

BRB No. 02-0160 BLA

ALVA H. PARTIN (deceased) and)
BERTHA S. PARTIN)
(Widow of ALVA H. PARTIN))

Claimant-Respondent)

v.)

CANADA MOUNTAIN COAL AUGURING)

and)

OLD REPUBLIC INSURANCE COMPANY)

Employer/Carrier-)
Petitioner)

DIRECTOR, OFFICE OF WORKERS')

DATE ISSUED:

COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Part-in-Interest)

DECISION and ORDER

Appeal of the Decision And Order On Remand Awarding Benefits and
the Decision And Order Awarding Benefits of Thomas F. Phalen, Jr.,
Administrative Law Judge, United States Department of Labor.

John E. Anderson (Cole, Cole, and Anderson, PSC), Barbourville,
Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for
employer/carrier.

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

PER CURIAM:

Employer appeals the Decision And Order On Remand Awarding Benefits and

the Decision And Order Awarding Benefits (97-BLA-0961 and 00-BLA-0956) of Administrative Law Judge Thomas F. Phalen on both the miner's claim and the 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 Based on the dates of filing, the administrative law judge adjudicated the miner's and the survivor's claims pursuant to 20 C.F.R. Part 718. The prior history of the case is set forth in the Board's most recent decision in *Partin v. Canada Mountain Augering*, BRB No. 99-1285 BLA (Oct. 27, 2000)(unpub.). In that decision, the Board reaffirmed its prior holding affirming the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a), as the law of the case, *citing Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) and *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984), affirmed the administrative law judge's finding that the record was devoid of evidence which could establish complicated pneumoconiosis at Section 718.304(b), but vacated the administrative law judge's finding that the medical opinion evidence was sufficient to support a finding of complicated pneumoconiosis at Section 718.304(c), and therefore vacated the administrative law judge's finding that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304 and remanded the case for consideration of all relevant evidence thereunder, and, if reached, consideration of disability causation at Section 718.204(c)(2000). Considering the relevant evidence at Section 718.304 on remand, the administrative law judge concluded that the evidence established the existence of complicated pneumoconiosis and that claimant was therefore entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. Accordingly, benefits on the miner's claim were awarded. Turning to the survivor's claim, which had been consolidated with the miner's claim, the administrative law judge concluded that claimant was entitled to benefits on her survivor's claim based on the applicability of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. Accordingly, benefits were awarded on the survivor's claim.

On appeal, employer contends that the administrative law judge erred in

¹ 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.

finding that the evidence established the existence of complicated pneumoconiosis. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not participating 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Griffith v. Director, OWCP*, 49 F.3d 184, 186 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

First, employer again contends that the administrative law judge erred in concluding that the x-ray evidence supported a finding of complicated pneumoconiosis pursuant to Section 718.304(a). In its previous decision in this case, however, the Board held that its affirmance of the administrative law judge's finding that the x-ray evidence of record was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a) constituted the law of

the case. The Board stated therein: “Inasmuch as the Board’s previous finding regarding the x-ray evidence at Section 718.304(a) was not challenged by the employer through either a motion for reconsideration or appeal to the United States Court of Appeals, our holding on the issue constitutes the law of the case, see *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).” *Partin* at 4. Accordingly, employer’s argument concerning the x-ray evidence is rejected.

Employer next contends that the administrative law judge erred in finding that the medical opinions establish the existence of complicated pneumoconiosis at Section 718.304(c), and that the relevant evidence when weighed together establishes the existence of complicated pneumoconiosis. As the Board previously affirmed the administrative law judge’s weighing of the medical opinions of Drs. Fino, Branscomb, Baker and Velamati, we will not revisit those findings. *Williams, supra*; *Bridges, supra*. Pursuant to the Board’s remand instructions, the administrative law judge considered the opinions of Drs. Vuskovich and Mohan. While noting that Dr. Mohan did not mention any respiratory disability, the administrative law judge placed little weight on his opinion inasmuch as it was unclear from his records whether Dr. Mohan was treating the miner for a pulmonary-related condition or whether, in spite of having seen the miner on several occasions from October 1995 through July 1996, he had any superior understanding of the miner’s condition. Decision and Order at 4. Further, the administrative law judge found Dr. Mohan’s reports of little value as his treatment of the miner was of limited scope and he made no mention of the miner’s smoking or employment histories. This was rational. Claimant’s Exhibit 3; see *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); cf. *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 2002 WL 1769283 (6th Cir.). Likewise, the administrative law judge accorded little weight to Dr. Vuskovich’s opinion as it was based on his x-ray interpretation that that x-ray did not show complicated pneumoconiosis, which was contrary to the administrative law judge’s finding that the x-ray evidence established complicated pneumoconiosis, and Dr. Vuskovich failed to provide any other explanations for his conclusion. This was rational. *Scott v. Mason Coal Co.*, 2002 WL 832020 (4th Cir. May 2, 2002); *Clark, supra*. We therefore affirm the administrative law judge’s weighing of these opinions pursuant to Section 718.304(c) as it is supported by substantial evidence and in accordance with law, and affirm the administrative law judge’s finding that, after considering all the relevant evidence, claimant established the existence of complicated pneumoconiosis and was, therefore, entitled to the irrebuttable presumptions of total disability and death due to pneumoconiosis at Section 718.304. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); see *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-131 (1991); see also *Eastern Assoc. Coal Corp. v. Director, OWCP*

[Scarbro], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999). The administrative law judge's award of benefits on both the miner's and survivor's claim is, therefore, affirmed.

Accordingly, the administrative law judge's Decision And Order On Remand Awarding Benefits and Decision And Order Awarding Benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge