

BRB No. 08-0425 BLA

D.B.)
(Widow of C.B.))
)
Claimant-Respondent)
)
v.)
)
COLLEY & COLLEY COAL COMPANY)
) DATE ISSUED: 02/27/2009
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Seventh Remand of Stuart A. Levin,
Administrative Law Judge, United States Department of Labor.

Gregory R. Herrell (Arrington, Schelin & Herrell, P.C.), Bristol, Virginia,
for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Seventh Remand (00-BLA-0386) of
Administrative Law Judge Stuart A. Levin awarding benefits on claims 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 This case involves a miner's claim filed on

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

September 29, 1980 and a survivor's claim filed on April 21, 1992. Following numerous hearings and decisions, the Board issued a February 8, 2002 Decision and Order,² wherein it affirmed the administrative law judge's award of benefits in the miner's claim. The Board also affirmed the award of benefits in the survivor's claim based upon the derivative entitlement provisions set forth in 20 C.F.R. §725.212 (2000). [*D.B.*] v. *Colley & Colley Coal Co.*, BRB No. 01-0291 BLA (Feb. 8, 2002) (unpub.). Specifically, the Board affirmed the administrative law judge's finding of sixteen and three-quarter years of coal mine employment. *Id.* The Board also affirmed the administrative law judge's finding that claimant established invocation of presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.305³ The Board further affirmed the administrative law judge's finding that the evidence did not establish rebuttal of the Section 718.305 presumption. *Id.*

Pursuant to employer's appeal, the United States Court of Appeals for the Fourth Circuit affirmed the administrative law judge's finding of sixteen and three-quarter years

(2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

² The Board also issued decisions in this case on March 30, 1990, October 13, 1990, January 28, 1997, and June 25, 1999. [*C.B.*] v. *Colley & Colley Coal Co.*, BRB No. 88-1072 BLA (Mar. 30, 1990) (unpub.); [*C.B.*] v. *Colley & Colley Coal Co.*, BRB No. 88-1072 BLA (Oct. 13, 1994) (*recon.*) (*en banc*) (unpub.); [*C.B.*] v. *Colley & Colley Coal Co.*, BRB No. 96-0487 BLA (Jan. 28, 1997) (unpub.); [*C.B.*] v. *Colley & Colley Coal Co.*, BRB No. 98-1274 BLA (June 25, 1999) (unpub.).

³ Section 718.305 states that:

If a miner was employed for fifteen or more years in one or more underground coal mines, and if there is a chest x-ray submitted in connection with such miner's claim . . . and it is interpreted as negative with respect to the requirements of §718.304, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis The presumption may be rebutted only by establishing that the miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

20 C.F.R. §718.305(a).

of coal mine employment. *Colley & Colley Coal Co. v. [D.B.]*, No. 02-1258 (4th Cir. Mar. 11, 2002) (unpub.). However, the court held that the administrative law judge erred in his consideration of whether the evidence established rebuttal of the Section 718.305 presumption. *Id.* The court, therefore, remanded the case to the administrative law judge for reconsideration of whether the evidence established rebuttal of the Section 718.305 presumption. *Id.*

On remand, in a 2004 Decision and Order, the administrative law judge again found that the evidence did not establish rebuttal of the Section 718.305 presumption. Accordingly, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim. Pursuant to employer's appeal, the Board, in its most recent decision, addressed the administrative law judge's finding that the evidence did not establish rebuttal at 20 C.F.R. 718.305. *[D.B.] v. Colley & Colley Coal Co.*, BRB No. 01-0291 BLA (Aug. 26, 2005) (unpub.). In its consideration of the administrative law judge's findings, the Board held, *inter alia*, that the administrative law judge mischaracterized Dr. Tomashefski's report as based solely on negative x-ray evidence and, therefore, contrary to the regulations. *Id.* The Board, therefore, remanded the case to the administrative law judge for further consideration of whether the evidence established rebuttal of the Section 718.305 presumption.⁴ *Id.*

In a Decision and Order on Remand dated February 12, 2008, the decision that is currently before the Board, the administrative law judge reconsidered all of the medical opinion evidence of record and again found that the evidence did not establish rebuttal of the presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305. Accordingly, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim. On appeal, employer contends that the administrative law judge erred in finding that the evidence established rebuttal of the presumption set forth at 20 C.F.R. §718.305. Claimant⁵ responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions.⁶ The Director, Office of Workers' Compensation Programs, has not filed a response brief.

⁴ The Board summarily denied employer's motion for reconsideration. *[D.B.] v. Colley & Colley Coal Co.*, BRB No. 05-0322 BLA (Mar. 28, 2006) (Order on recon.) (*en banc*) (unpub.).

⁵ Claimant is the widow of the deceased miner who died on March 25, 1992. Director's Exhibit 96. Claimant died on May 3, 2007. Claimant's daughter is currently pursuing the miner's and survivor's claims.

⁶ In its reply brief, employer contends that the Board should not accept claimant's response brief because claimant's daughter has not demonstrated that she is a proper party in this case. Employer notes that, because the Black Lung Disability Trust Fund

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’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the administrative law judge erred in finding that the evidence did not establish rebuttal of the Section 718.305 presumption. Once a miner has the benefit of the Section 718.305 presumption, the causal relationship of total disability due to pneumoconiosis is presumed and the burden to disprove the relationship lies with the party opposing entitlement. *See Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). In this case, employer attempts to establish rebuttal by establishing that the miner’s pulmonary impairment did not arise out of his coal mine employment. As the Fourth Circuit has stated, in the context of a similar regulatory presumption, the rebuttal standard “requires the employer to rule out any causal relationship between the miner’s disability and his coal mine employment by a preponderance of the evidence.” *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 339, 20 BLR 2-246, 2-250 (4th Cir. 1996).

Employer argues that the administrative law judge erred in finding that Dr. Tomashefski’s opinion did not establish rebuttal of the Section 718.305 presumption. We disagree. Dr. Tomashefski opined that the miner’s “respiratory failure” was due to his emphysema,⁷ which was attributable to his cigarette smoking. Employer’s Exhibit 2. Although Dr. Tomashefski opined that coal dust exposure was not a cause of the miner’s his emphysema, the administrative law judge permissibly discredited his opinion because the doctor failed to provide any reasoning or rationale for his conclusion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Because Dr. Tomashefski attributed the miner’s pulmonary impairment to emphysema, and failed to provide an explanation for his conclusion

has fully paid all benefits, “nothing more could be due to the widow’s estate.” Employer’s Reply Brief at 2. However, employer ignores the fact that claimant’s estate could be adversely affected by a reversal of the administrative law judge’s award of benefits if there is a claim by the Director, Office of Workers’ Compensation Programs, against claimant’s estate for the overpayment of benefits. Consequently, we accept the brief of claimant’s daughter as a representative of claimant’s estate. 20 C.F.R. §725.360(b).

⁷ Dr. Tomashefski also opined that the miner’s chronic bronchitis “was a minor contributory factor to his respiratory failure.” Employer’s Exhibit 2. Dr. Tomashefski opined that the miner’s coal workers’ pneumoconiosis was “so minimal” that “it would not have caused him any respiratory symptoms, respiratory impairment or exercise limitation.” *Id.*

regarding the etiology of that disease, the administrative law judge permissibly found that Dr. Tomashefski's opinion did not rule out any causal relationship between the miner's disability and his coal mine employment,⁸ and was, therefore, insufficient to establish rebuttal of the Section 718.305 presumption. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Employer's Exhibit 2.

Employer also contends that the administrative law judge erred in his consideration of the opinions that were developed prior to the miner's death, namely, the opinions of Drs. Garzon, O'Neill, Dahhan, and Castle. On remand, the administrative law judge accorded less weight to the opinions of these doctors because they opined that the miner did not suffer from pneumoconiosis, a condition later proven to exist by the autopsy evidence. 2008 Decision and Order on Remand at 4-5. The Board, in its 2005 Decision and Order, held that this was a proper basis for according less weight to the opinions of Drs. Garzon, O'Neill, Dahhan, and Castle. [*D.B.*], slip op. at 4. The Board's previous holding on this issue constitutes the law of the case and governs 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 administrative law judge's basis for according less weight to the opinions of Drs. Garzon, O'Neill, Dahhan, and Castle that were rendered before the miner's death.

Employer also argues that the administrative law judge erred in his consideration of the later opinions of Drs. Dahhan, Castle, and Hansbarger, rendered after the miner's autopsy results were available. In its 2005 Decision and Order, the Board held that the administrative law judge permissibly accorded less weight to Dr. Dahhan's opinion, developed after the miner's death, on the ground that it was inadequately explained; permissibly found that Dr. Castle's opinion was entitled to diminished weight because it was not supported by the weight of the objective studies of record; and properly accorded less weight to Dr. Hansbarger's opinion because the doctor failed to adequately consider the significance of relevant medical evidence of record. [*D.B.*], slip op. at 4-7. On remand, the administrative law judge accorded less weight to the opinions of these physicians for the same reasons previously affirmed by the Board. 2008 Decision and Order on Remand at 5-7. The Board's previous holdings on these issues constitute the law of the case and govern the Board's determination. *See Brinkley*, 14 BLR at 1-150-

⁸ Dr. Tomashefski did not provide an explanation for his finding that claimant's respiratory failure was not due to his coal dust exposure. Because the administrative law judge provided a proper basis for discrediting Dr. Tomashefski's opinion, *i.e.*, that his opinion was not sufficiently reasoned, the administrative law judge's error, if any, in discrediting Dr. Tomashefski's opinion for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

51; *Bridges*, 6 BLR at 1-989-90. Consequently, we decline to address employer's contentions of error in regard to administrative law judge's basis for according less weight to the post-death opinions of Drs. Dahhan, Castle, and Hansbarger.

As instructed, the administrative law judge, on remand, also reconsidered the opinions of Drs. Buddington and Schmidt. However, because both of these physicians concluded that the miner's coal dust exposure and pneumoconiosis contributed to his respiratory impairment, the administrative law judge properly found that the opinions of Drs. Buddington and Schmidt did not assist employer, in establishing, by a preponderance of the evidence, that the miner's pulmonary disability was unrelated to his coal mine employment. 2008 Decision and Order on Remand at 7.

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption set forth at 20 C.F.R. §718.305. We, therefore, affirm the administrative law judge's award of benefits in the miner's claim. Consequently, we also affirm the administrative law judge's award of derivative survivor's benefits. *See* 20 C.F.R. §725.212 (2000).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge