



BRB No. 17-0163 BLA

KAY HEPLER)

(o/b/o PAUL W. HEPLER, deceased))

Claimant-Petitioner)

v.)

GILBERTSON COAL COMPANY)

and)

DATE ISSUED: 12/21/2017

LACKAWANNA CASUALTY COMPANY)

Employer/Carrier-)

Respondents)

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 Theresa C. Timlin,
Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Judd Wyotek (Marshall, Dennehey, Warner, Coleman & Goggin),
Allentown, Pennsylvania, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (2010-BLA-5196) of Administrative Law Judge Theresa C. Timlin denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving a subsequent miner's claim filed on January 21, 2009,² is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with eleven years of coal mine employment.³ Because the miner established less than fifteen years of coal mine employment, the administrative law judge found that the miner did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act.⁴ 30 U.S.C. §921(c)(4) (2012). Turning to whether the miner could affirmatively establish his entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found that the new evidence established the existence of clinical pneumoconiosis, thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered the miner's 2009 claim on the merits. After the administrative law judge found that the miner was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), she found that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's findings that the new evidence established the existence of clinical pneumoconiosis and

¹ Claimant is the surviving spouse of the miner, who died on February 7, 2013. Claimant's Brief at 1. Claimant is pursuing the miner's claim.

² The miner's three previous claims, filed in 1978, 1990, and 2004, were each denied because the miner failed to establish any element of entitlement. Director's Exhibits 1, 2, 61.

³ The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 5. 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, 1-202 (1989) (en banc).

⁴ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

that one of the applicable conditions of entitlement had changed since the denial of the miner's prior claim became final. *Hepler v. Gilbertson Coal Co.*, BRB No. 13-0208 BLA (Feb. 10, 2014) (unpub.). The Board also affirmed the administrative law judge's finding that the evidence established that the miner suffered from a totally disabling pulmonary impairment, but it vacated the finding that the miner was totally disabled due to pneumoconiosis and remanded the case for further consideration. *Id.* On remand, the administrative law judge found that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and she denied benefits.

On appeal, claimant contends that the administrative law judge erred. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

Without the Section 411(c)(4) presumption, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

At this stage in the case, it is undisputed that the miner has established every element of entitlement but the final one, disability causation. To establish that he is totally disabled due to pneumoconiosis, a claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i),(ii). Claimant must establish the cause of the miner's total disability "by means of a physician's documented and reasoned medical report." 20 C.F.R. §718.204(c)(2).

In remanding this case, the Board held that the administrative law judge failed to adequately explain how Dr. Kraynak's opinion that the miner was totally disabled due to clinical pneumoconiosis was well-reasoned and documented. *Hepler*, BRB No. 13-0208 BLA, slip op. at 9. On remand, the administrative law judge found that Dr. Kraynak failed to adequately account for the miner's open heart surgery as another potential cause of the miner's disability. Decision and Order on Remand at 7. The administrative law judge also accorded less weight to his opinion because he relied upon an inaccurate understanding of the level of the miner's pulmonary impairment. *Id.* The administrative law judge therefore found that the evidence did not establish that the miner was totally disabled due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Claimant contends that the administrative law judge erred in evaluating Dr. Kraynak's opinion. We disagree. The administrative law judge specifically noted that Dr. Hertz, a Board-certified pulmonologist,⁵ opined that the miner's moderate restrictive pulmonary impairment was due to his open heart surgery, which included a median sternotomy. Employer's Exhibit 6 at 29. Dr. Hertz explained how a sternotomy causes a restrictive pulmonary defect:

[A sternotomy] entails splitting the breastbone to operate on the heart and then rewiring it together. And the healing and scarring that takes place with that is a very frequent cause of decreasing lung volumes and restriction on pulmonary function testing.

Employer's Exhibit 6 at 29.

The administrative law judge credited Dr. Hertz's opinion that the miner's pulmonary impairment was due in part to his open heart surgery. Decision and Order on Remand at 7 n.7. Although Dr. Kraynak acknowledged that a part of the miner's pulmonary impairment could have been due to his open heart surgery, Claimant's Exhibit 14 at 25-26, the administrative law judge permissibly found that the doctor failed to adequately explain the degree to which the miner's open heart surgery (sternotomy) affected the miner's pulmonary impairment.⁶ Decision and Order on Remand at 7. The

⁵ The administrative law judge accurately noted that, while Dr. Kraynak is Board-eligible in Family Medicine, Dr. Hertz is Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order on Remand at 6-7; Claimant's Exhibit 14 at 7; Employer's Exhibit 6 at 5. The administrative law judge found that Dr. Hertz's credentials "render[ed] him well-qualified to offer an opinion on whether [the miner's] total disability is due to pneumoconiosis." *Id.*

⁶ Claimant argues that the administrative law judge improperly relied on Dr. Hertz's opinion, which she discredited on the issue of whether the miner's disability was

administrative law judge thus reasonably found that Dr. Kraynak's opinion was not sufficiently reasoned to meet claimant's burden to establish that the miner's pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment.⁷ See *Cooper v. U.S. Steel Corp.*, 7 BLR 1-842, 1-845 (1985); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). Because the administrative law judge permissibly discredited Dr. Kraynak's opinion,⁸ the only opinion supporting a finding of disability causation, we affirm the finding that claimant failed to establish that clinical pneumoconiosis is a substantially contributing cause of his total disability, pursuant to 20 C.F.R. §718.204(c). Because claimant failed to establish that the miner's total disability

due to pneumoconiosis. However, both Drs. Kraynak and Hertz agree that a medial sternotomy, which is an invasive procedure, can result in a restrictive impairment. The administrative law judge rationally concluded that Dr. Kraynak failed to adequately address the significance of this surgery as it relates to the cause of the miner's disabling impairment. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (It is within an administrative law judge's discretion to determine whether a physician's opinion is reasoned).

⁷ Claimant argues that the administrative law judge failed to properly consider Dr. Kraynak's status as the miner's treating physician. Contrary to claimant's argument, while a treating physician's opinion may be due additional deference, there is no *per se* rule that a treating physician's opinion must always be accorded the greatest weight. See *Soubik v. Director, OWCP*, 366 F.3d 226, 236, 23 BLR 2-82, 2-101 (3d Cir. 2004). Here, the administrative law judge properly considered Dr. Kraynak's status as the miner's treating physician pursuant to the factors set forth at 20 C.F.R. §718.104(d), but permissibly found that his opinion was not well-reasoned. Decision and Order on Remand at 7; 20 C.F.R. §718.104(d); see *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

⁸ Because the administrative law judge provided a valid basis for according less weight to Dr. Kraynak's opinion, we need not address employer's remaining arguments regarding the weight she accorded to his opinion. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

was due to pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge