

BRB No. 99-0372 BLA

ANNA C. KOSYDAR)
(Widow of JOSEPH KOSYDAR))
)
 Claimant-Petitioner))
)
 v.)
)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Swelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Rita Roppolo (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0292) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a miner's claim and a 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). This case is before the Board for the third time.¹ The administrative law judge credited the miner with five years of coal mine

¹Claimant is the surviving widow of the miner, Joseph Kosydar, who originally filed a miner's claim on August 31, 1971, Director's Exhibit 12. The miner died on February 18, 1972, Director's Exhibit 4. Subsequently, claimant filed a survivor's claim on September 11, 1972, Director's Exhibit 12. In a 1988 Decision and Order, Administrative Law Judge Charles W. Campbell found that claimant failed to establish at least ten years of coal mine employment, adjudicated the claims

pursuant to the permanent criteria at 20 C.F.R. Part 410, Subpart D, and denied benefits, Director's Exhibit 14.

Claimant appealed and the Board affirmed Judge Campbell's finding that less than ten years of coal mine employment was established, but vacated his findings under Part 410, Subpart D, and remanded the case for consideration pursuant to 20 C.F.R. Part 718 in accordance with the holding of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987). *Kosydar v. Director, OWCP*, BRB No. 88-1520 (Jan. 29, 1991)(unpub.). On remand, in a Revised Decision and Order issued in August, 1991, Judge Campbell found that the existence of pneumoconiosis was not established by the medical evidence of record pursuant to 20 C.F.R. §718.202(a)(1)-(4) and, therefore, denied benefits.

Claimant appealed and the Board affirmed Judge Campbell's findings pursuant to Section 718.202(a)(1)-(4) and, therefore, affirmed the denial of benefits. *Kosydar v. Director, OWCP*, BRB No. 91-2161 (May 27, 1994)(unpub.). Claimant appealed the Board's decision to the Third Circuit, which affirmed Judge Campbell's

employment and found that no mistake in a determination of fact had been established pursuant to 20 C.F.R. §725.310 regarding the fact that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied in both the miner's and the survivor's claims.

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

findings as to the length of the miner's coal mine employment and pursuant to Section 718.202(a)(1)-(4) and, therefore, affirmed the denial of benefits. *Kosydar v. Director, OWCP*, No. 94-3391 (3d Cir., May 12, 1995)(unpub.). Claimant filed a timely motion for modification on May 10, 1996, at issue herein, Director's Exhibit 19.

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact.² If a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), see *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993). In order to establish entitlement to benefits under Part 718 in a miner's claim, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id.* In a survivor's claim filed prior to January 1, 1982, Director's Exhibit 12, entitlement may be established based on a finding that the miner was totally disabled due to pneumoconiosis at the time of his death, see 20 C.F.R. §718.1; *Trent, supra*; *Perry, supra*, or if the evidence of record establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), see 20 C.F.R. §§718.1, 725.212(a)(3)(ii); *Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985). Moreover, in this case arising within the jurisdiction of the Third Circuit Court, if pneumoconiosis actually hastened the miner's death, then pneumoconiosis is a substantially contributing cause of death for purposes of Section 718.205, see *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

²The administrative law judge properly noted that because the miner had died in 1972, claimant is precluded from establishing a change in condition, but is limited to establishing a mistake in a determination of fact pursuant to Section 725.310. Decision and Order at 9-10.

Initially, claimant contends that the administrative law judge erred in failing to consider whether the lay evidence of record established entitlement under Part 718 pursuant to 20 C.F.R. §§718.202, 718.203(c) and 718.204(c)(5) in the miner's and survivor's claims filed prior to 1981. We agree. The Third Circuit Court held in *Keating, supra*; see also *Hillibush v. U.S. Department of Labor*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988), that under Section 718.202, in claims filed prior to January 1, 1982, the claimant can rely solely on lay testimony, due to the lack of medical evidence resulting from "lost, destroyed or incomplete" medical evidence,³ see Section 413(b) of the Act, 30 U.S.C. §923(b); 20 C.F.R. §718.202(c).⁴ Contrary to the administrative law judge's findings, Decision and Order at 8, both the miner's and the survivor's claims were filed prior to January 1, 1982, Director's Exhibit 12, and, therefore, Section 718.202(c) is applicable. Moreover, the Third Circuit Court has held that "all types of relevant evidence must be weighed together in determining whether claimant has met its burden of establishing the existence of pneumoconiosis pursuant to Section 718.202, see *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Consequently, we vacate the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202 and remand the case for reconsideration of all relevant

³In this regard, the record contains negative readings of a May, 1971, x-ray, Director's Exhibit 12, but the original x-ray is missing from the file. The administrative law judge found that the original x-ray "seems to be missing" due to, as the Director contended, the age of the file and the "twenty-seven year lapse from the time of filing to the time of this decision," but found that there "has been no malfeasance by any party," Decision and Order at 10. In addition, as claimant contends, the record does not contain any pulmonary function study, blood gas study or autopsy evidence.

⁴Section 718.202(c) provides that pneumoconiosis may not be found solely on the basis of a living miner's statement or testimony or, in claims filed after January 1, 1982, through affidavits of survivors of dependents in claims involving a deceased miner, see 20 C.F.R. §718.202(c).

evidence, including the lay evidence of record, pursuant to Sections 725.310 and 718.202(a) and (c), and pursuant to 20 C.F.R. §718.203(c), if reached, see *Keating, supra*.

In addition, the Third Circuit Court has held that in a survivor's case, the administrative law judge may consider whether the lay evidence of record establishes total disability pursuant to Section 413(b) of the Act, as implemented by 20 C.F.R. §718.204(c)(5), where the evidence is insufficient to establish total disability pursuant to subsections (c)(1)-(c)(4), see *Hillibush v. U.S. Department of Labor*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988). The Board has construed *Hillibush* to mean that Section 718.204(c)(5) is not available where the medical evidence of record affirmatively establishes "that no lung disease was present," see *Pekala v. Director, OWCP*, 13 BLR 1-1 (1989). The Director contends that consideration of lay evidence under Section 718.204(c)(5) is precluded because there is relevant medical evidence which establishes that claimant only suffered from cardiac disease, not lung disease. However, neither the administrative law judge or Judge Campbell considered whether the medical evidence of record affirmatively establishes "that no lung disease was present," see *Pekala, supra*, but only whether the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1), (4). Moreover, the Board's scope of review is a narrow one that can be exceeded if it engages in the initial consideration of evidence, which is the responsibility of the administrative law judge, see *Bozick v. Consolidation Coal Co.*, 732 F.2d 64, 6 BLR 2-23 remanded for recon., 735 F.2d 1017, 6 BLR 2-119 (6th Cir. 1984). When the administrative law judge does not make the necessary findings, remand to the administrative law judge is necessary as the Board lacks jurisdiction to provide factual findings to augment any gaps in the administrative law judge's opinion. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); see also *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, if the administrative law judge considers Section 718.204(c) on remand and finds the evidence of record insufficient to establish total disability pursuant to subsections (c)(1)-(c)(4), he should also consider the applicability of Section 718.204(c)(5), in accordance with the holdings in *Hillibush, supra*, and *Pekala, supra*.⁵

Next, claimant contends that the administrative law judge failed to consider all of the relevant evidence of record in not finding ten years of coal mine employment established. Thus, claimant contends that the administrative law judge erred in failing to consider entitlement pursuant to the interim presumption at 20 C.F.R. §727.203 and, specifically, in failing to consider whether the lay evidence of record established invocation of the interim presumption at 20 C.F.R. §727.203(a)(5). The Director responds, agreeing that the

⁵If claimant establishes access to Section 718.204(c)(5), the administrative law judge must make complete and reviewable findings as to whether the lay evidence in this case is sufficient to establish the presence of total respiratory disability pursuant to *Kosack v. Director, OWCP*, 7 BLR 1-248 (1984), and whether claimant's disability is due to pneumoconiosis, see *Gessner v. Director, OWCP*, 11 BLR 1-1 (1987).

administrative law judge failed to consider all of the relevant evidence of record in considering the length of the miner's coal mine employment, but contending that such error was harmless because the medical evidence "clearly suggests" the lack of total pulmonary or respiratory disability, thereby precluding consideration of lay evidence pursuant to Section 727.203(a)(5) and the Director contends that the lay evidence fails to establish total pulmonary or respiratory disability.

Claimant, and the Director, properly note that the administrative law judge did not discuss the 1972 medical report of Dr. Niemeyer, issued just prior to the miner's death, which stated that claimant had ten to fifteen years of coal mine employment, Director's Exhibit 12. See *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).⁶ Consequently, we vacate the administrative law judge's finding, see *Tackett, supra*, and remand the case for reconsideration. If the administrative law judge finds at least ten years of coal mine employment established on remand, the interim presumption at Section 727.203, as written, is applicable, inasmuch as both the miner's claim and the survivor's claim were filed prior to April 1, 1980, Director's Exhibit 12, see 20 C.F.R. §727.203(a). Moreover, the rebuttable presumption at Section 411(c)(2) of the Act, 30 U.S.C. §921(c)(2), implemented by 20 C.F.R. §718.303, that the miner's death was due to pneumoconiosis is applicable to claims filed prior to January 1, 1982, in which more than ten years of coal mine employment was established, see 20 C.F.R. §718.205(b)(4); *Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Beard v. Director, OWCP*, 10 BLR 1-82 (1987), *aff'd*, 856 F.2d 192 (6th Cir. 1988)(table). Thus, the administrative law judge should consider the relevant evidence pursuant to Sections 725.310, 718.303 and 727.203(a), if necessary, see *Keating, supra*.

Finally, as claimant contends, the Third Circuit Court has held that invocation of the interim presumption under Section 727.203(a)(5) is available where the available medical evidence is insufficient to establish total disability or lack thereof under subsections (a)(1)-(4), see *Koppenhaver v. Director, OWCP*, 864 F.2d 287, 12 BLR 2-103 (3d Cir. 1988), *vacating* 11 BLR 1-51 (1988)(en banc recon.); *Hillibush, supra*; *Pekala v. Director, OWCP*, 13 BLR 1-1 (1989). Moreover, when Section 727.203(a)(5) is available, it is applicable to the claims of deceased miners as well as to the claim of survivors, see *DeForno v. Director, OWCP*, 14 BLR 1-11 (1990). Contrary to the Director's contentions, neither the administrative law judge or Judge Campbell considered whether the medical evidence is insufficient to establish total disability or lack thereof under Section 727.203(a)(1)-(4).

⁶Judge Campbell also did not discuss Dr. Niemeyer's 1972 report in making his original finding that claimant failed to establish ten years of coal mine employment, Director's Exhibit 14.

Inasmuch as the Board lacks jurisdiction to provide factual findings to augment any gaps in the administrative law judge's opinion, *see Bozick, supra; Rowe, supra; see also Anderson, supra; Worley, supra*, if the administrative law judge finds the interim presumption applicable on remand and that invocation it is not established pursuant to Section 727.203(a)(1)-(4), he should consider the relevant lay evidence of record under Section 727.203(a)(5).

Accordingly, the Decision and Order of the administrative law judge's denying benefits is vacated and the this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge