BRB No. 98-1658 BLA

DOROTHY ANDERSON (Widow of JAMES ANDERSON)	)	
Claimant-Petitioner	)	
v.	)	
GUNTHER-NASH MINING CONSTRUCTION COMPANY	)	DATE ISSUED:
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 of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Dorothy Anderson, Acworth, Georgia, *pro se*.

William H. Howe and Patricia T. Gonsalves (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (96-BLA-1063) of Administrative Law Judge Mollie W. Neal denying benefits in both

[1]Claimant is the widow of the miner, James Anderson, who died on May 23, 1995. Director's Exhibits 1, 5. Claimant filed her survivor's claim on August 28, 1995. Director's Exhibit 1.

a duplicate miner's claim[2] 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). The administrative law judge adjudicated both the miner's claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found the evidence insufficient to establish the existence of

[2]The miner filed his initial claim on November 12, 1977. Director's Exhibit 22. On November 10, 1983, Administrative Law Judge V. M. McElroy issued a Decision and Order - Granting Benefits, *id*., which the Board affirmed in part and vacated in part, and remanded for further consideration, *Anderson v. Gunther-Nash Mining Construction Co*., BRB Nos. 83-2793 BLA and 83-2793 BLA-A (Jan. 26, 1988)(unpub.). On April 25, 1988, Judge McElroy issued a Decision and Order - Upon Remand denying benefits. *Id*. Judge McElroy's denial was based on his finding that the evidence was sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and (b)(4), and that the evidence was insufficient to establish entitlement to benefits under 20 C.F.R. §410.490. *Id*. The Board affirmed Judge McElroy's denial of benefits. *Anderson v. Gunther-Nash Mining Construction Co*., BRB No. 88-1805 BLA (Feb. 27, 1990)(unpub.). The miner filed his most recent claim on April 13, 1995. Director's Exhibit 21.

pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a)(1)-(4). Further, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis on the merits pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim. On appeal, claimant generally challenges the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim. Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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 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).

Initially, we will address the administrative law judge's findings with respect to the duplicate miner's claim. The administrative law judge stated that "since the miner's claim is a duplicate claim, the operative date from which the newly submitted evidence must be considered is April 25, 1988, the date of the denial of the prior miner's claim." Decision and Order at 8. The administrative law judge also stated that "[a]s such, any findings relating to a material change in condition[s] under Section 725.310[3] are encompassed in the following discussion of [a] material

[3]As previously noted, the miner's initial claim, which was filed on November 12, 1977, was denied by Judge McElroy on April 25, 1988. Director's Exhibit 22. The Board affirmed Judge McElroy's denial of benefits. *Anderson v. Gunther-Nash Mining Construction Co*., BRB No. 88-1805 BLA (Feb. 27, 1990)(unpub.). The miner filed a duplicate claim on April 13, 1995. Director's Exhibit 21. While the miner's duplicate claim was pending before the Department of Labor (DOL), the miner died on May 23, 1995. Director's Exhibits 1, 5. On May 31, 1995, the district director issued an Order to Show Cause why the miner's claim should not be denied by reason of abandonment. Director's Exhibit 21. On June 5, 1995, claimant responded to the district director's Order. *Id*. Claimant subsequently filed her survivor's claim on August 28, 1995. *Id*. On August 31, 1988, three days after claimant filed her survivor's claim, the DOL denied benefits in the miner's claim. *Id*. Subsequently, the DOL construed claimant's survivor's claim as a request for modification and again denied benefits in the miner's claim based on claimant's failure to establish modification pursuant to 20 C.F.R. §725.310. *Id*. However, the pertinent regulation provides that "[u]pon his or her own initiative, or upon the

change in conditions under Section 725.309(d)." *Id*. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994). The administrative law judge stated that "[t]he miner's claim was previously denied because he failed to establish any of the elements of entitlement under Sections 718.202(a), 718.203, and 718.204(b) and (c). Decision and Order at 8; Director's Exhibit 22.

We affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) since the newly submitted x-ray readings are negative for pneumoconiosis. Director's Exhibit 21; Employer's Exhibits 4, 6. We also affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since there is no biopsy or autopsy evidence demonstrating the presence of pneumoconiosis. In addition, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R.

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request of any party on the grounds of a change in conditions or because of a mistake in a determination of fact, the [district director] may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits." 20 C.F.R. §725.310(a). Thus, since filing of the survivor's claim pre-dates the denial of benefits by the DOL in the miner's claim, the survivor's claim was improperly construed as a request for modification in the miner's claim. Director's Exhibit 21. Hence, the administrative law judge should not have considered whether claimant established modification of the miner's duplicate claim. 20 C.F.R. §725.310.

§718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because the miner filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 21. Lastly, the presumption at 20 C.F.R. §718.306 is also inapplicable because the miner died after March 1, 1978.

Further, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the newly submitted reports of Drs. Bevill, Bray and Settle.[4] Although Dr. Settle treated the miner for emphysema, chronic obstructive pulmonary disease and bronchitis, Dr. Settle did not opine that these conditions were related to coal mine employment. *See* Director's Exhibit 21; *Shoup v. Director, OWCP*, 11 BLR 1-110 (1987). Dr. Bevill diagnosed "black lung." Claimant's Exhibit 3. Similarly, Dr. Bray diagnosed "probable coal-worker's pneumoconiosis." Claimant's Exhibit 1. The administrative law judge properly discredited the opinions of Drs. Bevill and Bray because she found them to be not well reasoned and documented.[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge properly discredited the opinion of Dr. Bray because she found it to be equivocal.[6] *See Justice v. Island*

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[4]The administrative law judge stated that "[t]he record includes extensive hospital records of emergency hospital admissions between 1989 and May 23, 1995, the date of the miner's death." Decision and Order at 11. However, the administrative law judge stated that "at no time during any of these hospital admissions does the record reflect that the miner was diagnosed with coal worker's pneumoconiosis or a respiratory impairment related to coal dust exposure." *Id*.

[5]The administrative law judge observed that "neither Dr. Bray nor Dr. Bevill presents findings which form the bases for his conclusions." Decision and Order at 12. The administrative law judge also observed "the conclusory nature of the opinions of Drs. Bevill and Bray." *Id*. The administrative law judge stated that "Drs. Bevill and Bray have provided no basis for their conclusions of the miner's coal workers[']pneumoconiosis, nor have they provided the results of x-rays or objective testing upon which they based their conclusions." *Id*. at 18.

[6]The administrative law judge stated that "Dr. Bray's diagnosis of 'probable pneumoconiosis' is too equivocal to support a finding of pneumoconiosis." Decision

Creek Coal Co., 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Therefore, since the administrative law judge properly discredited the only newly submitted medical opinions of record which could support a finding of pneumoconiosis, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

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and Order at 12.

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the newly submitted evidence insufficient to establish total disability. In finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1), the administrative law judge considered the newly submitted pulmonary function study evidence. The record contains five newly submitted pulmonary function studies dated July 20, 1988, May 13, 1991, October 23, 1991, December 17, 1991[7] and October 31, 1994. Director's Exhibit 21. The administrative law judge stated that these studies yielded qualifying values.[8] Decision and Order at 14-15. The administrative law judge also stated that the studies dated July 20, 1988, May 13, 1991, October 23, 199 and October 31, 1994 were invalidated by Dr. Kraman, a consulting physician. *Id*. Hence, the administrative law judge found the newly submitted pulmonary function study evidence insufficient to establish total disability. However, the administrative law judge did not provide a reason for according greater weight to the opinions of Dr. Kraman than to the administering physicians. An administrative law judge is required to provide a rationale for preferring the opinion of a consulting physician over that of an administering physician. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Thus, we vacate the administrative law judge's finding that the newly

[7]The administrative law judge stated that the December 17, 1991 pulmonary function study "produced qualifying values and was interpreted as showing severe obstruction with reduced FVC." Decision and Order at 14. However, the administrative law judge permissibly discredited this study because it "did not include the requisite number of tracings." *Id*. at 14-15; *see Estes v. Director, OWCP*, 7 BLR 1-414 (1984).

[8]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1), and remand the case for further consideration of the newly submitted evidence thereunder.

The administrative law judge also found the newly submitted arterial blood gas studies insufficient to establish total disability at 20 C.F.R. §718.204(c)(2). The record contains thirteen newly submitted arterial blood gas studies.[9] Director's Exhibits 13, 21; Claimant's Exhibit 2. The administrative law judge observed that "[a]n arterial blood gas study conducted by Dr. Bray on December 21, 1994 yielded qualifying results (DX 21-8); and a study [sic] conducted on March 8, 1995 and March 13, 1995 yielded qualifying values. (DX 21)." Decision and Order at 15. The administrative law judge stated that "both of these tests were conducted while Claimant was hospitalized for acute respiratory illness." *Id.* Further, the administrative law judge stated that "[a]s such, neither test can be found to be a reliable predictor of disability." *Id*. However, the record is devoid of any medical evidence which indicates that the miner's physical condition, at the time these arterial blood gas studies were performed, affected the values the studies produced. Without medical evidence establishing the unreliability of arterial blood gas studies, neither an administrative law judge nor the Board has the requisite medical expertise to make such a determination. *See Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Jeffries v. Director, OWCP*, 6 BLR 1-1013 (1984); *Cardwell v. Circle B Coal Co.*, 6 BLR 1-788 (1984). Further, the administrative law judge failed to consider arterial blood gas studies dated April 22, 1989, October 31, 1994, February 22, 1995, March 7, 1995, March 17, 1995 and May 22, 1995 which yielded qualifying values. Director's Exhibit 21; Claimant's Exhibit 2. While an administrative law judge is not required to accept evidence that she determines is not credible, she nonetheless must address and discuss all of the relevant evidence of record. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Thus, we vacate the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(2), and remand the case for further consideration of the newly submitted evidence thereunder. However, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since the record does not contain evidence of cor pulmonale with right sided congestive heart failure.

Finally, on remand, the administrative law judge must consider whether the

[9]Whereas nine studies yielded qualifying values, Director's Exhibit 21; Claimant's Exhibit 2, four studies yielded non-qualifying values, Director's Exhibits 13, 14, 21; Employer's Exhibit 2.

newly submitted evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c)(4).[10] Therefore, since we remand the case for further consideration of the newly submitted evidence at 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(4), we vacate the administrative law judge's finding that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Ross, supra*. Consequently, we vacate the administrative law judge's denial of benefits in the miner's claim.

[10]Although the administrative law judge stated that "[i]n the absence of contrary probative evidence, evidence which meets the criteria set forth at Sections 718.204(c)(1) through (c)(5) may establish total disability," Decision and Order at 13, the administrative law judge did not consider whether the newly submitted medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c)(4). In his office notes, Dr. Settle opined that the miner was totally disabled. Director's Exhibit 7.

Next, we address the administrative law judge's findings with respect to the survivor's claim. Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.[11] *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *See Boyd*, *supra*.

In finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1), the administrative law judge considered the death certificate signed by Dr. Bevill and the relevant medical reports of Drs. Bevill and Bray. In a report dated February 27, 1996, Dr. Bevill opined that "if [the miner] had in fact documented Coal Miner's disease I feel that his illness and death was directly related to this environmental exposure." Director's Exhibit 19. In a subsequent report, Dr. Bevill opined that black lung did contribute to [the miner's] illness and eventual demise." Claimant's Exhibit 3. Dr. Bray diagnosed "probable coal-worker's pneumoconiosis" and opined that the miner's "death was directly related to his respiratory disease and, of that disease, I believe the pneumoconiosis was playing a significant contributing role." Claimant's Exhibit 1. The death certificate indicated that the miner's death was caused by respiratory failure and chronic obstructive pulmonary disease. Director's Exhibit 5. The administrative law judge properly discredited the opinions of Drs. Bevill and Bray because she found them to be not well reasoned and documented.[12] *See Clark, supra*; *Fields, supra*;

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[11]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

[12]The administrative law judge stated that Dr. Bevill "provides no basis for his opinions." Decision and Order at 19. The administrative law judge observed that

Lucostic, supra; *Fuller, supra*. Thus, inasmuch as the administrative law judge properly discredited the only medical opinions of record which could support a finding that pneumoconiosis was the direct cause of the miner's death, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis on the merits at 20 C.F.R. §718.205(c)(1).

In addition, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). In *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993), the Sixth Circuit held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) in a case in which the disease actually hastens his death. The administrative law judge stated that "[t]here is no credible physician's report...which states [that] the miner's death was hastened by pneumoconiosis or that pneumoconiosis was a contributing cause of the miner's death." Decision and Order at 20. As previously noted, the administrative law judge properly discredited the opinions of Drs. Bevill and Bray because she found them to be not well reasoned and documented. *See Clark, supra*; *Fields, supra*; *Lucostic, supra*; *Fuller, supra*. Therefore, since the record contains no credible evidence that the miner's death was hastened by pneumoconiosis, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis on the merits at 20 C.F.R. §718.205(c)(2). *See Brown, supra*.

Finally, inasmuch as the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304 is not applicable in this survivor's claim because there is no evidence of complicated pneumoconiosis, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis on the merits at 20 C.F.R. §718.205(c)(3).

Dr. Bevill "provides no x-ray evidence or other objective data for his findings." *Id*. Additionally, the administrative law judge stated that "Dr. Bray did not provide reasons for his opinion or state findings which formed the basis for that opinion." *Id*.

Hence, in view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis on the merits pursuant to 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim,[13] *see Trumbo, supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[13]In view of our disposition of the survivor's claim on the merits at 20 C.F.R. §718.205(c), we decline to address the administrative law judge's findings on the merits at 20 C.F.R. §718.202(a)(1)-(4). *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

JAMES F. BROWN
Administrative Appeals Judge