

BRB No. 01-0658 BLA

EMMA M. CLEVINGER )  
(Widow of VERNARD CLEVINGER) )

Claimant-Respondent )

v. )

DATE ISSUED:

GRAFTON COAL COMPANY )

and )

WEST VIRGINIA COAL-WORKERS' )  
PNEUMOCONIOSIS FUND )

Employer/Carrier- )  
Petitioners )

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

Party-in-Interest )

DECISION AND ORDER

Appeal of the Decision and Order - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Robert Weinberger (State of West Virginia Employment Programs Litigation Unit, Coal-Workers' Pneumoconiosis Claims Defense), Charleston, West Virginia, for employer/carrier.

Jeffrey S. Goldberg (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and

HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier appeals the Decision and Order - Awarding Benefits (2000-BLA-0449) of Administrative Law Judge Gerald M. Tierney on a survivor's claim<sup>1</sup> 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 credited the miner with at least twenty years of coal mine employment, based on employer's concession, and adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>2</sup> In addition, the administrative law judge found that Grafton Coal Company was the properly designated responsible operator. Addressing the merits, the administrative law judge found the medical evidence of record sufficient to establish the existence of

---

<sup>1</sup> Claimant is the widow of the miner, Vernard Clevenger, who died on February 21, 1995. Director's Exhibit 5. During his lifetime, the miner filed an application for benefits on March 2, 1977, which was ultimately denied in a Decision and Order issued by Administrative Law Judge Charles Rippey on January 24, 1986. Director's Exhibits 47-1, 47-42. No further action was taken on the miner's claim. Claimant filed her survivor's claim on September 1, 1998, Director's Exhibit 1, and this is the only claim currently before the Board.

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board requested supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). In addition, the administrative law judge found the medical evidence sufficient to establish that pneumoconiosis was a contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in this survivor's claim, commencing as of February 1995.

On appeal, employer generally contends that the administrative law judge erred in finding the medical evidence sufficient to establish entitlement to survivor's benefits. Specifically, employer contends that the administrative law judge erred in his weighing of the medical opinion evidence of record, arguing that the administrative law judge failed to properly consider the professional qualifications of the physicians who provided the relevant medical opinions. In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.<sup>3</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

On appeal, employer generally contends that the administrative law judge erred in finding that the medical evidence was sufficient to establish entitlement to benefits. Employer argues that the administrative law judge's decision to accord greater weight to the opinion of Dr. O'Keefe, a Board-certified cardiologist, over the contrary opinions of Drs. Petsonk and Fino, both of whom are Board-certified pulmonologists, was not

---

<sup>3</sup> The parties do not challenge the administrative law judge's decision to credit the miner with at least twenty years of coal mine employment, his finding that Grafton Coal Company was the properly designated responsible operator, his findings pursuant to 20 C.F.R. §§718.202(a)(1), (2), 718.203(b), or his determination of February 1995 as the date from which benefits commence. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

rational. Employer's contentions are not meritorious.

Contrary to employer's contention, the administrative law judge is not required to mechanically accord greater weight to the medical opinions of physicians based strictly on their status as Board-certified pulmonologists over the opinions of physicians who are not pulmonologists. Rather, the professional qualifications of a physician is one factor to be considered by the administrative law judge in his overall weighing of the medical opinions of record.<sup>4</sup> *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Herein, the administrative law judge set forth all of the medical opinion evidence, including the qualifications of the physicians, and fully discussed the individual medical reports. Decision and Order at 5-8; Director's Exhibits 5, 8-10, 36, 37, 39, 40, 42, 47; Claimant's Exhibits 4, 9, 10. While the administrative law judge found that both Dr. Petsonk and Dr. Fino are Board-certified pulmonologists, Decision and Order at 5, 7, he nevertheless, provided a rationale for according little weight to these opinions. The administrative law judge reasonably found that Dr. Petsonk's 1981 opinion, that the miner had no ventilatory impairment arising from his coal mine employment, was rendered prior to the more recent evidence which demonstrated a severe obstructive lung disease and therefore accorded it "little weight." Decision and Order at 6; *Akers, supra*; see *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182

---

<sup>4</sup>The administrative law judge must address the qualifications of the respective physicians, the explanation of their conclusions, the documentation underlying their medical judgments and the sophistication and bases of their diagnoses. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

(1984). Likewise, the administrative law judge reasonably accorded little weight to the opinion of Dr. Fino, finding that this report was not based on a complete review of the record nor did Dr. Fino adequately identify the underlying documentation upon which he relied.<sup>5</sup> Decision and Order at 7; *Akers, supra*; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Rather, the administrative law judge accorded greater weight to the opinion of Dr. O'Keefe, the miner's treating physician, finding that this opinion was more persuasive. The administrative law judge, while acknowledging that Dr. O'Keefe's treatment records were silent as to the cause of the miner's lung disease, nonetheless, found that Dr. O'Keefe established the link between the miner's respiratory impairment and his coal dust exposure in his deposition testimony. Decision and Order at 6; Director's Exhibits 10, 40, 42; Claimant's Exhibit 9. Consequently, the administrative law judge credited the opinion of Dr. O'Keefe, which he also found was supported by the opinion of Dr. Jackson, as sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 8. The administrative law judge also found that these medical opinions were sufficient to outweigh the contrary probative evidence of record and, thus established the existence of pneumoconiosis pursuant to Section 718.202(a). Decision and Order at 8; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

Inasmuch as employer does not otherwise allege any specific error of law or fact with the administrative law judge's findings pursuant to Section 718.202(a) or his

---

<sup>5</sup> In support of his opinion that coal mine dust exposure did not play a role in the miner's lung disease, Dr. Fino explained why the results of the spirometric testing were not consistent with a dust related lung condition. However, the administrative law judge found that Dr. Fino's report was not clear as to what pulmonary function studies were reviewed inasmuch as the objective evidence summary chart contained within Dr. Fino's report did not contain any pulmonary function studies, nor did the additional 1984-1995 evidence Dr. Fino listed contain any pulmonary function study evidence. Decision and Order at 7; Director's Exhibit 36.

findings pursuant to Section 718.205(c), and the Board is not empowered to reweigh the relevant evidence, we affirm the administrative law judge's award of benefits. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

BETTY JEAN HALL  
Administrative Appeals Judge