

BRB No. 09-0805 BLA

ANNA BRENNAN)
(Widow of JOHN BRENNAN))
)
Claimant-Respondent)
)
v.)
)
ANTHRACITE TECHNOLOGY,)
INCORPORATED) DATE ISSUED: 08/31/2010
)
and)
)
ROCKWOOD INSURANCE COMPANY)
OF PENNSYLVANIA C/O INSERVCO)
)
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 on Remand of Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Raymond F. Keisling (Carpenter, McCadden & Lane, LLP), Wexford,
Pennsylvania, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James,
Associate Solicitor; 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 appeals the Decision and Order on Remand (07-BLA-5186) of Administrative Law Judge Janice K. Bullard awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended* by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case involves a survivor's claim filed on November 7, 2005,¹ and is before the Board for the second time. In the initial decision, the administrative law judge, after crediting the miner with thirty-two years of coal mine employment,² found that the x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). After weighing all of the relevant evidence together, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). After finding that claimant³ was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *A.B. [Brennan] v. Anthracite Technology, Inc.*, BRB No. 08-0229 BLA (Nov. 25, 2008) (unpub.). However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remanded the case for further consideration. *Id.* The Board also vacated the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.*

On remand, the administrative law judge found that all of the relevant medical evidence, when weighed together, established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the evidence

¹ Although the miner filed several claims for benefits during his lifetime, each of these claims was denied. The miner's most recent claim, filed on March 26, 2001, was denied by the district director on August 5, 2002. There is no indication that the miner took any further action in regard to his 2001 claim.

² The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

³ Claimant is the surviving spouse of the deceased miner, who died on October 23, 2005. Director's Exhibit 6.

established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer also challenges the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c). Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), have filed a response to employer's appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Impact of the Recent Amendments

By Order dated May 20, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director have responded.

The Director asserts that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits.⁴ Employer agrees that Section 1556 is applicable to this claim, based on its filing date. However, employer contends that it is "premature" to apply Section 1556 "since there have been no regulations set forth." Employer's Supplemental Brief at 1.

As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant carried her burden to establish each element of entitlement by a preponderance of the evidence, we hold that there is no need to consider whether she could establish entitlement with the aid of the rebuttable presumption reinstated by

⁴ Section 1556 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time his death, he was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

Section 1556.

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. 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). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). 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) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

The Existence of Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis. 20 C.F.R. §718.202(a).

In the initial decision, the administrative law judge considered the opinions of Drs. Kibelstis, Miller, and Renn pursuant to 20 C.F.R. §718.202(a)(4). While Drs. Kibelstis and Miller diagnosed pneumoconiosis, Director's Exhibits 7, 8, Dr. Renn opined that the miner did not suffer from the disease. Employer's Exhibits 1, 6. The administrative law judge initially found that Dr. Renn's opinion was entitled to "little weight" because, *inter alia*, it was based upon a limited amount of x-ray and CT scan evidence. Decision and Order at 8. The administrative law judge accorded the greatest weight to Dr. Miller's opinion because it was based on the most comprehensive review of the record. *Id.* at 9. The administrative law judge found that Dr. Kibelstis's diagnosis of pneumoconiosis was also entitled to "some weight." *Id.* The administrative law judge, therefore, found that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that Dr. Renn's opinion, that the miner did not have pneumoconiosis, was entitled to little weight. *Brennan*, slip op. at 6. However, the Board agreed with employer that the administrative law judge had not adequately addressed the entirety of Dr. Miller's opinion. *Id.* Consequently, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and remanded the case to the administrative law judge with instructions to determine whether Dr. Miller's diagnosis of pneumoconiosis was reasoned and documented. *Id.* at 7.

On remand, the administrative law judge determined that Dr. Miller's diagnosis of pneumoconiosis was not well-documented. Decision and Order on Remand at 6. The administrative law judge, therefore, found that Dr. Miller's opinion was "not entitled to weight." *Id.* However, in weighing all of the relevant evidence together, the administrative law judge found, despite her finding that Dr. Miller's opinion was entitled to less weight, that the overall weight of the evidence still established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Employer argues that the administrative law judge erred in her consideration of the x-ray evidence and Dr. Renn's medical opinion. In its 2008 Decision and Order, the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Brennan*, slip op. at 2 n.2. The Board also affirmed the administrative law judge's finding that Dr. Renn's opinion, that the miner did not suffer from pneumoconiosis, was entitled to little weight. *Id.* at 6. The Board's previous holdings on these issues constitute the law of the case and govern the Board's determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address employer's contentions of error in regard to the administrative law judge's consideration of the x-ray evidence and Dr. Renn's opinion. Employer's remaining statements regarding the administrative law judge's finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) amount to a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We, therefore, affirm the administrative law judge's finding that the evidence established the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Death Due to Pneumoconiosis

Employer also contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In considering whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge considered the opinions of Drs. Miller and Renn. Dr. Miller, the miner's treating physician, completed the miner's death certificate, listing the immediate cause of death as idiopathic pulmonary fibrosis. Director's Exhibit 6. Dr. Miller listed anthracosilicosis⁵ as a significant condition contributing to the miner's death. *Id.* In a follow-up letter dated January 23,

⁵ Anthracosilicosis is a form of "clinical pneumoconiosis." 20 C.F.R. §718.201(a)(1).

2006, Dr. Miller confirmed his opinion that “anthracosilicosis was definitely a contributing factor in the [miner’s] death.” Director’s Exhibit 9. In a more detailed report dated May 29, 2006, Dr. Miller summarized his treatment of the miner from January, 2001 to the miner’s death on October 24, 2005. Director’s Exhibit 8. In regard to the cause of the miner’s death, Dr. Miller stated:

[The miner] died . . . because of chronic respiratory failure that was due to [i]diopathic [p]ulmonary [f]ibrosis and [a]nthracosilicosis (Coal Worker’s Pneumoconiosis).

[The miner’s] [a]nthracosilicosis was of sufficient severity to keep him from performing his prior occupation or similarly arduous work. It also contributed to his chronic respiratory failure, and, ultimately, to his death.

Director’s Exhibit 8.

During a June 15, 2007 deposition, Dr. Renn indicated that he agreed with Dr. Miller’s opinion that the miner’s death was due to idiopathic pulmonary fibrosis. Employer’s Exhibit 6 at 19. Dr. Renn, however, indicated that he did not agree with Dr. Miller’s opinion that anthracosilicosis was a cause of the miner’s death, noting that he found no evidence of coal workers’ pneumoconiosis. *Id.*

In her 2007 Decision and Order, the administrative law judge credited Dr. Miller’s opinion, that the miner’s pneumoconiosis contributed to his death, over Dr. Renn’s contrary opinion. Decision and Order at 12. The administrative law judge accorded less weight to Dr. Renn’s opinion because it was based on a faulty premise, *i.e.*, that the miner did not suffer from clinical pneumoconiosis. *Id.* In its 2008 Decision, the Board held that, in light of its decision to vacate the administrative law judge’s finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), it was necessary to also vacate the administrative law judge’s finding that the evidence established that the miner’s death was due to pneumoconiosis.⁶ *Brennan*, slip op. at 8.

On remand, the administrative law judge found that Dr. Miller’s opinion, that the miner’s anthracosilicosis contributed to his death, was well reasoned. Decision and Order on Remand at 7. The administrative law judge, therefore, found that the evidence

⁶ The Board, however, rejected employer’s contention that Dr. Miller’s opinion was insufficient, as a matter of law, to support a finding that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *A.B. [Brennan] v. Anthracite Technology, Inc.*, BRB No. 08-0229 BLA, slip op. at 8 (Nov. 25, 2008) (unpub.).

established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.*

Employer contends that the administrative law judge erred in relying upon Dr. Miller's opinion to support a finding that the miner's death was due to pneumoconiosis, since the administrative law judge previously accorded less weight to the doctor's opinion that the miner suffered from pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge acknowledged that, in considering whether the medical opinion evidence established the existence of pneumoconiosis, she had accorded no weight to Dr. Miller's opinion. Decision and Order on Remand at 7. However, the administrative law judge correctly noted that she was not required to accord less weight to Dr. Miller's opinion regarding the cause of the miner's death, merely because the doctor had not provided support for his diagnosis of pneumoconiosis. *Id.* Because the administrative law judge found that the overall weight of the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), Dr. Miller's diagnosis of pneumoconiosis is in accord with the administrative law judge's ultimate conclusion. Thus, Dr. Miller, unlike Dr. Renn, did not rely upon a faulty premise, *i.e.*, that the miner did not suffer from pneumoconiosis, in addressing the contribution of pneumoconiosis to the miner's death. See *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Clites v. J & L Steel Co.*, 663 F.3d 14, 3 BLR 2-86 (3d Cir. 1981); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

We also reject employer's contention that the administrative law judge erred in finding that Dr. Miller's opinion was sufficient to establish that the miner's death was due to pneumoconiosis. In her consideration of Dr. Miller's opinion, the administrative law judge stated:

As the [m]iner's primary treating physician, Dr. Miller was involved with his care during his final hospitalization, when breathing problems were a significant part of the [m]iner's overall health picture . . . Dr. Miller also directly reported on the [m]iner's condition while in the hospital, noting a severely decreased O₂ sat[.] of just 78 percent on 6 liters of oxygen and "severe diffuse decreased breath sounds." When discharged, eleven days before his death, the [m]iner had "baseline severe dyspnea with minimal exertion" and experienced severe hypoxia merely by having his oxygen mask fall off.

Based on these reports, Dr. Miller's opinion as expressed on the death certificate, and in his written opinion, was well-reasoned and well-documented.

Decision and Order on Remand at 7 (citations omitted).

It is the function of the administrative law judge to evaluate the physicians' opinions, *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986), and the Board will not substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). As the administrative law judge properly analyzed the medical opinions and explained her reasons for crediting or discrediting the opinions she reviewed, we affirm her finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-108.

Accordingly, the administrative law judge's Decision and Order on Remand 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