

BRB Nos. 11-0403 BLA
and 11-0541 BLA

MICHAEL ANTHONY TULLIO)

Claimant)

v.)

U.S. STEEL MINING COMPANY, LLC)

DATE ISSUED: 02/17/2012

Employer)

and)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

and)

BEATRICE JANE TULLIO (Widow of
MICHAEL ANTHONY TULLIO))

Claimant)

v.)

U.S. STEEL CORPORATION)
c/o WELLS FARGO DISABILITY
MANAGEMENT)

Employer (Self-Insured)/Carrier)

and)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR)

Party-in-Interest

)
) DECISION and ORDER

Appeal of the Decision and Order in the Living Miner's Case and Remand of the Survivor's Case to the District Director of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

William J. Evans and Susan Baird Motschiedler (Parsons, Behle & Latimer), Salt Lake City, Utah, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order in the Living Miner's Case and Remand of the Survivor's Case to the District Director (2001-BLA-00920 and 2008-BLA-05397) of Administrative Law Judge Richard K. Malamphy (the administrative law judge) on claims 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).² This is the third time this case has been before the Board. When this case was most recently before the Board, the Board vacated the second decision of Administrative Law Judge Daniel J. Roketenetz awarding benefits on a subsequent miner's claim.³ *Tullio v. U.S. Steel Mining Co., LLC*, BRB No. 05-0762

¹ Claimant, the widow of the miner, who died on March 3, 2007, is pursuing his claim, as well as her survivor's claim filed on March 30, 2007.

² The 2010 amendments to the Act do not apply to the miner's claim, as it was filed before January 1, 2005. Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010).

³ The miner's first claim, filed on February 17, 1994, was denied by the district director on July 1, 1994. *See* Director's Exhibit 29. The miner did not pursue this claim further.

On August 28, 2000, the miner filed a second claim for benefits. In a decision dated November 22, 2002, Administrative Law Judge Daniel J. Roketenetz awarded benefits. Pursuant to an appeal by employer, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings regarding the length of coal mine

BLA (July 3, 2006)(unpub.). The Board remanded the case for further consideration pursuant to Section 718.202(a)(4), instructing the administrative law judge to reconsider Dr. Farney's opinion, that the miner's emphysema was unrelated to his coal dust exposure, inasmuch as Judge Roketenetz's findings regarding Dr. Farney's opinion were not supported by the record. Specifically, the Board held that the administrative law judge erred in according less weight to Dr. Farney's opinion on the ground that Dr. Farney failed to refer to the medical evidence on which he relied in formulating his opinion. The Board held that, in fact, Dr. Farney discussed in detail the medical evidence on which he relied in formulating his opinion.⁴ Board's 2006 Decision and Order at 4-5.

employment, and pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), and 718.204(b)(2)(i)-(iv), as well as his finding pursuant to 20 C.F.R. §725.309 (2000). Nonetheless, the Board vacated Judge Roketenetz's award of benefits, and remanded the case for reconsideration of whether pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4) and, if reached, whether disability causation was established pursuant to 20 C.F.R. §718.204(c). *Tullio v. U.S. Steel Mining Co., LLC*, BRB No. 03-0258 BLA (Dec. 19, 2003)(unpub.). Subsequently, the Board denied claimant's request for reconsideration on August 31, 2004. Following the Board's decision remanding the case, Judge Roketenetz issued a decision, on May 24, 2005, again awarding benefits, finding that pneumoconiosis and disability causation were established pursuant to 20 C.F.R. §718.202(a)(4) and 718.204(c), based on the opinion of Dr. Poitras.

⁴ The Board noted that Dr. Farney stated that he "conducted a detailed history and physical examination, obtained an occupational history, and standard laboratory studies, including complete blood count, urinalysis, urine measurement of products of nicotine, pulmonary function measurements, arterial blood gas measurements, oximetry measurements during exercise and a high resolution CT scan of the chest" and discussed in detail the results he obtained on claimant's electrocardiogram, pulmonary function and blood gas tests, and claimant's CT scan. *Id.* Further, the Board noted that in rendering his conclusion in his 2001 report, Dr. Farney stated that "[t]he constellation of data in this case is diagnostic of chronic obstructive pulmonary disease (emphysema). Pulmonary function measurements indicate the presence of severe air flow obstruction with minimal reversibility, air trapping, and marked reduction of the diffusion capacity. The diagnosis of emphysema is further indicated by the characteristic radiographic findings." Director's Exhibit 24. Dr. Farney further stated that "[t]he natural course of his pulmonary disease and current findings are typical of ordinary cigarette smoke related emphysema." *Id.* At the hearing, when Dr. Farney was asked, in conjunction with his 2001 report, whether he reviewed "the medical records that are contained in the Director's exhibits" he answered, "[y]es I have." Hearing Transcript at 71. Further, the Board noted that employer was correct that Dr. Farney's hearing testimony was replete with references to medical evidence contained in the record that support his finding that claimant's emphysema is unrelated to his coal dust exposure. *Id.* at 73-95.

The Board also instructed Judge Roketenetz to explain why he found the opinion of Dr. Poitras, that the miner's coal dust exposure played a significant role in causing his lung disease, "well-reasoned and well-documented," as opposed to the opinion of Dr. Farney, since Dr. Poitras did not clearly identify the medical evidence on which he relied. Board's 2006 Decision and Order at 6. Additionally, the Board affirmed Judge Roketenetz's finding that claimant had a nine pack-year smoking history, but instructed Judge Roketenetz to consider the effect this finding had on his weighing of the opinions of Drs. Poitras and Farney. Board's 2006 Decision and Order at 8. Finally, in light of Judge Roketenetz's errors in evaluating the opinions of Drs. Poitras and Farney on the issue of legal pneumoconiosis, the Board vacated the administrative law judge's finding that disability causation was established at Section 718.204(c), and remanded the case for reconsideration thereunder, if reached. Board's 2006 Decision and Order at 9.

On remand, the administrative law judge⁵ concluded that the only issues to be decided by him were whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.204(a)(4) and, if reached, whether the pneumoconiosis was totally disabling pursuant to 20 C.F.R. §718.204(c). In reconsidering the medical opinions of Drs. Farney and Poitras, the administrative law judge found that the existence of pneumoconiosis was not established at Section 718.202(a)(4), based on Dr. Farney's better reasoned opinion, that the miner's emphysema was unrelated to coal mine employment, and, therefore, denied benefits in the miner's claim.⁶

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.⁷ 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).

⁵ The administrative law judge noted that Judge Roketenetz retired, and the case was ultimately assigned to him. Decision and Order at 4.

⁶ The administrative law judge stated, "[t]he parties have made it clear that they desire a decision in the living miner's claim prior to a hearing in the survivor's case." Decision and Order at 2. Therefore, the administrative law judge deferred action on the survivor's claim pursuant to the parties' request. Decision and Order at 4. Accordingly, we affirm the administrative law judge's Decision and Order insofar as it remands the survivor's claim to the district director for adjudication.

⁷ Because the miner's last coal mine employment was in Utah, we will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner is totally disabled due to pneumoconiosis arising out of coal mine employment, 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. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

On appeal, claimant contends that the administrative law judge erred in failing to find pneumoconiosis established at Section 718.202(a)(4). Specifically, claimant contends that the administrative law judge erred in crediting the opinion of Dr. Farney over the opinion of Dr. Poitras. Employer responds, asserting that the administrative law judge's Decision and Order denying benefits in the miner's claim should be affirmed. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

Considering the medical opinions pursuant to Section 718.202(a)(4), the administrative law judge stated:

Dr. Poitras is [B]oard[-]certified in internal medicine and Dr. Farney has that certification as well as being [B]oard[-]certified in pulmonary disease.

[O]ne can understand Dr. Poitras' opinion that the miner has legal coal workers' pneumoconiosis as the worker has severe lung disease, had considerable coal dust exposure, and his smoking history is minimal.

However, Dr. Farney who is [B]oard[-]certified in pulmonary disease has concluded otherwise. This physician's examination included a CT scan and Dr. Farney testified, at length, at the hearing. Dr. Farney stated that the scan showed findings consistent with emphysema[,] which is not related to coal workers' pneumoconiosis. Moreover, spirometry did not reflect restrictive lung disease which is primarily attributable to coal workers' pneumoconiosis.

I find the opinion of Dr. Farney to be better reasoned than that of Dr. Poitras. Therefore, I conclude that neither medical coal workers' pneumoconiosis nor legal coal workers' pneumoconiosis has been demonstrated in this case.

Therefore, the living miner's claim for benefits must be denied.

Decision and Order at 9.

After consideration of the administrative law judge's Decision and Order, the evidence of record, and the issues presented on appeal, we affirm the administrative law judge's denial of benefits in the miner's claim as it is rational, supported by substantial evidence, and in accordance with applicable law. The administrative law judge permissibly accorded greater weight to the opinion of Dr. Farney based on his superior credentials, *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), and properly accorded Dr. Farney's opinion greater weight because it was based on a more thorough review of the record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Further, as claimant has failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, his finding that benefits are precluded in the miner's claim is affirmed. *See Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order in the Living Miner's Case and Remand of the Survivor's Case to the District Director is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge