BRB No. 03-0449 BLA

LAURA CRAWFORD (Widow of EDWARD L. CRAWFORD) Claimant-Petitioner v. CLINCHFIELD COAL COMPANY Employer- Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/22/2004 DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Modification and Denying Claim for Survivor's Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Laura Crawford, Grundy, Virginia, *pro se.*

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1], without the assistance of counsel, appeals the Decision and Order on Remand Granting Modification (in a miner's claim) and Denying Claim for Survivor's Benefits (99-BLA-0345) of Administrative Law Judge Daniel F. Sutton on a miner's

[1]Claimant is Laura Crawford, surviving spouse of the miner, Edward L. Crawford, who died on September 10, 1997. Director's Exhibit 4. Claimant is pursuing both claims.

claim and a survivor's claim, both 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] The case is before the Board for the second time. In his most recent decision, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Thus, the administrative law judge found that the evidence established a mistake in a determination of fact in the miner's claim, wherein benefits were previously awarded, pursuant to 20 C.F.R. §725.310(a)(2000).[3] The administrative law judge also found that the evidence established that it was in the interest of justice under the Act to allow for modification of the miner's claim. Accordingly, the administrative law judge denied both claims.

The relevant procedural history of this case is as follows: The miner originally filed a claim with the Department of Labor (DOL) on November 1, 1979. This claim was denied by DOL. The miner took no further action on the claim, and thus, the denial became final. Director's Exhibit 45. The miner filed a second claim with DOL on January 6, 1992. This claim was denied by DOL. As the miner took no further action on the claim, the denial became final. Director's Exhibit 46. The miner filed a third claim with DOL on May 31, 1994. Director's Exhibit 47. Following a hearing, Administrative Law Judge Vivian Schreter-Murray issued a Decision and Order awarding benefits in the miner's claim on October 24, 1995. Employer appealed to the Board and it affirmed Judge Schreter-Murray's award of benefits. *Crawford v. Clinchfield Coal Co.*, BRB No. 96-0375 BLA (July 22, 1996)(unpub.). The miner died on September 10, 1997. Director's Exhibit 4. Thereafter, employer notified DOL that it would terminate benefits payments due to the miner's death. Director's Exhibit 47. Claimant filed a survivor's claim with DOL on October 21, 1997. Director's Exhibit 1. Employer filed a request for modification of the award of benefits in the miner's claim on May 26, 1998. Director's Exhibit 47. The modification request and the survivor's claim were consolidated. On modification, Administrative Law Judge Daniel F. Sutton (the administrative law judge) issued a Decision and Order dated May 18, 2000, wherein he granted employer's request to submit additional medical evidence. The administrative law judge considered all of the evidence of record and concluded that it failed to establish the existence of

---

[2]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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The revisions to the regulations at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001, and thus are not applicable to these claims.

pneumoconiosis pursuant to Section 718.202(a)(2000). The administrative law judge found, therefore, that Judge Schreter-Murray's Decision and Order awarding benefits contained a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(a)(2000). The administrative law judge, therefore, denied benefits in both claims. Claimant appealed to the Board. A majority panel of the Board vacated the administrative law judge's denial of benefits on the basis that the administrative law judge improperly weighed the x-ray evidence at Section 718.202(a)(1)(2000). *Crawford v. Clinchfield Coal Co.*, BRB No. 00-0904 BLA (July 31, 2001)(unpub.)(McGranery, J, dissenting). The Board, therefore, remanded the case to the administrative law judge for him to reweigh the x-ray evidence at Section 718.202(a)(1), and to weigh all of the relevant evidence at Section 718.202(a), pursuant to the holding set forth in *Island Creek Coal Co. v. Compton*, 211 F. 3d 203, 22 BLR 2-162 (4th Cir. 2000). The Board also instructed the administrative law judge to consider whether modification is in the interest of justice under the Act pursuant to Section 725.310(a)(2000).[4] *Crawford*, slip op. at 7-8. Employer subsequently filed a motion for reconsideration with the Board, requesting *en banc* review. A majority panel of the full Board reaffirmed the Board's previous Decision and Order, and remanded the case to the administrative law judge for him to reconsider the evidence at Section 718.202(a) in accordance with the Board's prior instructions. The majority panel of the full Board also reaffirmed the instruction for the administrative law judge to consider whether modification is in the interest of justice under the Act pursuant to Section 725.310(a)(2000). Judge McGranery renewed her dissent. Judge Gabauer filed a separate opinion.[5] *Crawford v. Clinchfield Coal Co.*, BRB

---

[4]Judge McGranery dissented: she disagreed with all three allegations of error. First, she believed that in finding that the administrative law judge had erroneously relied on recent x-ray evidence, the majority had misconstrued the administrative law judge's decision. Second, she believed that the administrative law judge had properly considered the CT scan evidence as corroboration of the correctness of his determination that the weight of the x-ray evidence was negative and she considered his analysis to be consistent with the teaching of *Compton*. Third, she believed that the administrative law judge had properly granted the petition for modification after finding that there had been a mistake in the prior decision of the ultimate fact, *i.e.* claimant's entitlement to benefits. Accordingly, Judge McGranery would have affirmed the administrative law judge's decision denying benefits in both claims.

[5] Judge Gabauer wrote separately, concurring in part, and dissenting in part, from the majority opinion. Judge Gabauer concurred with the majority that the administrative law judge violated the prohibition against reliance upon a later is better rationale, as set forth in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), and he concurred in the majority opinion that the administrative law judge was required to

No. 00-0904 BLA (May 16, 2002)(Decision and Order on Reconsideration *en banc)*(unpub.)(Gabauer, J., concurring in part, dissenting in part)(McGranery, J., dissenting).

On remand, the administrative law judge found that the x-ray evidence was "at best in equipoise", after he considered the relevant qualifications of all of the x-ray readers. The administrative law judge concluded, therefore, that the evidence was insufficient to sustain claimant's burden of establishing the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order on Remand at 7. The administrative law judge found that the Board previously held that he rationally found the medical opinion evidence to be insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Decision and Order on Remand at 8. The administrative law judge found, therefore, that the evidence as a whole failed to establish the existence of pneumoconiosis at Section 718.202(a). The administrative law judge finally found that allowing modification of the miner's claim was appropriate, as "favoring correctness over finality in this case clearly accomplishes justice under the Act." Decision and Order on Remand at 9. The administrative law judge noted that he based his "interest of justice" finding, in part, upon the fact that employer stated that it would not seek reimbursement of any benefits paid pursuant to the prior award in the miner's claim. *Id;* See Employer's Closing Argument to the Administrative Law Judge at 2. Claimant filed the instant appeal with the Board, without the assistance of counsel.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer, in response, urges affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

---

consider whether modification is in the interest of justice under the Act. Judge Gabauer joined Judge McGranery's dissent, however, suggesting that the administrative law judge should not be prohibited from considering x-rays and CT scans together based on a view that the holding in *Compton* requires such a weighing.

In order to establish entitlement to benefits in a living miner's claim under the 20 C.F.R. Part 718 regulations, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In a survivor's claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that such pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R §718.203, and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Most recently, the Board remanded this case to the administrative law judge for him to reconsider the x-ray evidence at Section 718.202(a)(1) and to consider the evidence in light of the holding set forth in *Compton*. We first review the administrative law judge's findings pursuant to Section 718.202(a)(1). The record contained eighteen x-ray interpretations, when Judge Schreter-Murray issued her 1995 Decision and Order. Judge Schreter-Murray relied upon a preponderance of the evidence to find that it established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). She based her finding on the fact that thirteen of the interpretations were positive for pneumoconiosis and five were negative for pneumoconiosis, including positive interpretations by Dr. Franke, who is dually qualified as both a B-reader and a Board-certified radiologist. Director's Exhibits 45-47. Of the thirty-one interpretations of x-rays taken between 1995-1997, and submitted after employer's request for modification, twenty-three were negative for pneumoconiosis, and eight were positive. Director's Exhibits 12, 14, 17, 19, 21, 24, 27; Employer's Exhibits 7-22, 24-31. The twenty-three newly submitted negative interpretations were read by Drs. Navani, Wheeler or Scott, who are dually qualified as B-readers and Board-certified radiologists. *Id.* Dr. Fino, who is a B-reader, read each of the eight positive readings in the record. Employer's Exhibits 24-31. On remand, the administrative law judge noted that Drs. Navani, Wheeler and Scott reviewed the most recent x-rays taken of the miner. He further found that Drs. Navani, Wheeler and Scott, the three most qualified readers of record, were unanimous in their position that the x-rays were negative for pneumoconiosis. Decision and Order at 7. After considering the respective qualifications of the doctors, the administrative law judge concluded: "I am unable to identify any reliable and valid basis for crediting one group of interpretations from among the best qualified radiologists over another." Decision and Order at 7 (footnote omitted). The administrative law judge found that the evidence was "at best in equipoise", and therefore insufficient to satisfy

claimant's burden of establishing the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 7. We hold that as the administrative law judge accurately considered all of the relevant evidence, rejected rationales which the Board prohibited him from relying on previously, and considered the qualifications of all of the x-ray readers of record, the administrative law judge's finding that the x-ray evidence of record is in equipoise constitutes a permissible exercise of the administrative law judge's discretion. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). [6] We affirm, therefore, the administrative law judge's finding that that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

We next address the administrative law judge's findings pursuant to Section 718.202(a)(4). The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 8. The administrative law judge erroneously stated that the Board previously affirmed his finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Rather, the Board merely held that the administrative law judge permissibly credited the medical opinions that concluded that the miner did not have pneumoconiosis, based on the superior credentials of the physicians providing those opinions, and because those opinions were better reasoned. *Crawford v. Clinchfield Coal Co.*, 00-0904 BLA (July, 31, 2001)(unpub.)(McGranery, J., dissenting), slip op. at 5-6. Nevertheless, because the Board's affirmance of the administrative law judge's findings with respect to those medical opinions constitutes the law of the case, *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984),[7] we affirm the administrative law judge's finding

---

[6] Because there is no autopsy or biopsy evidence of record, claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3): Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because the instant claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally inasmuch as the instant claim is not a survivor's claim filed before June 30, 1982, Section 718.306 is also inapplicable. *See* 20 C.F.R. §718.306(a). Thus, claimant cannot establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3) as a matter of law. 20 C.F.R. §§718.202(a)(3); 718.304; 718.305(e); 718.306(a).

[7] The administrative law judge erred in failing to weigh the CT scan evidence

that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

As the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis at each of the relevant subsections of Section 718.202(a), we affirm the administrative law judge's finding that the evidence as a whole was insufficient to establish the existence of pneumoconiosis. *See Compton,* 211 F. 3d at 21-211; 22 BLR 2-173-74, Decision and Order at 9. As claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, we further affirm the administrative law judge's denial of benefits in the survivor's claim. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Neeley, 11* BLR at 1-86-87.

With respect to the miner's claim, the Board additionally instructed the administrative law judge to reconsider whether modification of the miner's previous award was in the interest of justice under the Act pursuant to Section 725.310(a)(2000). The administrative law judge stated:

> In this case, the Employer has not sought modification based on evidence that it could have offered to Judge Schreter-Murray. Instead, it relies on the interpretations of x-rays that were taken after the hearing before Judge Schreter-Murray and new medical opinions, which are based on a review of all of the evidence including the new x-rays, and CT scans. Thus, it is not a situation where a losing party is abusing the process by attempting to retry its case using evidence that was available the first time around. Therefore, I find that favoring correctness over finality in this case clearly accomplishes justice under the Act, especially where the Employer has made it clear that it does not seek reimbursement of any benefits paid pursuant to the prior award in the Miner's claim.

Decision and Order on Remand at 9.

---

together with the medical opinions of record. We hold that this error is harmless, however, as all of the CT scan evidence of record was negative for pneumoconiosis, and therefore, would not assist claimant in satisfying her burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer's Exhibits 1-6; *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.,* 6 BLR 1-378 (1983).

The determination of the interest of justice under the Act is to be made based upon the facts and circumstances of each case. *Branham v. Bethenergy Mines, Inc.*, 21 BLR 1-79 (1988)(McGranery, J., dissenting). Modification is not appropriate in instances where there is wrongdoing or impropriety by the moving party. *Branham*, 21 BLR at 1-83-84, *citing O'Keefe v. Aerojet-General Shipyards Inc.*, 404 U.S. 254, at 255-56 (1971); *Banks v. Chicago Grain Trimmers Ass'n Inc.*, 390 U.S. 459, 464 (1968). Absent such wrongdoing or impropriety, however, "[o]ne could hardly find a better reason for rendering justice than that it would be unjust or unfair to require an employer to pay benefits to a miner who does not meet the requirements of the Act." *Branham*, 21 BLR at 1-83. In the instant case, where there is no evidence of wrongdoing or impropriety on the part of the employer, the administrative law judge properly found that modification was in the interest of justice under the Act, as he properly found that the newly submitted evidence failed to establish the existence of pneumoconiosis at Section 718.202(a). We affirm, therefore, the administrative law judge's finding that modification of the miner's award of benefits is in the interest of justice under the Act, as a permissible exercise of the administrative law judge's discretion. *Branham*, 21 BLR at 1-84.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Modification and Denying Claim for Survivor's Benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge