequate explanation as to why he would credit or discredit the opinions. *Shell v. Barnes & Tucker Co.*, BRB No. 98-0909 BLA (Sept. 13, 1999)(unpublished). An administrative law judge may not credit or reject relevant medical evidence without adequate explanation. *See Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1983). Where the administrative law judge does not provide an adequate explanation for his conclusions, the Board will remand the case for the reconsideration of the relevant evidence. *See Brewster v. Director, OWCP*, 7 BLR 1-120 (1984).

As the Board held in its 1999 Decision and Order, the administrative law judge's crediting of the opinions of Drs. Mittal and Dvorchak in his 1997 Decision and Order was based merely on a recitation of the doctors' diagnoses, and a reiteration of his previous findings with regard to Dr. Mittal's opinion in the initial Decision and Order in 1996, findings which the Board vacated.⁴ *Shell v. Barnes & Tucker Co.*, BRB No. 98-0909 BLA (Sept. 13, 1999)(unpublished), slip op. at 6. In addition, the Board held that it was inconsistent for the administrative law judge to acknowledge, on the one hand, that there was a "void" in the opinions of Drs. Mittal and Dvorchak with regard to how the miner's pneumoconiosis contributed to his death, but to find, on the other hand, that the opinions of the two physicians were credible, without providing an explanation. *Id.*, slip op. at 6-7; *see* ALJ 1998 Decision and Order on Remand at 3; Director's Exhibits 9, 13; Claimant's Exhibit 3. In the Decision and Order on Remand presently under review, the administrative law judge inaccurately stated that "the Board *found* that the opinions of [Drs. Mittal and Dvorchak] [were] cursory and not well-reasoned." Decision and Order on Remand at 10 (emphasis added). Although that was not the case, for the reasons discussed *supra*, this

mischaracterization of the Board's 1999 Decision and Order is harmless error inasmuch as the administrative law judge independently and properly found that the opinions of Drs. Mittal and Dvorchak were not entitled to greater weight, given the unreasoned conclusions of the opinions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *see also Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order on Remand at 11; Director's Exhibits 9, 13; Claimant's Exhibit 3.

Claimant also contends that it was error for the Board to vacate the administrative law judge's previous finding that Dr. Perper's opinion was entitled to determinative weight under Section 718.205(c)(2). We disagree. In its September 13, 1999 Decision and Order, the Board held that, inasmuch as the record does not contain evidence affirmatively supporting a finding that the miner was suffering from hypoxia, it was improper for the administrative law judge to credit Dr. Perper's opinion that, because of his pneumoconiosis, the miner developed hypoxia which accelerated his heart disease. *See Shell v. Barnes & Tucker Co.*, BRB No. 98-0909 BLA (Sept. 13, 1999)(unpublished), slip op. at 3-4. Claimant's Exhibit 1. Dr. Perper based this opinion on a review of the medical evidence in this case, but the Board correctly noted that the record does not contain evidence affirmatively supporting a finding that the miner was suffering from hypoxia. *Id.* Thus, contrary to claimant's suggestion on appeal, the Board did not usurp the administrative law judge's role as fact-finder in vacating the administrative law judge's crediting of Dr. Perper's opinion on these grounds, but rather properly vacated the administrative law judge's crediting of Dr. Perper's opinion as unsupported by substantial evidence. Moreover, the Board vacated the administrative law judge's rejection of the opinions of Drs. Bush, Mendelow, Hurwitz, Griffin, Fino and Kleinerman, all of which indicated that pneumoconiosis did not contribute to the miner's death, because the administrative law judge failed to provide an adequate explanation for doing so. *Shell v. Barnes & Tucker Co.*, BRB No. 98-0909 BLA (Sept. 13, 1999)(unpublished), slip op. at 4-5; *see Ridings, supra; Brewster, supra*; Employer's Exhibits 1-9. The Board held that the administrative law judge improperly discounted these opinions because they did not agree with Dr. Perper's conclusion, and were not in accord with the administrative law judge's own medical conclusion that the miner's pneumoconiosis and emphysema were severe. *Shell v. Barnes & Tucker Co.*, BRB No. 98-0909 BLA (Sept. 13, 1999)(unpublished), slip op. at 5.

On remand, the administrative law judge properly credited the opinions of Drs. Bush, Mendelow, Hurwitz, Griffin, Fino and Kleinerman over Dr. Perper's opinion in light of the underlying support for the various opinions. *See Clark, supra; Tackett, supra*; Decision and Order on Remand at 10-11; Claimant's Exhibit 1; Employer's Exhibits 1-9. Specifically, the administrative law judge properly accorded greater weight to the opinions of Drs. Bush, Mendelow, Hurwitz, Griffin, Fino and Kleinerman because they were supported by the

undisputed evidence of record that the miner had a long history of hypertension, worsening coronary artery disease, increased sizes of the left and right ventricles at the time of death, and an enlarged heart three times the normal weight. *Id.* The administrative law judge properly discounted Dr. Perper's opinion, that the miner developed hypoxia from pneumoconiosis and that the hypoxia hastened the miner's death, Claimant's Exhibit 1, inasmuch as there was no clinical evidence of record affirmatively indicating that the miner suffered from hypoxia. *See Clark, supra; Tackett, supra;* Decision and Order on Remand at 10-11; Claimant's Exhibit 1. We affirm, therefore, the administrative law judge's finding that the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c)(2) (2000). *See* 20 C.F.R. §718.205(c)(2); *see also Lukosevicz, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge