

BRB No. 99-1205 BLA

IRENE V. ENGLAND)
(Widow of LEONARD E. ENGLAND))
)
Respondent Claimant-)
)
) DATE ISSUED:
v.)
)
ROBINSON-PHILLIPS COMPANY)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF)
WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR) DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Awarding Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Irene V. England, Princeton, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Barry H. Joyner (Henry L. Solano, 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, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-BLA-1214) of Administrative Law Judge Edward Terhune Miller with respect to 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).¹ In his Decision and Order, Judge Miller noted that he was considering the case on remand from the Board's Decision and Order vacating an award of benefits rendered by Administrative Law Judge Jeffrey Tureck. Judge Miller determined that although the x-ray evidence was insufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(1), claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) based upon the opinion of Dr. Cardona who was the miner's treating physician for fifteen years. Accordingly, in light of the Board's prior affirmance of Judge Tureck's finding that claimant established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), Judge Miller awarded benefits.

¹Claimant, Irene V. England, is the surviving spouse of the deceased miner, Leonard E. England. The miner was awarded benefits during his lifetime in a Decision and Order issued by Administrative Law Judge Richard H. Beddow, Jr., on September 22, 1987. Director's Exhibit 38. The miner died on July 2, 1994. Director's Exhibit 22. The cause of the miner's demise was identified on the death certificate as cardiopulmonary collapse due to arteriosclerotic heart disease and pneumoconiosis. *Id.* Claimant filed an application for survivor's benefits on August 9, 1994. Director's Exhibit 1. Inasmuch as the miner's claim was filed after January 1, 1982, the award of benefits with respect to his claim did not render claimant derivatively entitled to benefits in the survivor's claim. See *Reigh v. Director, OWCP*, 20 BLR 1-44 (1996), *modifying on recon.*, 19 BLR 1-64 (1995).

Employer argues on appeal that Judge Miller erred in finding the existence of pneumoconiosis established under Section 718.202(a)(4) and that the Board erred in affirming Judge Tureck's finding of death due to pneumoconiosis pursuant to Section 718.205(c)(2). The Director, Office of Workers' Compensation Programs (the Director), has responded and urges the Board to instruct the administrative law judge to weigh the evidence concerning the existence of clinical pneumoconiosis separately from the evidence concerning legal pneumoconiosis. Claimant has not filed a brief in 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 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).

Initially, we must address the procedural history of this case subsequent to the Board's prior Decision and Order. Pursuant to 20 C.F.R. §802.405(a), "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken *as directed by the Board.*" 20 C.F.R. §802.405(a)(emphasis supplied); see 33 U.S.C. §921(b)(4). In the present case, the Board vacated Judge Tureck's findings under Section 718.202(a)(1) and (a)(4) and remanded the case to him with instructions to consider evidence omitted from his initial Decision and Order and to provide "a proper rationale for his weighing of the CT scans of record." *England v. Robinson-Phillips Co.*, BRB No. 96-1429 BLA, slip op. at 4 (Apr. 30, 1997)(unpub.). Understanding that the Board required him to provide an evidentiary basis for his finding regarding the superior reliability of CT scans, Judge Tureck issued an Order of Remand sending the case to the district director solely for the purpose of obtaining "appropriate expert medical evidence comparing the relative value of CT scan evidence vs. conventional x-ray evidence in diagnosing coal workers' pneumoconiosis." Director's Exhibit 42. Judge Tureck further stated that "[w]hen this evidence is obtained, the case shall be returned to me for decision on remand." *Id.* At this stage in the proceedings, events transpired which resulted in the admission of evidence exceeding the scope of the Board's remand Order.

Upon receiving the case from Judge Tureck, the district director sent the CT scans and chest x-rays read as positive for pneumoconiosis by Dr. Ward to Dr. Sargent and asked him to respond to Judge Tureck's inquiry. Dr. Sargent initially provided a report in which he offered negative interpretations of the CT

scans and x-rays. Director's Exhibit 44. In response to subsequent correspondence from the district director, Dr. Sargent proffered an opinion stating that CT scans are, in fact, more accurate than chest x-rays. Director's Exhibit 45. It appears from the record that the district director then transferred the case to the Office of Administrative Law Judges (OALJ) for a *de novo* hearing, contrary to Judge Tureck's Order of Remand. Director's Exhibit 47.

Without any indication in the record that Judge Tureck, who continues to serve in the OALJ, was unavailable, the case was assigned to Judge Miller. He issued a Notice of Hearing. In response, claimant, who has been without counsel at all stages of these proceedings, requested, with employer's concurrence, that the case be decided on the record. Judge Miller granted claimant's request and issued a Procedural Order in which he admitted the evidence developed by the district director and evidence submitted by employer after the case was returned to the OALJ, including rereadings of the CT scans and x-ray evidence, as well as medical opinions pertaining to the existence of pneumoconiosis and the cause of the miner's death. Judge Miller then issued the Decision and Order - Awarding Benefits.

It is apparent that the admission into the record of rereadings of the CT scans and x-rays and medical record reviews submitted on remand exceeds the scope of the Board's remand instructions and Judge Tureck's Order of Remand, as this evidence is not directed to the issue of the relative accuracy of CT scans and chest x-rays. In light of this error, we now strike it from the record.² In

²Some of the evidence proffered by employer on remand bears upon the issue of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). This issue is not subject to reconsideration in light of the Board's previous affirmance of Judge Tureck's determination that claimant established this element of entitlement. *England v. Robinson-Phillips Co.*, BRB No. 96-1429 BLA (Apr. 30, 1997)(unpub.). Contrary to employer's argument, logic dictates that if Judge Tureck finds pneumoconiosis established on remand, there is no need to revisit his otherwise rational weighing of the evidence relevant to Section 718.205(c).

addition, the findings rendered on remand do not comport with the Board's remand Order, as the Board directed Judge Tureck to provide the basis for his determination that CT scans are superior to chest x-rays in assessing the presence of pneumoconiosis. *England, supra*, slip op. at 4. Under the terms of the Board's instructions, absent evidence of his unavailability, Judge Tureck was the only administrative law judge who could comply with the Board's directions on remand. 20 C.F.R. §802.405(a).

Accordingly, we hereby vacate Judge Miller's Decision and Order - Awarding Benefits and remand the case to Judge Tureck for reconsideration of his findings under Section 718.202(a)(1) and (a)(4) in accordance with the instructions set forth in our prior Decision and Order. Judge Tureck should base his findings upon the evidence before him in his initial Decision and Order and the evidence developed on remand which addresses the comparative diagnostic value of CT scans and chest x-rays. When reconsidering the issue of the existence of pneumoconiosis pursuant to Section 718.202(a), Judge Tureck must weigh the evidence in accordance with the recent decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).³ The court held in *Compton* that when determining whether the evidence is sufficient to support a finding of pneumoconiosis under Section 718.202(a)(1)-(4), the administrative law judge must weigh all relevant evidence together. However, we decline to instruct Judge Tureck to consider the evidence pertaining to legal pneumoconiosis and clinical pneumoconiosis separately as urged by the Director. The Director raised the same argument in *Compton* and although the court found the Director's point "well-taken," it rejected the Director's position as expressing an unreasonable interpretation of the Act and the regulations. See *Compton, supra*.

Accordingly, Judge Miller's Decision and Order - Awarding Benefits is vacated and the case is remanded to Judge Tureck for further proceedings consistent with this opinion.

³This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's last year of coal mine employment occurred in West Virginia. Director's Exhibit 2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge